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Robert Kratovil

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JOINT TENANCIES AND "CREATIVE FINANCING"—
THE LAND CONTRACT

*Robert Kratovil**

The drying up of institutional mortgage money in recent years has resulted in a burgeoning of "creative financing" of home sales. Newspaper advertisements often seek to attract buyers by stating that "owner financing is available" or that the "mortgage is assumable."¹ Another form of "creative financing" is the installment contract, which is commonplace in jurisdictions in which the simplified forfeiture process offers a quick and inexpensive means of extinguishing the rights of a defaulting purchaser.² Many of the homes financed by this method are owned by a husband and wife in joint tenancy.³ A question that will therefore recur is what effect the execution of an installment contract by the joint tenants will have on an existing joint tenancy.

* Professor of Law, John Marshall School of Law; Former Vice President Chicago Title Insurance Company; J.D., DePaul University; author REAL ESTATE LAW (7th ed. 1979); MODERN MORTGAGE LAW AND PRACTICE (2nd ed. 1979); MODERN REAL ESTATE DOCUMENTATION (1975).

1. This statement indicates that the mortgage lacks a due-on-sale clause or that in the jurisdiction in question the due-on-sale clause exists but is deemed unenforceable in the circumstances. Kratovil, *A New Dilemma for Thrift Institutions: Judicial Emasculation of the Due on Sale Clause*, 12 J. MAR. J. PRAC. & PROC. 299 (1979).

2. Kratovil, *Forfeiture of Installment Contracts in Illinois*, 53 ILL. B.J. 188 (1964). See also G. OSBORNE, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW §§ 3.25 *et seq.* (1979).

3. Mattis, *Severance of Joint Tenancies by Mortgages: A Contextual Approach*, 1977 S. ILL. U.L.J. 27, 39.

The decision best known in this area is *In re Baker's Estate*.⁴ A husband and wife who owned land in joint tenancy entered into an installment contract. The husband died during the life of the contract. The court held that the joint tenancy in the legal title had been severed by the execution of the contract, thus destroying the right of survivorship. The right to receive the contract proceeds was therefore held in tenancy in common. The doctrine of equitable conversion was invoked to sustain the holding of severance. The court held that the contract effected an equitable conversion of the realty into personalty.⁵ Five judges joined in this opinion and four dissented.⁶

The holding in *Baker's Estate* virtually compels the probating of the estate of the decedent. Since a deed will be needed from the decedent's heirs if he dies intestate, heirship must be adjudicated. If the decedent died testate, the will must be admitted. Since the precise purpose of electing to hold land in joint tenancy is avoidance of the expense of probate, the *Baker's Estate* decision frustrates the intention of the parties. Such frustration should be avoided in the absence of some compelling public policy. The decision is devoid of any suggestion that such policy exists. The situation deserves close scrutiny.

Whether a joint tenancy or a tenancy in common is created is

4. 247 Iowa 1380, 78 N.W.2d 863 (1956). *Baker's Estate* remains accepted doctrine in Iowa. Iowa Title Standard § 4.11, 36 IOWA CODE ANN. § 558 appendix (West 1981).

5. *In re Baker's Estate*, 247 Iowa 1380, 78 N.W.2d 863, 868-69 (1956). The court discussed the contention that the intent of the parties should prevail but found no intent to have a right of survivorship in the proceeds of the sale.

6. Both opinions noted the existence of law to the contrary. *E.g.*, *Watson v. Watson*, 5 Ill. 2d 526, 126 N.E.2d 220 (1955). *Illinois Pub. Aid Comm'n v. Stille*, 14 Ill. 2d 344, 153 N.E.2d 59 (1958) cites cases from Massachusetts and Florida as also going contra to *Baker's Estate*. The contra cases, it is said, serve better to carry out the intention of the parties, for the act of contracting to sell merely substitutes rights in money for rights in land. *Id.* at 347, 153 N.E.2d at 63. Thus these contra cases reach the result that the chose in action represented by the seller's contract claim against the buyer is owned in joint tenancy. *See also Taylor v. Crocker-Citizens Nat'l Bank*, 258 Cal. App. 2d 682, 65 Cal. Rptr. 771 (1968) (proceeds of joint tenancy property said to retain character of property from which they were acquired absent a contrary agreement); *In re Maguire's Estate*, 152 A.D. 337, 296 N.Y.S. 528 (1937) (tenants by entirety who enter into contract of sale remain tenants by entirety in proceeds).

There are also decisions that adhere to the position taken in *Baker's Estate*. *E.g.*, *Buford v. Dahlke*, 158 Neb. 39, 62 N.W.2d 252 (1954) criticized in *Swenson & Degnan, Severance of Joint Tenancies*, 38 MINN. L. REV. 466 (1954) and Note, *Real Property: Cotenancy: Effect of a Contract to Convey by Joint Tenants: Buford v. Dahlke, 158 Neb. 39, 62 N.W.2d 252*, 41 CORNELL L. Q. 154 (1954). There is an annotation dealing with the question. Annot., 64 A.L.R.2d 918, 936 (1959).

largely a matter of intention.⁷ In like manner it has been held that the question of severance is basically a question of intention.⁸ It might reasonably be supposed that a jurisdiction, like Iowa, that declares intention to be the crucial test with respect to creation of a joint tenancy should also hold intention to be the primary test for severance.⁹

In a typical case in which a husband and wife purchase a home and take title in joint tenancy, there is every indication that they wish to create a right of survivorship and to avoid the expense of probate. If they sell the home on an installment contract, the overwhelming probability is that this "creative financing" device was resorted to because institutional financing was unavailable. The Iowa court in *Baker's Estate* deals two blows to the parties. First, the joint tenancy in the legal title is severed, so that the deed to the purchasers must come from the heirs or devisees of the deceased joint tenant and from the surviving joint tenant. Thus, probate of the estate becomes necessary. Second, the surviving joint tenant is deprived of half the proceeds of the sale.

Therefore, the real issue relates to the intention of the parties regarding the right of survivorship in the proceeds of sale. Persons of limited means who wish to avoid the expense of probate strongly favor the right of survivorship. This is especially true of a husband and wife. When their intent to create a right of survivorship is evident, it should be given effect by the court.

A conceptual view of the problem is helpful. The conspicuous characteristic of a joint tenancy is the right of survivorship.¹⁰ For such a right to exist it must be included in the bundle of rights called "property."¹¹ Each joint tenant's bundle of rights is regarded as in-

7. *Switzer v. Pratt*, 237 Iowa 788, 23 N.W.2d 837 (1946) (deed by landowner to self and wife in joint tenancy held to create joint tenancy rejecting requirement of four unities and pointing out that contra Nebraska case was promptly overruled by legislature); *Spark v. Brown*, 167 Kan. 159, 205 P.2d 938 (1949); *Isherwood v. Springs First Nat'l Bank*, 365 Pa. 225, 74 A.2d 89 (1950).

8. *Bradley v. Mann*, 34 Colo. App. 135, 525 P.2d 492 (1974).

9. Comment, *Joint Tenancies—Severance—Effect of Contract to Sell*, 42 IOWA L. REV. 646, 648 (1957).

10. *Coleman v. Jackson*, 286 F.2d 98 (D.C. Cir. 1960), cert. denied, 366 U.S. 933 (1961).

11. Property consists of an aggregate or bundle of rights protected by the government. Perhaps the oldest decision is the one that is best known. *Easton v. Boston C. & M. R.R.*, 51 N.H. 504, 511 (1872). For the historical development of this view, see *Kratovil and Harrison, Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596, 599 (1954). The old property law decisions throw no light upon the right of survivorship as a property right viewed from a modern constitutional law perspective. That it is indeed a property right protected by constitutional principles is clear. Thus it has been held that a rule established

cluding the right of survivorship, conditioned upon the right of severance either by the voluntary act of the other joint tenant or by an involuntary process against the other joint tenant, such as an execution sale and deed.¹² There is no rule of law that requires this portion of the bundle of rights to remain inviolate until one joint tenant dies.¹³ When a transaction takes place that results in an equal reduction of each joint tenant's bundle of rights, there is no severance. This universally accepted proposition is well illustrated by the situation in which both joint tenants execute a real estate mortgage. In such a case, the quantum of the subtraction varies from state to state. In title theory states, some sort of legal title vests in the mortgagee. The estate of the joint tenants, however, less this defeasible legal title, remains a joint tenancy. In lien theory states the quantum of the interest vested in the mortgagee and thus subtracted from the estate of the joint tenants is smaller or, at any rate, different. The result is the same: the estate remains a joint tenancy. If this equal subtraction principle represents an accepted viewpoint, as indeed it does, it is difficult to justify a refusal to apply it to a contract of sale.¹⁴

It is everywhere conceded that the right of survivorship exists only at the will of each joint tenant. Either joint tenant may sever it.¹⁵ A conveyance by one joint tenant is only one act that may result in a severance. Severance also occurs when the act destroys one of the four unities: title, time, interest, and possession.¹⁶ There are

by a line of judicial decisions that protects the joint tenant's right of survivorship cannot be annulled retroactively by a subsequent decision overruling these former decisions. *Jackson v. Fillmore*, 367 So. 2d 948 (Ala. 1979).

12. *In re Estate of Larendon*, 439 Pa. 535, 266 A.2d 763 (1970).

13. *E.g.* *Wilcoxon v. United States*, 310 F. Supp. 1006 (D. Kan. 1969); *Wardlow v. Pozzi*, 170 Cal. App. 2d 208, 338 P.2d 564 (1959); *Cole v. Cole*, 139 Cal. App. 2d 691, 294 P.2d 494 (1956); *Grishaver v. Grishaver*, 225 N.Y.S.2d 924 (1961); *Reilly v. Sageser*, 2 Wash. App. 6, 467 P.2d 358 (1970). *See* Annot., 64 A.L.R.2d 918, 923 (1959).

14. When both joint tenants join in a mortgage there is no severance. *Illinois Pub. Aid Comm'n v. Stille*, 14 Ill. 2d 344, 153 N.E.2d 59, 63 (1958); *Estate of Kotz*, 486 Pa. 444, 406 A.2d 524 (1979); *Brown v. Hargraves*, 198 Va. 748, 96 S.E.2d 788 (1957). Such a mortgage in no way disturbs the four unities. *Estate of Kotz*, 486 Pa. 444, 406 A.2d 524 (1979). Likewise the joint tenancy is not severed where the joint tenants join in a lease of the premises. *Gillette v. Nicolls*, 121 Cal. App. 2d 185, 262 P.2d 856 (1953). When all joint tenants concur in an act, there is no adverse act which would terminate the joint tenancy. *Hewitt v. Biege*, 183 Kan. 352, 327 P.2d 872 (1958).

15. *See supra* note 13. *See also* Annot., 64 A.L.R.2d 918 (1959).

16. *See, e.g.*, *People v. Nogarr*, 164 Cal. App. 2d 591, 330 P.2d 858 (1958); *In re Zaring's Estate*, 93 Cal. App. 2d 577, 209 P.2d 642 (1949); *Kozacik v. Kozacik*, 157 Fla. 597, 26 So. 2d 659 (1946); *Tindall v. Yeats*, 392 Ill. 502, 64 N.E.2d 903 (1946); *Van Antwerp v. Horan*, 390 Ill. 449, 61 N.E.2d 358 (1945); *DeForge v. Patrick*, 162 Neb. 568, 76 N.W.2d 733 (1956); *In re Whitesides Estate*, 159 Neb. 362, 67 N.W.2d 141 (1954); *Steinmetz v. Steinmetz*, 130 N.J.

differences of opinion about whether and when, the unilateral act of one of the tenants will sever a joint tenancy. For example, there are various views regarding the effect of the execution of a mortgage by one joint tenant.¹⁷ Under the equal subtraction view, there is no necessary disturbance of the four unities when both joint tenants agree to the transaction. The estate that remains in the joint tenants possesses all the requirements relative to the four unities.¹⁸

Little is to be gained by focusing attention on the nature of the cotenancy created in this type of problem. As discussed earlier the real issue relates to the intention of the parties regarding the right of survivorship. A husband and wife who acquire their home as joint tenants intend, in most cases, to create a right of survivorship. The question to be answered, then, is whether this intention should be frustrated by adherence to the technical rules governing joint tenancies. Clearly, public policy favors giving effect to the intention of the parties.

Statutes in many states reverse the common law presumption of joint tenancy and create a tenancy in common when the deed is silent.¹⁹ Statutes in other states go further and abolish the right of survivorship in joint tenancies.²⁰ Even in this latter group of states, however, if the deed to the joint tenants adds language of survivorship, a right of survivorship exists.²¹ Thus, even when the legislature has expressed its distaste for the right of survivorship, courts recognize that this is a matter best left to the intention of the parties.

Eq. 176, 21 A.2d 743 (1941); *Bassler v. Rewodlinski*, 130 Wis. 26, 109 N.W. 1032 (1906). *Mattis, Severance of Joint Tenancies by Mortgages: A Contextual Approach*, 1977 S. ILL. U.L.J. 27.

17. Some courts hold that a mortgage by one joint tenant severs the joint tenancy. *See* Illinois Pub. Aid Comm'n v. Stille, 14 Ill. 2d 344, 53 N.E.2d 59 (1958); *Hardin v. Wolf*, 318 Ill. 48, 148 N.E. 868 (1925); *Eder v. Rothamel*, 202 Md. 189, 95 A.2d 860 (1953); *Tracy-Collins Trust Co. v. Goeltz*, 5 Utah 2d 350, 301 P.2d 1086 (1956). *But see* D. A. D., Inc. v. Moring, 218 So. 2d 451 (Fla. Dist. Ct. App. 1969); *American Nat'l Bank & Trust Co. v. McGinnis*, 571 P.2d 1198 (Okla. 1977).

18. How far the doctrine of equal subtraction can be pushed is a matter for conjecture. If the joint tenants join in a conveyance of a determinable fee, it is unclear whether the resulting possibility of reverter would be owned in joint tenancy. *Kratovil, Divided Interests in Land: Enforcement Problems Under Modern Concepts of Real Property Law*, 14 HOUS. L. REV. 583 (1977).

19. *E.g.*, ILL. REV. STAT. ch. 76, § 1 (1981).

20. *Chandler v. Kountze*, 130 S.W.2d 327 (Tex. Civ. App. 1939); *see* 48A C.J.S. Joint Tenancy §§ 5, 10 (1981).

21. *Anson v. Murphy*, 149 Neb. 716, 32 N.W.2d 271 (1948); *Bunting v. Cobb*, 234 N.C. 132, 66 S.E.2d 661 (1951); *Holohan v. Melville*, 41 Wash. 2d 380, 249 P.2d 777, *reh'g denied*, 41 Wash. 2d 380, 255 P.2d 899 (1952). Courts have no right to deprive the parties of their right to create a joint tenancy. *Stambaugh v. Stambaugh*, 288 Ky. 491, 156 S.W.2d 827 (1941); *Mitchell v. Frederick*, 166 Md. 42, 170 A. 733 (1934).

There are other situations in which the courts have consistently given effect to the parties' intent to create a right of survivorship. Deeds are often drawn by unskilled non-lawyers who fail to follow the prescribed procedure for creating a joint tenancy. Even in these cases, courts are not reluctant to come to the rescue. For example, a husband owned land and executed a deed of a half interest to his wife, stating that they were to hold the land as joint tenants. The court, recognizing substance over form, held that although the deed did not create a joint tenancy, a right of survivorship was created which could be annexed to an estate in common.²² The intention to create a right of survivorship prevails. Either by statute or court decision, a deed by a landowner to himself and another as joint tenants will, in most states, create a joint tenancy despite the absence of the traditional four unities.²³

Another area in which courts focus on the intent of the parties is when an attempt to create a tenancy by the entirety has been defective. A tenancy by the entirety, with its attendant right of survivorship, continues to exist in a number of states as between a husband and wife.²⁴ Quite often, however, parties who are not legally married regard themselves as married persons and take title to land by a deed describing them as tenants by the entirety. A number of courts fasten upon the obvious intention to create survivorship rights and treat the cotenancy as a joint tenancy with the right of survivorship.²⁵ Some courts take this a step further. Thus it has been held that a deed to two sisters "as tenants by the entireties" created a joint tenancy²⁶ and a deed to two brothers "as tenants by

22. *Runions v. Runions*, 186 Tenn. 25, 207 S.W.2d 1016 (1948).

23. *E.g.*, *Kleeman v. Sheridan*, 75 Ariz. 311, 256 P.2d 553 (1953); *Blevins v. Palmer*, 172 Cal. App. 2d 324, 342 P.2d 356 (1959); *Curtis v. Smithers*, 20 Conn. Supp. 321, 134 A.2d 576 (1957); *Florida Nat'l Bank of Jacksonville v. Gann*, 101 So. 2d 579 (Fla. App. 1958); *Switzer v. Pratt*, 237 Iowa 788, 23 N.W.2d 837 (1946); *Siegel v. Hackler*, 181 Kan. 316, 310 P.2d 914 (1957); *Haynes v. Barker*, 239 S.W.2d 996 (Ky. 1951); *Creek v. Union Nat'l Bank*, 266 S.W.2d 737 (Mo. 1954); *Brown v. Jackson*, 35 N.M. 604, 4 P.2d 1081 (1931).

24. *Pierce v. Hall*, 223 Or. 563, 355 P.2d 259 (1960). *See also* Annot., 9 A.L.R. 4th 1189, 1192 (1981).

25. *Coleman v. Jackson*, 286 F.2d 98 (D.C. Cir. 1960); *Morris v. McCarty*, 158 Mass. 11, 32 N.E. 938 (1893); *Righter v. Righter*, 442 Pa. 428, 275 A.2d 4 (1971); *Kepner*, *The Effect of an Attempted Creation of an Estate by the Entirety in Unmarried Grantees*, 6 RUTGERS L. REV. 550 (1952); Note, *Real Property—Tenancy by Entirety—Joint Tenants—Deed Purporting to Convey Property by the Entireties to Man and Woman not Legally Married Created a Joint Tenancy*, 37 NOTRE DAME LAW. 441 (1962); Note, *Real Property: Co-Ownership by Husband and Wife: Creation of a Tenancy by the Entirety by a Conveyance to Three or More, Two of Whom are Husband and Wife: Heatter v. Lucas*, 37 CORNELL L.Q. 316 (1952).

26. *In re Richardson's Estate*, 229 Wis. 426, 282 N.W. 585 (1938).

the entirety" also created a joint tenancy.²⁷ It is obvious that such courts focus on the intention of the parties. When the parties intend to create a right of survivorship, that intention is given effect, regardless of the ineptitude with which that intention is expressed. This view reflects a sound public policy. When ancient shibboleths frustrate the intention of the parties, it is intention that must prevail. Emphasis is placed, as it deserves to be, upon the wish to create survivorship rights, not upon the technical nature of the tenancy created.²⁸

Courts have also given effect to the parties' intentions regarding the disposition of personalty derived from property held in tenancy by the entirety. Suppose, for example, that a husband and wife own land as tenants by the entirety. They sell the land and take a purchase money mortgage. Some courts have held, in such cases, that the mortgage is owned in tenancy by the entirety and passes to the survivor.²⁹ As a further example, a husband and wife owned land as tenants by the entirety and the fee simple title was condemned. The condemnation award was held to be owned in tenancy by the entirety and passed to the survivor upon the death of one of the tenants.³⁰ The holding is a recognition, in a cognate situation, that the election of a survivorship estate is evidence that the joint tenants intended survivorship rights in the proceeds of the sale, as well as of the estate.³¹

Shifting our focus from the intent of the parties, an argument has been made that the doctrine of equitable conversion would sup-

27. *Penn. Bank & Trust Co. v. Thompson*, 432 Pa. 262, 247 A.2d 771 (1968).

28. *See Coleman v. Jackson*, 286 F.2d 98 (D.C. Cir. 1960), *cert. denied*, 366 U.S. 933 (1961); *Wood v. Wood*, 264 Ark. 304, 571 S.W.2d 84 (1978); *Lopez v. Lopez*, 250 Md. 491, 243 A.2d 588 (1968); *Frederick v. Southwick*, 165 Pa. Super. 78, 67 A.2d 802 (1949). *But see Higgins v. Higgins*, 146 So. 2d 122 (Fla. App. 1962); *Fuss v. Fuss*, 373 Mass. 445, 368 N.E.2d 276 (1977); *Keller v. Porchey*, 560 S.W.2d 257 (Mo. App. 1977); *Mitchner v. Taylor*, 56 Tenn. App. 670, 412 S.W.2d 1 (1965).

29. *Ciconte v. Barba*, 19 Del. Ch. 6, 161 A. 925 (1932). *Contra Webb v. Woodcock*, 134 Or. 319, 290 P. 751 (1930). *See Annot.*, 64 A.L.R. 2d 8, 47 (1959).

30. *Smith v. Tipping*, 349 Mass. 590, 211 N.E.2d 231 (1965); *In re Idlewild Airport*, 85 N.Y.S.2d 617 (1948).

31. *Survey of Utah Law-1964*, 9 UTAH L. REV. 749, 768 (1965) comments on *Allred v. Allred*, 15 Utah 2d 396, 393 P.2d 791 (1964) and argues that:

A tenancy formed by a husband and wife and subject to survivorship should be considered as a calculated arrangement for holding wealth and an alteration in the form of that wealth should not affect the manner in which it is held. Since the parties intended the surviving joint tenant to own all of the real property, it logically follows that, absent the manifestation of a contrary intent, they should also intend the surviving joint tenant to own all of the proceeds from the sale of the property.

port a finding of a right of survivorship in the proceeds of the sale. In *Baker's Estate* the doctrine of equitable conversion was invoked in support of the court's conclusion that a severance of the joint tenancy had occurred. The doctrine of equitable conversion commands much support.³² Properly applied, however, the doctrine requires a holding at variance with that reached in *Baker's Estate*. Under the doctrine, the moment the contract of sale is signed, the vendor is deemed to hold the legal title in trust for the purchaser, who acquires an equitable title.³³

The legal title held by trustees has always occupied a special niche in joint tenancy law. The statutory reversal of the common law presumption that grantees take as joint tenants was never applicable to a title held by joint trustees. These titles have always been deemed to be held in joint tenancy.³⁴ The reason is that the heirs of a deceased trustee cannot administer the trust. There is no reason to vest them with a legal title that would compel the trust estate to probate an estate in order to acquire a dormant legal title. Moreover, minor heirs would be unable to convey their dormant legal title. In short, it is inconvenient to permit the title of a deceased joint trustee to pass to his heirs. The foregoing reasoning is also true of the "trust" title held by joint vendors. It is a matter of convenience to permit this "trust" title to pass to the surviving trustee. The survivor has power to receive contract payments,³⁵ and he has the power to convey title to a purchaser who has fully performed.³⁶

32. As to equitable conversion, see generally *Shay v. Penrose*, 25 Ill. 2d 447, 185 N.E.2d 218 (1962); 91 C.J.S. *Vendor and Purchaser* § 106 (1955).

33. *Shay v. Penrose*, 25 Ill. 2d 447, 185 N.E.2d 218 (1962). The doctrine has some interesting and beneficial consequences for the purchasers in those states that apply it to its fullest extent. Since the vendor is deemed to hold the legal title in trust for the purchaser, subsequent judgments against the vendor create no liens on the land; the naked legal title of a trustee will not support judgment liens. *Reuss v. Nixon*, 272 Ill. App. 219 (1933); *Lynch v. Eifer*, 191 Ill. App. 244 (1915); Annot., 87 A.L.R. 1505, 1515 (1933).

34. See, e.g., *Liden's Estate v. Foster*, 103 Colo. 58, 82 P.2d 775 (1938); *Stout v. Van Zante*, 109 Or. 430, 220 P. 414 (1923).

35. Little attention has been given to the problems of the purchaser where one joint tenant seller dies. Clearly, the purchaser discharges his legal obligation by making payment to the survivor. *Ehrlich v. Mulligan*, 104 N.J.L. 375, 140 A. 463 (1928); 70 C.J.S. *Payment* § 4 (1951). Of course, the survivor who receives such payment will be liable to the estate of the decedent in jurisdictions that follow *Baker's Estate*. Nevertheless, it is important to distinguish the payment problem from the problem of determining ownership of the proceeds of sale.

36. In those states that permit the chose in action represented in the unpaid purchase price to pass to the estate of the deceased vendor the surviving joint vendor would be accountable to the deceased estate. But the purchaser would be insulated from these difficulties.

These matters are not dealt with in *Baker's Estate*. Perhaps the attorneys involved failed in their duty to the court to explore all facets of the situation.

In truth, the doctrine of equitable conversion has nothing whatever to do with this problem. Thus in *In re Estate of Rickner*³⁷ the court held, on facts like those in *Baker's Estate*, that the surviving joint tenant was entitled to the contract proceeds because through equitable conversion, there was a mere change of form from real estate to proceeds of sale. In *In re Estate of King*,³⁸ on identical facts, the court held for the surviving joint tenant because there was no conversion at all, merely a change in the form of the assets. And in *Hewitt v. Biege*³⁹ the court held for the surviving joint tenant on the theory of mere change of form, without discussing conversion at all. Moreover, in equitable conversion, the legal title remaining in the seller is a naked legal title held in trust for the purchaser⁴⁰ and, as stated earlier, a legal title held by two or more trustees is held in joint tenancy even when there is no language requiring it.⁴¹

It is always easier to grasp a problem if the subject matter is identified. A seller's right to enforce his contract claim against the purchaser is a chose in action.⁴² Like any other contract claim, a chose in action can run in favor of two or more persons. It can also run in favor of two or more persons as joint tenants.⁴³ In states that recognize tenancy by the entirety in personalty, this chose in action can be held in tenancy by the entirety by sellers who are husband and wife.⁴⁴

37. 164 Mont. 51, 518 P.2d 1160 (1974).

38. 572 S.W.2d 200 (Mo. App. 1978).

39. 183 Kan. 352, 327 P.2d 872 (1958).

40. *Shay v. Penrose*, 25 Ill. 2d 447, 185 N.E.2d 218 (1962).

41. See cases cited *supra* note 34.

42. *Smith v. Glen Alden Coal Co.*, 347 Pa. 290, 32 A.2d 227, 232 (1943). When land is sold on contract, a vendor's interest therein ceases to be "real estate" and becomes a "chose in action." This chose in action is personal property. *Hewitt v. Biege*, 183 Kan. 352, 327 P.2d 872 (1958).

43. See decisions *supra* note 6. These decisions hold that joint tenants who enter into a contract of sale thereby acquire a chose in action (contract right against buyer) that, like their former estate in the land, is held in joint tenancy. To like effect are all the other decisions reaching a result contrary to that in *Baker's Estate*. *Hughes v. Hughes*, 171 Ind. App. 255, 356 N.E.2d 225 (1976); *Hewitt v. Biege*, 183 Kan. 352, 327 P.2d 872 (1958); *In re Estate of Rickner*, 164 Mont. 51, 518 P.2d 1160 (1974); *In re Estate of King*, 572 S.W.2d 200 (Mo. App. 1978).

44. See *DeYoung v. Mesler*, 373 Mich. 499, 130 N.W.2d 38 (1964), noted in Comment, *Tenancy by the Entirety in Personalty in Michigan: DeYoung v. Mesler*, 42 U. DET. L.J. 362 (1964). Thus, where a mortgage executed by tenants by the entirety is foreclosed, the surplus

The issue, then, is whether, when joint tenants sell their property on credit, the chose in action they acquire is held by them in joint tenancy if the documents are silent on the subject. There is a statutory presumption that a tenancy in common arises unless an intention to create a joint tenancy is expressed.⁴⁵ This is not the analysis given in *Baker's Estate*. Contrary to the holding in *Baker's Estate*, there is no problem of *severance* of joint tenancy with regard to the chose in action. The issue is whether there was, at the outset, a joint tenancy in the newly created chose in action.

This presents a serious problem. To hold, in defiance of the statutes, that a joint tenancy exists in a chose in action even in the absence of any survivorship language is a formidable piece of judicial legislation. It is possible, of course, to accept the explanation that when real estate held in joint tenancy is converted into personal property, the joint tenancy automatically attaches to the personal property. This conversion theory is best illustrated in the decisions holding that when land owned in tenancy by the entirety is condemned, the eminent domain award is owned by the husband and wife in joint tenancy.⁴⁶

Rules of statutory construction may also lead to a holding contrary to *Baker's Estate*. Unfortunate results are often the consequence of statutes construed literally. There is no need for this. Innumerable decisions teach us that it is the spirit of the statute that must guide us. Where the spirit dictates a result different from that

proceeds at the foreclosure sale is owned by the mortgagors in tenancy by the entirety. *E.g.*, *Diamond v. Ganci*, 328 Mass. 315, 103 N.E.2d 716 (1952); *Hamrick v. Lasky*, 107 S.W.2d 201 (Mo. App. 1937); *Stretz v. Zolkoski*, 118 Misc. 806, 195 N.Y.S. 46 (1922). This is because a tenancy by the entirety, unlike a joint tenancy, cannot be severed. *Carlisle v. Parker*, 38 Del. 83, 188 A. 67 (1936). In these states a mortgage running to a husband and wife is held by them in tenancy by the entirety. *Terral v. Terral*, 212 Ark. 221, 205 S.W.2d 198 (1947); *Bailey v. Smith*, 89 Fla. 303, 103 So. 833 (1925); *Gladowski v. Felczak*, 346 Pa. 660, 31 A.2d 718 (1943). There are some jurisdictions that refuse to recognize a tenancy by the entirety in personal property. *Panushka v. Panushka*, 221 Or. 145, 349 P.2d 450 (1960) noted in *Recent Cases, Real Property—Estate by Entirety—Equitable Conversion Converts Ownership of Proceeds to Tenancy in Common Absent a Contrary Intent*, 14 VAND. L. REV. 687 (1961). Joint tenancies in some types of personal property, notably bank accounts have been the subject of legislation. *Murgic v. Granite City Trust & Savings Bank*, 31 Ill. 2d 587, 202 N.E.2d 470 (1964); *Frey v. Wubbena*, 26 Ill. 2d 62, 185 N.E.2d 850 (1962). However, there is no significant body of legislation applicable to jointly owned choses in action arising out of installment sales.

45. See, *supra* text accompanying notes 19-20. This problem becomes even more formidable in those jurisdictions that have abolished the right of survivorship in joint tenancies. See generally, Moss and Siebert, *Classification and Creation of Joint Interest*, 1959 U. ILL. L.F. 883, 912.

46. See cases cited *supra* note 30. Of course, it is arguable that in eminent domain the conversion is involuntary, and that this makes a difference.

required by the letter of the statute, it is the spirit that prevails.⁴⁷ When we have nothing except a deed running to two grantees, the law requires that they be regarded as tenants in common, except, of course, in community property states. But when other documents exist that provide reliable guidance regarding the intention of the parties, these must be consulted. The laws do not forbid creation of a right of survivorship. To the contrary, the decisions make it clear that any obvious expression of an intention that a right of survivorship exists must be given effect.⁴⁸ Nor do the statutes require that such intention be expressed in any particular way. When a husband and wife take title as joint tenants with the right of survivorship, it would be hard to find a clearer expression of an intention that this asset should pass to the survivor. When husband and wife enter into a contract of sale that expresses no contrary intention, most courts simply indulge the inference that the previously expressed intention must carry over into the proceeds of sale. Nothing in the statutes forbids this result. To be sure, good draftsmanship suggests that this continuing intention be spelled out by making the contract proceeds payable to the sellers "as joint tenants with the right of survivorship and not as tenants in common or as tenants by the entirety or as community property." Given the strong trend toward emphasizing the factor of intention, however, the decisions that refuse to follow *Baker's Estate* undoubtedly rest on solid ground. In a majority of the states, when a sole owner conveys to himself and another as joint tenants with the right of survivorship, the intention to create survivorship rights prevails despite the absence of the four unities.⁴⁹ The philosophy is that the bungling of conveyances must not be permitted to defeat the intention of the parties. *Baker's Estate* punishes the clients for the bungling of their attorneys.

Another unfortunate aspect of the holding in *Baker's Estate* surfaces when the purchaser defaults. In the absence of equities favoring the purchaser, the remedy of forfeiture is still available to

47. *E.g.*, *Elizabeth Arden, Inc. v. Federal Trade Comm'n*, 156 F.2d 132 (2d Cir. 1946), *cert. denied*, 331 U.S. 806 (1947); *United States v. Yee Ngee How*, 105 F. Supp. 517 (D. Cal. 1952); *City of Birmingham v. Hendrix*, 257 Ala. 300, 58 So. 2d 626 (1952); *Great W. Mushroom Co. v. Indus. Comm'n*, 103 Colo. 39, 82 P.2d 751 (1938); *Beebe v. Richardson*, 156 Fla. 559, 23 So. 2d 718 (1945); *Thornhill v. Ford*, 56 So. 2d 23 (Miss. 1952); 82 C.J.S. *Statutes* § 325 (1953).

48. *E.g.*, *In re Wilson's Estate*, 404 Ill. 207, 88 N.E.2d 662 (1949); *In re Estate of Loudon*, 249 Iowa 1393, 92 N.W.2d 409 (1958); *Longacre v. Knowles*, 333 S.W.2d 67 (Mo. 1960); *In re Estate of Whiteside*, 159 Neb. 362, 67 N.W.2d 141 (1954); *Williams v. Jones*, 175 Wis. 380, 185 N.W. 231 (1921); 48A C.J.S. *Joint Tenancy* § 4 (1981).

49. *See cases cited supra* note 23.

the vendor in many jurisdictions when the purchaser defaults.⁵⁰ When this occurs the equitable interest of the purchasers no longer exists.⁵¹ Under the rule in *Baker's Estate* the vendors would own the land as tenants in common, since their joint tenancy has been severed. This is regrettable. It certainly is an unintended result.

Considered from the standpoint of both policy and concept, the decision in *Baker's Estate* seems wanting in logic. As creative financing places these cases before the courts in greater numbers, it seems desirable that the contrary line of decisions be followed. Legislation clarifying the law to be applied to tenancies by the entirety would be desirable.

Meanwhile it would be helpful if attorneys, when drafting land contracts executed by joint tenants as vendors, would insert the appropriate language in the contract. This would dispose of the question regarding the joint tenancy in the chose in action represented by the contract price.

There remains the question of possible severance of the joint tenancy in the legal title retained by the vendors. Perhaps the best way to cope with the problem is to insert in the dispositive portion of the contract in the description of the vendors that "the vendors as joint tenants with the right of survivorship agree to sell." The courts following *Baker's Estate* would be likely to hold that the joint tenancy in the legal title is not severed when the intention to avoid severance is plainly expressed.

To put the payment problem into explicit language, it would be desirable to state that "at any time hereafter, including any period after the death of either vendor, payment of any sum due hereunder made to either vendor constitutes valid payment." It might be added that "the recital in any deed executed by either vendor that the other has died shall constitute conclusive evidence of that fact to the purchaser or his or their assigns."

While this article has not addressed the question of the cotenancy between two or more purchasers, it is plain that this is a problem at least as important as that discussed in this article. Careful draftsmanship can also deal competently with this problem. In any case, a greater awareness of cotenancy problems in credit sales is needed.

50. *Illinois Fair Plan Ass'n v. Astirs, Inc.*, 89 Ill. App. 3d 422, 411 N.E.2d 1050 (1980).

51. *Id.*