July 30, 1973

MATRIMONIAL PROPERTY HELD BY JOINT TENANCY

Matrimonial property held by spouses jointly: can either spouse unilaterally "sever" the joint tenancy; or can either spouse unilaterally seek "partition"?

A. *Common Law Position*

At common law a joint tenant had the right to sever a joint tenancy by disturbing one of the four unities of time, title, interest, or possession.[1] Any act which created a distinction in the interest in land between one joint tenant and the other had the effect of converting that one joint tenant's interest into a tenancy in common and therefore no longer subject to the contingency of survivorship.

Cheshire's Modern Law of Real Property[2] sets out five methods by which a joint tenancy may be "determined"

(i) alienation by one joint tenant;
(ii) acquisition by one tenant of a greater interest than that held by his co-tenants;
(iii) partition;
(iv) sale; and
(v) mutual agreement.

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[1] Megarry & Wade, *The Law of Real Property*, 3rd ed., at 415.

[2] Burn, *Cheshire's Modern Law of Real Property*, 11th ed., at 332.

[3] *Id.*

It will not be necessary to deal at great length with these various methods of determining a joint tenancy. However, one should note the distinction between *severance*--always possible at common law--and *partition*. *Voluntary partition* is always possible at common law (i.e., co-owners can mutually agree to physically divide the property).[4] *Compulsory partition* however, was not originally possible for joint tenants or tenants in common. The right to compel partition by action was conferred on joint tenants by the Partition Act of 1539 and 1540.[6] The Partition Act of 1868[7] gives the court discretion to order a sale in lieu of a physical partition if it thinks it fit to do so in all the circumstances.

B. *Alberta Statute Law*

The Partition Acts mentioned above are still in force in Alberta.[8] Other Alberta statutes of possible interest include: The Land Titles Act, R.S.A. 1970, c. 198; The Dower Act, R.S.A. 1970, c. 114; and The Married Women's Act, R.S.A. 1970, c. 227. The Alberta Land

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[4] *Id.* at 334; *see also*, Todd & McClean, *Cases and Text on Property*, 1968 (U.B.C.), at 6-37.

[5] Burn, *Cheshire's Modern Law of Real Property*, at 334.

[6] 31 Hen. 8, c. 1; 32 Hen. 8, c. 32; *see*, *Chitty's Statutes*, vol. IX at 1.

[7] 31 & 32 Vict., c. 40; *See*, *id.* at 4.

[8] *Robertson* v. *Robertson* (1951) 1 W.W.R. (N.S.) 183 (Alta. S.C.).

Titles Act contains no specific provisions dealing with the registration of instruments which would have the effect of severing a joint tenancy.

The important provision in The Dower Act is contained in section 26:

> (1) Where a married person is a joint tenant, tenant in common or owner of any other partial interest in land together with a person or persons other than the spouse of that married person, this Act does not apply to that land and it is not a homestead within the meaning of this Act nor does the spouse have any dower rights in it.
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> (2) Where a married person and his spouse are joint tenants or tenants in common in land, the execution of a disposition by them constitutes a consent by each of them to the release of their dower rights and no acknowledgment under this Act is required from either of them.

Subsection (2), without specifically saying so, would definitely seem to contemplate homestead rights in the jointly held property of a husband and wife. This subsection is important in determining whether a husband or wife can unilaterally sever property jointly held with his or her spouse or whether such a severance amounts to a "disposition" of homestead. Further, is a court ordered partition or sale in lieu thereof a "disposition" within The Dower Act? [9]

The Married Women's Act is not important for our purposes other than the fact it confers an independent right

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[9] For discussion of these problems *see infra*, D., E., and F.

to hold property in married women. Also of note is section 8 of this Act which expressly saves the rights and liabilities of spouses in acquiring property in joint tenancy.

C. *Various Other Provincial Statutory Provisions*

(1) *Saskatchewan*

Saskatchewan specifically deals with instruments effecting the severance of joint tenancies and will not allow a severance without proper registration *nor* will it allow registration without the consent of *all* joint tenants. These specific provisions are contained in section 240 of The Land Titles Act, R.S.S. 1965, c. 115, which section also specifically applies to The Homesteads Act, R.S.S. 1965, c. 118:

> 240. (1) Notwithstanding anything in this or any other Act, where any land, mortgage, encumbrance or lease registered under this Act is held by two or more persons in joint tenancy, other than as executors, administrators or trustees, the joint tenancy shall be deemed not to have been severed by any instrument heretofore or hereafter executed by one of the joint tenants, or by more than one but not all the joint tenants, unless the instrument has been registered under this Act.
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> (2) The registrar shall not accept for registration an instrument purporting to transfer the share or interest of any such joint tenant unless it is accompanied by the written consent thereto of the other joint tenant or joint tenants, duly attested in accordance with section 65 or 66, as the case may require.

> (3) *The Homesteads Act* applies with respect to instruments to which subsection (2) applies and with respect to consents required by that subsection.

In Saskatchewan then, it would seem that the common law position is definitely over-ridden by The Land Titles Act and a joint tenant could not unilaterally sever a joint tenancy whether the joint ownership was in homestead land or not.

(2) *British Columbia*

British Columbia also deals specifically with the problem of unilateral severance of a joint tenancy by a 1968 amendment to The Land Registry Act[10] adding subsection (1a) to section 22.[11] Section 22(1) and 22 (1a) now read:

> 22. (1) Any registered owner of land may make a valid transfer directly to himself jointly with another or others, and registered owners may make a valid transfer directly to one or more of their number either alone, or jointly with some other person, and a trustee or an executor or an administrator may make a valid transfer to himself individually.
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> (1a) A person may transfer land to himself in like manner as he could have transferred land to another person.

The reasons for, and the effects of this amendment are fully explained in a letter to W. F. Bowker, Director

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[10] S.B.C. 1968, c. 22.

[11] R.S.B.C. 1960, c. 208.

of the Institute of Law Research & Reform from J. V. Di Castri, Director, Legal Services for the Province of British Columbia. The letter is dated August 11, 1972, and is contained in the Institute's file on Common Promisor--2-CPP-70. Briefly, Mr. Di Castri explained the amendment as giving legislative authority for:

(i) A transfer from A & B as joint tenants to A and B as tenants in common, and vice versa. (This was in fact allowed in practice before the amendment without specific statutory authority.)

(ii) A transfer from A to A operating as a severance of a joint tenancy. This amendment specifically allows a unilateral severance of a joint tenancy. Mr. Di Castri explains also how this unilateral severance was brought about before the amendment by a rather round-about and cumbersome method necessitating the use of a cooperative third party.

British Columbia also has in force legislation similar to our Dower Act, contained in The Wife's Protection Act, R.S.B.C. 1960, c. 407. This raises the question whether the right to partition or severance is affected when a matrimonial home is jointly held; i.e., does "homestead" include jointly-owned property in British Columbia?

This latter question has been answered in the negative by the British Columbia Court of Appeal in

Evans v. *Evans*.[12] The headnote states in part:

> In the definition of "homestead" in the *Wife's Protection Act*, RSBC 1948, ch. 364, sec. 2, the words "registered . . . in the name of the husband" mean registered in his name only.
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> Therefore said definition does not include land the title to which is registered in the names of a husband and wife as joint tenants; and the Act does not apply to land so registered.
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> Therefore said *Wife's Protection Act* does not bar the granting of an application under the *Partition Act*, RSBC 1948, ch. 246, for the partition, or sale in lieu thereof, of land so registered.

British Columbia has also enacted The Partition Act, R.S.B.C. 1960, c. 276 which adopts much of the earlier English legislation with some significant changes. The case law interpretation of this statute indicates that British Columbia courts are given discretion in the exercise of which they may refuse a partition or sale of jointly-held property, depending on the circumstances in each case.[13] This differs from the position under The Partition Act, 1868, in which the only discretion available would seem to be to grant a sale in lieu of partition.[14]

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[12](1951) 1 W.W.R. (N.S.) 280. *See also* Robinson, *University of British Columbia Legal Notes*, Vol. 1 at 224 --comment on the *Evans* case and a later amendment to the definition of "homestead" in the Act.

[13]C.E.D. (Western) 2nd Edition, Vol. 18 at 467.

[14]*See, Wilkstrand and Mannix* v. *Cavanaugh and Dillon* [1936] 1 W.W.R. 113; *aff'd.* [1936] 2 W.W.R. 69 (Alta. A.D.);
[Continued on next page.]

(3) *Manitoba*

In relation to partition the Acts of significance are: The Dower Act, R.S.M. 1970, c. D-100, and The Law of Property Act, R.S.M. 1970, c. L-90. Before an amendment to The Law of Property Act in 1959, c. 32, the case law held:[15]

> There is no legislation in Manitoba which entitles a husband to a partition and sale of a homestead, within the meaning of *The Dower Act*, *infra*, as a matter of right, without the consent of his wife, even though the property is jointly owned; and, whatever are the merits of any particular case, there is no power in the court to enforce such alleged right.

Section 19 of The Law of Property Act presently reads:

> 19. (1) All joint tenants, tenants in common, mortgagees and other creditors having any lien or charge on, and all persons interested in, to, or out of any land in Manitoba, may be compelled to make or suffer partition or sale of the land or any part thereof.

[Continued from page 7.]

cf. Hicks v. *Kennedy* (1957) 20 W.W.R. 517 (Alta. A.D.) for different position when joint tenancy held to be a marriage settlement within The Domestic Relations Act; *see also*, *Grunet* v. *Grunet* (1960) 32 W.W.R. 509 (Sask. Q.B.).

[15] *See* headnote of *Wimmer* v. *Wimmer* [1947] 1 W.W.R. 734 *aff'd* [1947] 2 W.W.R. 249 (Man. C.A.); *see also*, *Kluss* v. *Kluss* [1947] 2 W.W.R. 379 (Man. K.B.); *Szmando* v. *Szmando* [1940] 1 W.W.R. 21 (Man. K.B.).

> (2) Where a person to whom subsection (1) applies is a married man or a married woman, an action for partition or sale of the land may be brought by or against him or her; and
>
> (a) partition; or
>
> (b) where in the opinion of the court, the land cannot reasonably be partitioned, sale thereof in lieu of partition;
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> may be ordered by the court without the consent of any party to the action, and without the consent of his or her spouse having been obtained as porivided in The Dower Act.

Subsection (2) specifically allows the court to dispense with a spouse's consent in exercising its discretion to cause a sale or a partition of homestead which is jointly owned:[16]

> The amendment of sec. 19 of *The Law of Property Act*, RSM, 1940, ch. 114, by 1949, ch. 32, makes it possible to proceed for partition where the property is held jointly by man and wife and is their homestead; but whether the order should be made is discretionary. Since that amendment *Wimmer* v. *Wimmer* [1947] 2 W.W.R. 259 259 (Man. C.A.), 1947 Can. Abr. 391, is no longer applicable.

There is no legislation in Manitoba specifically dealing with the *severance* of joint tenancies so it would

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[16] From the headnote of *Fritz* v. *Fritz* [1950] 1 W.W.R. 446 (Man. C.A.); *See also*, C.E.D. (Western) 2nd Edition, Vol. 18 at 467, para. (b).

seem--as in Alberta--much would depend on the Registrar's practice as to whether a joint tenancy can be unilaterally severed. Section 86(1) of The Real Property Act, R.S.M. 1970, c. R-30, is somewhat analagous to section 22(1) of British Columbia's Land Registry Act [without the addition of subsection (1a)]:

> 86. (1) An owner of land registered under this Act may make a valid transfer to himself jointly with any other person, and registered owners may make a valid transfer to one of their number either solely or jointly with some other person.

In British Columbia, before the addition of subsection (1a) to section 22, a joint tenant was allowed to sever a joint tenancy without the other joint tenant's permission, but the mechanics were cumbersome. The joint tenant had to convey a fractional interest to a third party who would convey it back to the joint tenant who would then effect a consideration of these interests ending up with a certificate of title for an undivided half interest in the land.[17] Whether or not this is possible in Manitoba is not known. There does not appear to be any formal method of consolidating title under the Manitoba Act.

(4) *Ontario*

The relevant statutes in Ontario include The Dower Act, R.S.O. 1970, c. 135; The Land Titles Act, R.S.O. 1970,

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[17] *See*, Di Castri's letter referred to *supra*, p. 6.

c. 234; and The Partition Act, R.S.O. 1970, c. 338. In considering the question of whether a joint tenant can unilaterally *sever* a joint tenancy without the other joint tenant's permission in Ontario the first statute to be examined is The Land Titles Act. The relevant sections are:

> 67. (1) Any two or more persons entitled concurrently or successively, or partly in one mode and partly in another, to such estates, rights or interests in land as together make up such an estate as would, if vested in one person, entitle him to be registered as owner of the land may apply to the proper master of titles to be registered as joint owners in the same manner and with the same incidents, so far as circumstances admit, in and with which it is in this Act declared that an individual owner may be registered.
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> (2) Where several persons are so registered as owners, the entry may, if the parties so desire, define the estates, rights and interests, other than trust estates, rights and interests, to which the owners are respectively entitled, and such entry may be made either upon first registration or subsequently in case the estates, rights or interests so arise.
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> 68. (1) No person shall be registered as owner of an undivided share in freehold or leasehold land or of a charge apart from the other share or shares.
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> (2) The share of each owner may be stated and, where the extent of his interest appears the register or by the statement of his co-owner, he may transfer or charge his share or he may without such statement transfer his share to his co-owner.

It has been held in Ontario that section 68 does not abrogate the common law right of a joint tenant to unilaterally sever the joint tenancy by transferring his interest to a third party and such a transfer is registrable under the Act.[18] The *Re Cameron* case referred to above (footnote #18), establishes the right of unilateral *severance* of a joint tenancy where no matrimonial property or homestead is involved. In answering the question whether this right is affected in the marriage situation The Partition Act and The Dower Act must be examined.

Examining first The Partition Act, section 5 seems of the most immediate importance.

> 5. (1) In an action or proceeding for partition or administration, or in an action or proceeding in which a sale of land in lieu of partition is ordered, and in which the estate of a tenant in dower or tenant by the curtesy or for life is established, if the person entitled to the estate is a party, the court shall determine whether the estate ought to be exempted from the sale or whether it should be sold, and in making such determination regard shall be had to the interests of all the parties.
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> (2) If a sale is ordered including such estate, all the estate and interest of every such tenant passes thereby, and no conveyance or release to the to the purchaser shall be required from such tenant, and the purchaser his heirs and assigns, hold the premises

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[18] *Re Cameron* [1957] 11 D.L.R. (2d) 201; O.R. 581, (H.C.J.).

> freed and discharged from all claims by virtue of the estate or interest of any such tenant, whether the same be to any undivided share or to the whole or any part of the premises sold.
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> (3) The court may direct the payment of such sum in gross out of the purchase money to the person entitled to dower or estate by the curtesy or for life, as is considered, upon the principles applicable to life annuities, a reasonable satisfaction for such estate, or may direct the payment to the person entitled of an annual sum or of the income or interest to be derived from the purchase money or any part thereof, as seems just, and for that purpose may make such order for the investment or other disposition of the purchase money or any part thereof as is necessary.

This section, especially subsection (2), would seem to clearly allow the court to entertain an action for partition with respect to homestead property with or without the consent of both spouses.

The only remaining question is whether a spouse could unilaterally *sever* joint "matrimonial property". Section 3 of The Dower Act would seem to say there can be no dower estate in jointly held property:

> 3. Where a husband dies beneficially entitled to any land for an interest that does not entitle his widow to dower at common law, and such interest, whether wholly equitable or partly legal and partly equitable, is or is equal to an estate of inheritance in possession, *other than an estate in joint tenancy*, his widow is entitled to dower out of such land.

It has in fact been held in the case of *Lubovich* v. *Cuckovich*[19] by the Ontario Appellate Division that section three of The Dower Act means a wife cannot be entitled to dower in land in which she and her husband are joint tenants:[20]

> It is clear, of course, that she had no dower in the lands while seized as a joint tenant. She was a joint owner of the whole estate, and the existence of any right to dower was incompatible with her own title. If she predeceased her husband, no dower could attach. If she survived him, the estate was wholly hers.

The conclusion would seem to be then, that in Ontario a spouse can unilaterally *sever* a joint tenancy in matrimonial property or bring about an action for *partition* without the other spouse's permission though the matter is not entirely free from doubt.[21]

D. *The Case Law*

(1) *The right of a joint tenant to unilaterally "sever" a joint tenancy in matrimonial or non-matrimonial property.*

No Alberta case law has been found concerning the right of a joint tenant, whether a joint tenant with his

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[19] [1930] 4 D.L.R. 339.

[20] *Id.* at 342-43 *per* Orde J.A.

[21] *Contra see* Magwood, *The Ontario Land Titles Act* (1954) at 7. (The *Lubovich* case is not cited.)

spouse or not, to *unilaterally sever* the joint tenancy. The Supreme Court of Canada has held in *Stonehouse* v. *A.G. of B.C.*[22] that an unregistered deed of one joint tenant spouse transferring all her interest in the land to a third party had the effect of severing the joint tenancy and defeated the husband's right to survivorship. It was held that there was nothing in the British Columbia Land Registry Act changing the common law with respect to severance of joint tenancies. Whether or not this case will apply to Alberta is a moot question.

The case may be applicable in Alberta with respect to the severance of a joint tenancy where no dower interest is involved.[23] The *Stonehouse* case could not however be used as direct authority with respect to the severance of a joint tenancy where a dower interest is involved. There was no question of dower in the case, presumably because the *Evans* case[24] has established that there can be no "homestead" in jointly held property in British Columbia.

It has also been held in Ontario that a joint tenant's common law right to effect a severance of a joint tenancy is unaffected by The Ontario Land Titles Act:[25]

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[22] [1962] S.C.C. 103; 37 W.W.R. 62. *Cf. Foort* v. *Chapman* [1973] 4 W.W.R. 471 where it was recently held in the British Columbia Supreme Court by Wooton J. that a mere unregistered agreement for sale would not have the effect of severing a joint tenancy and therefore could not defeat the right to survivorship. No mention at all was made of the *Stonehouse* case.

[23] The case took place before the 1968 amendment to The Land Registry Act specifically allowing unilateral severance of joint tenancy. *See supra*, part C-(2).

[24] *Supra*, n. 12.

[25] *Re Cameron, supra*, n. 18 at 584-585.

Now the question one must ask one's self is whether The Land Titles Act which set up a new system of registering land in the province has altered the law of real property as has been stated. In my opinion it is clearly established by authority that unless the statute clearly did so it is not deemed to have altered the law and in effect The Land Titles Act merely provided a system of registering land and conveying titles which it has hoped would simplify the sale and transfer of land. . . .

The effect of The Land Titles Act has been considered in other cases. In the case of *In re Skill and Thompson* the Ontario Court of Appeal dealt with the matter. This case is reported in (1908), 17 O.L.R. 186 and at p. 194, Meredith J.A. had this to say:-

> The Land Titles Act is not an Act to abolish the law of real property; it is an Act far more harmless in that respect than in some quarters seems to be imagined, at times, at all events, when the wish is father to the imagination. It is an Act to simplify titles and facilitate the transfer of land; and, doubtless, greater familiarity with it will tend to remove a good many false notions regarding its revolutionary character.

In another and somewhat earlier judgment of the Court of Appeal the case of *John Macdonald & Co. Limited* v. *Tew* (1914), 32 O.L.R. 262, Sir William Mulock, who was then Chief Justice of the Exchequer, had this to say at p. 265:-

> The Land Titles Act deals simply with the question of registration; it does not interfere with any common law or other rights of an owner of land to mortgage the same by instrument not capable of registration under the Land Titles Act.

> I think the same remarks might be applied to the right to convey land and this was an opinion of one who in his day was an eminent conveyancer. I know of no section of The Land Titles Act which abrogates any of the rights of a joint tenant and one of those rights at common law seems clearly to have been the right to break the joint tenancy by conveying the interest of the joint tenant, the effect of such a conveyance being to create a tenancy in common between the grantee of such a grant and the remaining joint tenant.

These general remarks concerning the relationship of The Land Titles Act to the common law may also be applicable in Alberta.

A comment on the *Stonehouse* case in *The Canadian Bar Review*[26] rightly points out a distinction found in the wording of British Columbia's Land Registrary Act and that found in most other Terrens systems. Most Canadian Acts would seem to be fairly similar to our section 56 which sets out the necessity for registration:

> 56. After a certificate of title has been granted for any land, no instrument is effectual to pass any estate or interest in that land (except a leasehold interest for three years or for a less period) or to render that land liable as security for the payment of money, unless the instrument is executed in accordance with the provisions of this Act and is duly registered thereunder, but upon the registration of any such instrument in the manner hereinbefore prescribed the estate or interest specified therein passes or, as the case may be, the land becomes liable as security in manner and subject to the convenants, conditions

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[26](1963) 41 Can. B.R. 272.

> and contingencies set forth and specified in the instrument or by this Act declared to be implied in instruments of a like nature.

The British Columbia Act however, added an exception to this general rule by adding the words "except as against the persons making the same. . . ." These words were heavily relied on in *Stonehouse* to allow the unregistered transfer to direct the deceased spouse of her interest (or at least change its character).[27] It can be submitted then, that without these words an unregistered transfer of a joint tenant's interest in Alberta has no effect in passing that interest or in severing the joint tenancy (subject to the possible objection that an "estate" or "interest" need not "pass" to cause a severance since it is only a change in "character" from a joint tenancy to a tenancy in common).[28] What is most important to keep in mind however, is that whether or not The Alberta Land Titles Act allows an unregistered transfer to effect a severance of a joint tenancy or not, it says nothing about the right of a joint tenant to apply for the registration of such an instrument with or without the other joint tenant's permission.

(1) *The right of a joint tenant to unilaterally bring an action for "partition" of matrimonial property.*

At the outset, before making an examination of the case law on this subject, it should be once again

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[27] *See, id,* at 274.

[28] *See, Stonehouse, supra,* n. 22 at 67 (W.W.R.).

emphasized there is a fundamental distinction between the *severance* of and *partition* of joint tenancies. A severance of a joint tenancy merely changes the nature of the estate to ownership by tenancy in common, while a partition gets rid altogether of any co-ownership rights and each former co-tenant becomes an *absolute* owner of a defined share of the land in proceeds of the sale thereof.[29]

The case law in Alberta on this particular problem is conflicting and definitely unsettled at this point in time. The first case on point is *Robertson* v. *Robertson*[30] in which Mr. Justice Egbert held that a dower right exists in property jointly held by spouses so long as they are married. The court also held that it cannot effect the partition of a homestead without both spouses' permission. It is very important to note here however, that no application was made under section 11 of The Dower Act to dispense with the spouse's consent to disposition since the applicant felt the Partition Act, 1868, gave an absolute right to partition.

The next case on point in Alberta is *McWilliam* v. *McWilliam*[31] heard both in the Supreme Court and Appellate Division. In the Supreme Court, Mr. Justice Smith (as he then was) expressly disagreed with the *Robertson* case and

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[29] *See* Todd and McClean, *Cases and Text on Property*, U.B.C. (1968) at 6-18 and 6-36.

[30] (1951) 1 W.W.R. (N.S.) 183 (Alta. S.C.). *See also*, *Wimmer* v. *Wimmer* [1947] 2 W.W.R. 249 (Man. C.A.) decided before The Law of Property Act was amended.

[31] (1960) 31 W.W.R. 480 (Alta. S.C.), *affirmed on different grounds* (1961) 34 W.W.R. 476 (Alta. A.D.).

held that a sale under The Partition Act is not a *disposition* within The Dower Act (and, therefore, need not be consented to). Alternatively it was held even if it were a disposition, the court was prepared to dispense with the husband's consent to the "disposition". The Appellate Division, although upholding the decision in the result, refused to consider the correctness of the *Robertson* case:[32]

> . . . for in this case, unlike the *Robertson* case, there was before the court an application to dispense with the other spouse's consent to partition. The learned trial judge ordered that the appellant's consent be dispensed with. *The Dower Act* provides that consent may be dispensed with "if a married person and his spouse are living apart" (sec. 11 [1] [a]), and the evidence was that these parties had not lived together since 1956.

The last decision on point in Alberta is that of Mr. Justice Kirby in *Wagner* v. *Wagner*.[33] Kirby J. agreed with the view of Smith J. that "a sale of land pursuant to The Partition Act, 1868 is not a disposition within the meaning of that word as used in The Dower Act."[34] At the same time Kirby J. held that this was a proper

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[32] *Id.* at 477.

[33] (1970) 73 W.W.R. 474 (Alta. S.C.); *see also, Schofield* v. *Graham* (1969) 69 W.W.R. 332 (Alta. S.C.) concerning the right of joint tenants to mutually agree to sever the tenancy.

[34] *Id.* at 477.

case to dispense with the husband's consent to the sale of the property in which he had a dower right since he and his wife had been separated for two months. In this case the partition action was brought concurrently with a petition for a decree of divorce--both of which were granted.

At this point note should also be made of sections 22 and 24 of The Domestic Relations Act, R.S.A. 1970, c. 113. Section 22 allows the court to make an order for the disposition of joint property in a proceeding for a judicial separation.[35] By section 24, when a decree absolute or declaration of nullity is given the court may make such order as it sees fit with respect to property, in ante- or post-nuptial settlements. Such settlements must normally be proven by writing or strong evidence or else may transfer into the joint names of the spouses by the husband will be presumed a gift. If such presumption is upheld the former wife could bring an action for partition after the divorce, etc.[36] If the joint ownership was established to be a marriage settlement, it could only be dealt with under The Domestic Relations Act.[37]

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[35] *See, Morasch* v. *Morasch* (1962) 40 W.W.R. 50 (Alta. S.C.).

[36] *See, Redgrove* v. *Unruh* (1961) 35 W.W.R. 682 (Alta. S.C.), *aff'd.* (1962) 39 W.W.R. 317 (Alta. A.D.).

[37] *See, Hicks* v. *Kennedy* (1956) 18 W.W.R. 367 (Alta. S.C.) *rev'd. in part* (1957) 20 W.W.R. 517 (Alta. A.D.).

E. *The Land Titles Office Practice*

In undertaking a study of the severance of joint tenancies in Alberta it was felt it would be useful to know the practice of the Registrars of the South Alberta and North Alberta Land Registration Districts in dealing with the unilateral severance of joint tenancies. Pursuant to this, a letter was sent to the Registrar in Calgary, Mr. H. E. McCombs, and a meeting was arranged with Mr. Emile Gamache, Registrar, in Edmonton. The specific question asked these gentlemen essentially was, "What is the Land Titles Office practice with respect to severance of joint tenancies? Will their office register transfers by one joint tenant, without the other's permission, which would have the effect of severing the joint tenancy--both in homestead land and otherwise?"

(1) *Edmonton Land Titles Office Practice*

Mr. Gamache indicated that the Edmonton Land Titles Office does not accept for registration any conveyance by only one joint tenant (whether a conveyance of homestead land or not). Mr. Gamache was of the opinion that:[38]

> (i) The Registrar does not have jurisdiction [i.e., legislative authority under the Act] to recognize a conveyance by one joint tenant as a severance.

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[38] *See, also,* letter from Mr. Gamache to Mr. H. E. McCombs, Re: Severance of Joint Tenancy, dated October 6, 1969. Carbon copy kindly supplied by Mr. Gamache in file #2-JoT-00.

(ii) In the situation where homestead land is involved The Dower Act (especially section 26(2)) does not allow a disposition by one spouse without the other's permission where they jointly own the land.

(iii) A severance can only be effected by a judge's order pursuant to a partition action.

Thom's Canadian Torrens System, 2nd edition, comments on this type of practice by Land Titles Offices in this way:[39]

> However, it may be noted that in some jurisdictions the practice is to refuse any transfer by a joint tenant without the consent of the remaining joint tenant. . . . This practice appears to depend upon the assumption that there is no distinction between joint tenants and tenants by entireties; this, of course, is not so. In a stated case by the Master of Titles at Toronto [*Re Cameron*, *supra*, n. 18] on facts somewhat similar to *Stonehouse* an analogous practice based on s. 98 of the Ontario *Land Titles Act* was considered not to fall within the enactment and the right of one of two joint tenants to transfer her undivided one-half interest without the consent of or notice to the other joint tenant was confirmed. In view of the foregoing authorities it seems difficult to support

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[39]Edited by Victor Di Castri, at 431-32.

the view that the common-law rules as to joint tenancy have been disturbed by the Torrens system.

(2) *Calgary Land Titles Office Practice*

Copy of Registrar's letter is attached.

South Alberta Land Registration District

LAND TITLES OFFICE

CALGARY, ALBERTA

ADDRESS YOUR REPLY TO
THE REGISTRAR
LAND TITLES OFFICE
P.O. BOX 7575
CALGARY 2, ALBERTA

August 1st, 1973

Mr. R.J. Gilborn,
Research Assistant,
The Institute of Law Research and Reform,
The University of Alberta,
EDMONTON, Alberta.

Dear Sir:

Re: Severance of Joint Tenancy

I am sorry that I have not answered your letter of July 5th before now but we are converting to the loose title system in Calgary and this fact plus the large volume of registrations, have kept me busy.

When I first became Registrar, I was prepared to sever a joint tenancy upon transfer of one party or mortgage by one party in accordance with the common law. I felt that in view of the fact that the Land Titles Act does not mention "joint tenancy", it would be in order to sever the tenancy. However, John Hart, Q.C. who was then Deputy Attorney General, did not approve and gave instructions that we could only accept a Judge's Order in this respect and this practice has been followed since then.

I do not agree with Mr. Gamache that Section 26 of the Dower Act is a problem with joint tenancy.

Yours truly,

H.E. McCombs
Registrar

HEM:dc

F. *Conclusions and Recommendations*

It is obvious that in Alberta a joint tenant cannot in *practice* have a unilateral transfer severing a joint tenancy registered, whether that joint tenancy is in matrimonial property or not. The simplest procedure to enforce registration would probably be to bring a petition under section 181 of The Land Titles Act. Whether or not such a petition would be granted is an open question. It is respectively submitted, however, that the Land Titles Office practice of refusing to register unilateral transfers which would sever joint tenancies is not altogether sound at law--at least as respects joint tenancies in non-homestead land. It is submitted that the Alberta Land Titles Act has not changed the common law with respect to the right of a joint tenant to effect a *severance*. It is submitted that if the Legislature had wished to change the common law in this regard it would have had to do so specifically and clearly.[40]

It is submitted that the position of the Registrar is partly based on a failure to distinguish between a *severance*--which is as of right at common law--and a *partition*--which is a right statutorily conferred.[41] It is submitted that once this distinction is recognized there is no reason by the Registrar should need judicial or legislative authority to register a transfer effecting a severance since this right is conferred by the common

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[40] *Stonehouse* v. *A.G. of B.C., supra,* n. 22; *Re Cameron, supra,* n. 18; *Wright* v. *Gibbons* (1949) 78 Comm. L.R. 313.

[41] *See especially,* reason #(iii) under *Edmonton Land Titles Office Practice.*

law on a joint tenant. The Registrar can quite rightly say however, that he has no authority to effect a *partition* unilaterally requested--this would have to be done by a judge.

The correct position at law with respect to the severance or partition of joint *matrimonial* property is less clear. It is submitted that section 26(2) of The Dower Act clearly contemplates that jointly held property between two spouses is subject to dower rights. The question then becomes whether a *severance* or a *partition* of the joint tenancy is a "disposition" of homestead within section 2(a) of The Dower Act: Section 2(a) reads as follows:

> 2. In this Act,
>
> (a) "disposition"
>
> (i) means a disposition by act *inter vivos* that is required to be executed by the owner of the land disposed of, and
>
> (ii) includes
>
> (A) a transfer, agreement for sale, lease for more than three years or any other instrument intended to convey or transfer an interest in land,
>
> (B) a mortgage or encumbrance intended to charge land with the payment of a sum of money, and required to be executed by the owner of the land mortgaged or encumbered,
>
> (C) a devise or other disposition made by will, and
>
> (D) a mortgage by deposit of certificate of title or other mortgage that does not require the execution of a document;. . .

It is submitted that since a transfer to one's self is not allowed in Alberta,[42] all other possible methods of effecting a *severance* are covered under the definition of "disposition" above. Therefore, it would seem a joint tenant would need the permission of his or her joint tenant spouse to effect the severance of jointly held homestead property.

It is also submitted that the *Robertson* v. *Robertson* case[43] is in law the more correct (though perhaps not more practical view with respect to the right to ask for *partition* of jointly held homestead land. It is submitted that a partition or sale in lieu thereof creates individual and separate interests in land and falls within section 2(a)(ii)(A) of The Dower Act. At the same time however, it would seem very easy to avoid the strict effects of this interpretation by simply making application under section 11 of The Dower Act to dispense with the consent of a spouse to a disposition of homestead.

RECOMMENDATIONS

1. *IT IS RECOMMENDED THAT AN AMENDMENT TO THE PARTITION ACT, 1868 BE ENACTED IN ALBERTA, SPECIFICALLY ALLOWING THE COURT TO PROCEED*

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[42] *See*, Report #11, *Common Promisor and Promisee, Conveyances with a Common Party*, October 1972, Institute of Law Research and Reform, at 4-5.

[43] *Supra*, n. 8.

WITH A PARTITION ACTION WITHOUT THE CONSENT OF BOTH SPOUSES.[44]

2. *IT IS RECOMMENDED THAT THE DOWER ACT BE AMENDED BY INCLUDING IN THE DEFINITION OF "DISPOSITION" IN SECTION 1(a), A SPECIFIC SAVING CLAUSE INDICATING THAT PARTITION OR SALE IN LIEU THEREOF PURSUANT TO THE PARTITION ACT, IS NOT A "DISPOSITION" WITHIN THE MEANING OF THE DOWER ACT.*

3. *IT IS RECOMMENDED THAT FOR GREATER CLARITY THE DOWER ACT IN SECTION 2(a) ALSO SPECIFICALLY INDICATE WHETHER A SEVERANCE OF A JOINT TENANCY IS CONSIDERED TO BE A "DISPOSITION" WITHIN THE ACT.*

4. *IT IS RECOMMENDED THAT THE LAND TITLES ACT BE AMENDED BY ADDING SECTIONS WHICH SPECIFICALLY DEAL WITH THE REGISTRATION OF JOINT TENANCIES;*

   (a) INDICATING WHETHER THE UNILATERAL SEVERANCE OF A JOINT TENANCY IN NON-HOMESTEAD LAND WILL BE REGISTERED,

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[44] It may be that the Institute may also wish to recommend that judges be given a greater discretion in whether or not to grant sale or partition than they presently have under The Partition Act, 1868.

(b) INDICATING--IN HARMONY WITH AMENDMENT TO THE DOWER ACT WHETHER THE UNILATERAL SEVERANCE OF HOMESTEAD LAND WILL BE REGISTERED.

5. *IT IS RECOMMENDED THAT THE AMENDMENTS TO THE LAND TITLES ACT AND THE DOWER ACT DO NOT ALLOW THE UNILATERAL SEVERANCE OF JOINT TENANCIES IN HOMESTEAD LAND.*

Richard J. Gilborn