CO-OWNERSHIP UNDER VICTORIAN LAND LAW

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PART II[1]

III. DEALINGS BY CO-OWNERS

Co-owners may deal either concurrently or individually with the common property. If they act in combination they can dispose of the property in its entirety. If joint tenants they can individually dispose of an equal interest, or if tenants in common they can individually dispose of the interest to which they are respectively entitled for in such a tenancy there need be no unity of interest.[2] A tenancy in common presents no conceptual difficulty, for each tenant in common is entitled to a separate share, albeit an undivided share, and it is this which may be alienated. But the interest of each joint tenant is an interest in the whole of the common property, each being entitled to the entire estate subject only to the like rights of the others. It might therefore at first sight seem contradictory to state as above that each may dispose of an equal share of this estate free, of course, from the other joint tenants' interests. In discussing this apparent contradiction, Dixon J. (as he then was) in *Wright v. Gibbons*[3] stated:

> . . . in contemplation of law joint tenants are jointly seised for the whole estate they take in the land and no one of them has a distinct or separate title, interest or possession. . . . It represents only one of two not altogether compatible aspects of joint tenancy, a form of ownership bearing many traces of the scholasticism of the times in which its principles were developed. 'Albeit they are so seised,' says *Coke* (186a) (*'scil. totum conjunctim, et nihil per se separatim'*), 'yet to divers purposes each of them hath but a right to a moitie.' For purposes of alienation each is conceived as entitled to dispose of an aliquot share.[4]

Although the interest of a joint tenant lacks the capacity to devolve upon death,[5] it does therefore possess the potentiality, by a dealing *inter vivos,* to acquire a distinct and separate existence. The effect of particular dealings by a joint tenant upon his interest is considered when severance of a joint tenancy is discussed below. It may become an undivided share, the joint tenancy being severed and converted into a tenancy in common: it may be that, notwithstanding the dealing, no severance occurs, and no undivided share is created: or

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[1] This is the second instalment of this article. The first appeared in (1961) 3 *M.U.L.R.* 137. [2] See p. 167 *supra.* [3] (1949) 78 C.L.R. 313. [4] *Ibid.* 329-330.
[5] See p. 153 *supra.*

it may be that a compromise is achieved and that a dealing by a joint tenant effects a 'severance for the time' or 'suspends' the joint tenancy, thus protecting the enjoyment of the grantee notwithstanding the grantor-joint-tenant's death, but at the same time enabling the right of survivorship to operate after the grantee's interest has expired.[6] All that is here material to note is that a joint tenant may, *inter vivos,* deal with his interest in a variety of ways and that this interest, though initially indistinguishable from the entirety, has the potentiality of an independent existence.

A. Contract to Convey

Both joint tenants and tenants in common can contract to convey their interests, but they cannot alone contract to convey, nor grant an option to purchase,[7] binding the entirety. In the event of a breach of contract the right of the purchaser to damages depends upon the law of contract, and the fact of co-ownership does not appear material. But the issue here discussed is whether the existence of co-ownership will affect a purchaser's claim for specific performance.

(i) *P contracts to purchase the interest of A, a joint tenant, who dies before completion*

As is discussed below,[8] if A, one of two joint tenants, contracts to convey his interest, the contract, if capable of specific performance, will confer forthwith upon the purchaser an interest in equity and the tenancy will accordingly be severed in equity, though not at law.[9] As a result, if A dies before completion, the legal estate, but not the equitable interest, will pass to the surviving joint tenants. It appears, however, that in such circumstances the contract for sale would be specifically enforceable by the purchaser against the surviving joint tenants.[10]

(ii) *P contracts to purchase the entirety of Blackacre from A and B, but only A can convey*

If P contracts to purchase property from A and B, both of whom can convey, whether as joint tenants or as tenants in common, no difficulty arises. If, for example, only A can convey, again no difficulty arises if he seeks a decree of specific performance against P, for it is clear that equity will not compel P to accept such incomplete

[6] *Frieze v. Unger* [1960] V.R. 230, 242.

[7] *Snape v. Snape; London & Manchester Assurance Co. v. Same* [1959] *Current Law Yearbook* 1846.

[8] Discussed in next issue.

[9] *Hinton v. Hinton* (1755) 2 Ves. Sen. 631, 634; *Brown v. Raindle* (1796) 3 Ves. Jun. 256.

[10] In *Hinton v. Hinton* (1755) 2 Ves. Sen. 631, Lord Hardwicke L.C., at 634, stated: 'If the articles were such as amounted there to a severance of the joint-tenancy in equity, in such case this court would decree against the survivor.'

performance of his contract. But what if it is P who seeks specific performance against A in relation to the interest which A can alone convey? Lord St. Leonards has stated the general rule as follows:[11]

> A purchaser generally although not universally may take what he can get with compensation for what he cannot have. . . . In regard to the limits of the rule that a purchaser may elect to take the part to which a title can be made at a proportionate price, it has not been determined whether under any circumstances of deterioration to the remaining property the vendor could be exempted from the obligation of conveying that part to which a title could be made: but the proposition is untenable that if there is a considerable part to which no title could be made the vendor was therefore exempted from the necessity of conveying any part.

Until 1950, however, the authorities were not in agreement. In *Attorney-General v. Day*,[12] Lord Hardwicke expressed the view that P could so insist upon specific performance.[13] In *Horrocks v. Rigby*,[14] A and B had agreed to sell a public house but upon examination of title it was found that A had no interest in the property and that B was entitled to only a moiety. The purchaser was willing to accept this moiety on an abatement of the purchase price and sought specific performance of the agreement against B. The purchaser succeeded, Fry J. stating:

> I think that where an agreement is entered into by A. and B. with C. and it afterwards appears that B. has no interest in the property, A. may nevertheless be compelled to convey his interest to C. I should have come to that conclusion upon principle, for I do not see why a purchaser is to lose his right against a vendor who can complete, because from a circumstance of which the purchaser had no knowledge, he has no right against persons who cannot complete. But I am very much fortified in that conclusion by a passage in the judgment of Lord *Hardwicke* in *Attorney-General v. Day*.[15]

But discord was introduced by the judgment of the Court of Appeal in *Lumley v. Ravenscroft*.[16] Here both contracting parties were apparently tenants in common,[17] but one was an infant against whom specific performance could not be granted. Lindley L.J. stated as a general rule that where a co-owner purports to deal with the entirety, specific performance will not be granted against him as to his share,

[11] Sugden, *Vendors and Purchasers* (14th ed. 1862) 316, cited with approval by the Privy Council in *Basma v. Weekes* [1950] A.C. 441, 455.

[12] (1748) 1 Ves. Sen. 218.

[13] *Ibid.* 224. His Lordship stated: 'On the other hand, if on the death of one of the tenants in common, who contracted for a sale of the estate, the purchaser brings a bill against the survivor, desiring to take a moiety of the estate only, the interest in the moiety being divided by the interest in the estate, I should think (though I give no absolute opinion as to that) in the case of a common person he might have a conveyance of a moiety from the survivor, although the contract cannot be executed against the heir of the other.'

[14] (1878) 9 Ch. D. 180.

[15] *Ibid.* 182.

[16] [1895] 1 Q.B. 683.

[17] *Basma v. Weekes* [1950] A.C. 441, 456.

at any rate in the absence of misrepresentation or misconduct. On the facts of *Lumley v. Ravenscroft* it is not easy to see how the defendant had purported to deal with the entirety, but in any event the case must now be read subject to the decision of the Privy Council in *Basma v. Weekes*:[18]

> A, B and C, tenants in common in equal shares, had agreed to sell two houses to the plaintiff. C had no power in law to make this contract without the concurrence of her husband. The plaintiff claimed specific performance against A and B relating to the one third undivided share held by each.

The Privy Council cited with approval the statement of Lord St. Leonards before referred to, and adverting to the conflict of views outlined above pointed out that neither *Attorney-General v. Day*[19] nor *Horrocks v. Rigby*[20] had been cited to the court in *Lumley v. Ravenscroft*[21] and, further, distinguished on other grounds the only two cases relied upon by Lindley L.J. in his judgment.[22] Lord Reid, upholding the plaintiff's claim, delivered the judgment of the Board:

> Their Lordships have reached the conclusion that the weight which must otherwise be given to a judgment of Lord Lindley is in this case seriously diminished by the circumstances to which they have adverted, and that the decision in *Lumley v. Ravenscroft* cannot be regarded as having impaired the authority of *Horrocks v. Rigby* or of the opinion of Lord Hardwicke in *Attorney-General v. Day*.[23]

It therefore seems clear that if A and B contract to sell Blackacre and only A can make title, a purchaser will not, in relation to A's interest, be denied specific performance simply because of the inability of B to perform his contract. The reason why B does not perform his contract seems irrelevant. It may be that B has no interest at all in the property,[24] or that B has an interest, but either is not subject to the relief of specific performance[25] or has no capacity to alone alienate his interest.[26] Again, if B is a tenant in common, there being no necessary unity of title, it may be that he cannot deduce a marketable title to his undivided share. Nor does it seem to matter that A had no knowledge of the circumstances but, as is discussed below,[27] if the facts were known to the purchaser he might on general equitable principles be refused relief.

(iii) *P contracts to purchase the interest of A, a co-owner*

If A, the owner of the entirety, contracts to convey a half share

[18] *Ibid.*; and see (1950) 24 *Australian Law Journal* 205.
[19] (1748) 1 Ves. Sen. 218. [20] (1878) 9 Ch. D. 180. [21] [1895] 1 Q.B. 683.
[22] *Price v. Griffith* (1851) 1 De G. M. & G. 80, discussed p. 311 *infra*. *Thomas v. Dering* (1837) 1 Keen 729, discussed p. 310 *infra*. [23] [1950] A.C. 441, 457.
[24] *Horrocks v. Rigby* (1878) 9 Ch. D. 180.
[25] *Lumley v. Ravenscroft* [1895] 1 Q.B. 683; *Boyd v. Ryan* (1947) 48 S.R. (N.S.W.) 163. [26] *Basma v. Weekes* [1950] A.C. 441. [27] P. 311 *infra*.

to B, no special problem seems to arise.[28] And if A, B and C are co-owners and A conveys his interest to B, again no special problem seems to arise for B and C remain entitled to possession of the entirety of the land subject now only to the like right of each other. But if A, a co-owner, contracts to convey his interest to X, a new participant to possession is introduced and, if specific performance of such a contract is sought, it may be argued that inconvenience would result to the other co-owners if against their wishes, and against the wishes of A, they are forced to share the possession and enjoyment of the land with X. In *Hexter v. Pearce*[29] the defendant was entitled as tenant in common to an undivided moiety of certain land and agreed with the plaintiffs to grant to them a lease to work, dig and sell the clay or other minerals in and upon the said moiety. In a suit by the plaintiffs for specific performance of this agreement the defendant contended, *inter alia,* that it would be neither practicable nor possible for the plaintiffs and the persons entitled to the other undivided moiety to work the minerals contemporaneously. In rejecting this contention, Farwell J. stated:[30]

> I am not aware that the Court has ever taken into consideration the comparative convenience or inconvenience of the plaintiffs and defendants apart from the considerations I have just mentioned. Whether the contract is a convenient or an inconvenient one is for the parties to consider when they enter into it. As regards a purchaser from a tenant in common, whether the purchase is of the fee or only of a lease, I cannot myself see that the purchaser need have any greater difficulty in working the minerals than the tenant in common himself would have had. I cannot assume that the defendant Wilkinson will act unreasonably. If he acts reasonably, then on the evidence before me I find that there is no difficulty in working. If I assumed that he was going to act unreasonably, I should not allow that to constitute a foundation for a defence which he would not otherwise possess.

In the earlier case of *Thomas v. Dering*[31] the Court, discussing a contract by a life tenant to convey the entirety, expressed the view that specific performance would not be decreed where performance would be unreasonable or would be prejudicial to persons interested in the property, but not parties to the contract. But whatever the position may be with regard to interests under a settlement, it would indeed have been curious had this view been applied to co-ownership which from its very nature demands the sympathetic co-existence of two or more people each with rights of enjoyment and possession extending to the entirety of the land. The actions for waste and account mark the extent to which each can alone enjoy and exploit the common

[28] *Fitzgerald and Another v. Masters* (1956) 30 A.L.J.R. 412. [29] [1900] 1 Ch. 341.
[30] *Ibid.* 346. [31] (1837) 1 Keen 729.

property, and proceedings for partition would be the remedy if peaceful contemporaneous user proves impossible.[32]

(iv) *P contracts to purchase the entirety from A, who turns out to be one of two co-owners*

Like the circumstances lastly discussed, A is a co-owner, but here P contracts to purchase the entirety. This situation resembles that secondly considered where P contracts to purchase the entirety from A and B but only A can convey, in that specific performance cannot be obtained against P, but if P seeks specific performance against A a difference is apparent for, whereas A and B contracted as co-owners, here A contracted as owner of the entirety. Nevertheless the 'settled rule'[33] stated by Lord St. Leonards[34] seems equally applicable and a purchaser will not be defeated simply on the basis that the vendor cannot carry out the contract in its entirety.[35] Thus, with an appropriate abatement of the rent, specific performance has been decreed where a mother entered into an agreement to lease the entirety of a house for business purposes, it being afterwards discovered that the premises belonged both to her and to her infant son as tenants in common.[36] And specific performance has likewise been decreed where it was discovered that the property belonged not only to the husband-vendor but to both husband and wife.[37] But, being an equitable remedy, specific performance will be refused where the conduct of the plaintiff precludes the assistance of equity. For example, this relief may be denied to a purchaser who knew that the defendant was only a co-owner in the same way as it may be denied to a purchaser who contracts to purchase the entirety from A and B knowing that specific performance cannot be obtained against B.[38] And if the defendant intended to deal with the whole of the land and contracted accordingly, specific performance may also be refused if the circumstances are such that there would be a certain hardship in compelling him to deal with his moiety.[39]

In all the cases referred to above it appears that the defendants were tenants in common. Subject to the qualification above referred to that unity of title does not necessarily exist between tenants in common,[40] there seems, however, no reason on principle to suppose that different considerations would apply to joint tenants.

[32] See p. 140 ff. *supra*; also *Burrow v. Scammell* (1881) 19 Ch. D. 175.
[33] *Burrow v. Scammell* (1881) 19 Ch. D. 175, 183, *per* Bacon V.-C.
[34] See p. 308 *supra*. [35] *Mortlock v. Buller* (1804) 10 Ves. Jun. 292.
[36] *Burrow v. Scammell* (1881) 19 Ch. D. 175.
[37] *Kennedy v. Spence* (1911) 24 Ontario Law Reports 535. And see *Gottesman v. Werner* [1912] 3 D.L.R. 296. [38] See p. 309 *supra*.
[39] *Price v. Griffith* (1851) 1 De G. M. & G. 80, as interpreted by Farwell J. in *Hexter v. Pearce* [1900] 1 Ch. 341, 345, who stated, however, that the case was really decided on the ground that the agreement was void for uncertainty and that this had been pointed out by Bacon V.-C. in *Burrow v. Scammell* (1881) 19 Ch. D. 175.
[40] See p. 309 *supra*.

B. Conveyances

A joint tenant can convey *inter vivos* his interest in the common property and so convert it into an undivided share but he cannot by himself convey the entirety of the land. As stated by Preston:

> For all purposes of alienation each is seised of and has a power of alienation over that share only which is his aliquot part; and joint tenants, as to property held in joint-tenancy, necessarily have equal shares.[41]

A tenant in common can only convey his undivided share, for this is all that he is entitled to. In either event, covenants for title will relate only to the interest conveyed, whether the conveyance is made by one co-owner to another, or by a co-owner to a stranger.

All co-owners may, of course, in combination convey the whole of the land, and the question may arise as to the *extent* of the covenants for title that each should give. Section 76 (1) and (7) of the Property Law Act 1958 provide:

> (1) In a conveyance there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say: . . .
>
> (7) A covenant implied as aforesaid may be varied or extended by a deed or an assent, and, as varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects and consequences, as if such variations or extensions were directed in this section to be implied.

In the case of both tenants in common and joint tenants, each co-owner may wish to restrict the extent of his covenants for title by giving several covenants that relate only to that interest which he could alone convey: in which case, in the event of a breach of covenant, each co-owner would be liable only for a proportionate part of the damages, depending upon the extent of his interest.[42] On the other hand, a purchaser may require the covenants of each co-owner to be joint and several and to extend to the entirety of the

[41] Preston, *Essay on Abstracts of Title* (2nd ed. 1824) ii, 62; *Perks v. Perks* [1950] *Western Weekly Reports* (Canada) 189; *Morrow v. Eakin* [1953] 2 D.L.R. 593.

[42] *Sutton v. Baillie* (1891) 8 T.L.R. 17. A tenant in common conveyed one (of two) undivided shares as beneficial owner, the other moiety being conveyed by a trustee. The tenant in common was liable only for one half of any damages sustained by breach of implied covenants.

land. Either result can be achieved by an appropriate wording of the conveyance. In Wolstenholme and Cherry's *Conveyancing Statutes*[43] it is stated:

> The covenant of a conveying party is implied "as regards the subject-matter or share of subject-matter *expressed* to be conveyed by him"; . . . Therefore, in the case of a conveyance by joint tenants, or tenants in common, there can be implied covenants joint or several or both, as to the entirety or part, as may be required.

The practical solution is to state in the contract the extent of the covenants for title that each co-owner will give in the conveyance. If the covenants for title are to be restricted in their extent the *Australian Encyclopaedia of Forms and Precedents* contains an appropriate precedent of a conveyance by joint tenants or tenants in common: the precedent is of a conveyance by three co-owners, part of which is as follows:

> . . . Now this Deed Witnesseth that in consideration of the sum of £— paid by the purchaser to the vendors (the receipt whereof the vendors hereby acknowledge) each of them the vendors so far as relates to his own share estate or interest in the property hereby assured and as beneficial owner (but so as to make each of them liable by way of damages in respect of any breach of implied covenants to the extent of one third only of such damages) hereby conveys unto the purchaser. . . .[44]

In the absence of an appropriate provision in the contract, the extent of the covenants for title that a purchaser is entitled, in all cases, to require from co-vendors appears to be in doubt. It may be argued that as the possession of a tenant in common extends to the entirety of the land, so should his covenants for title.[45] But the view is here expressed that a purchaser from tenants in common, whether or not they contract as such, but so long as it is clear on the facts that they are co-owners, is not entitled to require more than that each should severally covenant in relation only to his undivided share.[46] Certainly this appears so if there is a separate title to each share, for there seems no good reason why one tenant in common should be liable for a defect in a title not his own: nor, it seems, should a distinction be drawn in cases where two or more tenants in common have a common title, as still their entitlement is only to an undivided share and this is all that one alone can convey. Joint tenants present more of a problem, due primarily to a *dictum* of Cozens-Hardy J. in *National Society v. Gibbs*:[47]

[43] (11th ed. 1925) i, 251.
[44] (1959) xiii, 754.
[45] See p. 328 *infra*.
[46] And see (1934) 8 *Australian Law Journal* 256.
[47] [1899] 2 Ch. 289, 301.

> It may be that the proper form of covenants for title in an assignment by two joint tenants is to make them not joint, but joint and several.

Elsewhere this question has been discussed and it has been pointed out that this case has been cited for the proposition that joint tenants ought to enter into joint and several covenants applicable to the entirety.[48] But whether this a correct reading of the case has, it is considered, rightly been doubted. The personalities of joint tenants, so far as they relate to the land, the subject-matter of the joint tenancy, are in all respects indistinguishable,[49] and they, unlike tenants in common, must necessarily have unity of title. It may, therefore, seem reasonable to require the covenants for title to be both joint and several and to extend to the whole of the land. But like tenants in common, each joint tenant can alone convey only his aliquot part and receives only a portion of the purchase price and, it is therefore submitted, should correspondingly assume no more than a like obligation.

In the case of a conveyance *to* co-owners, the extent of the benefit of the covenants for title is set out in section 76 (1) of the Property Law Act 1958; but with this provision must be read section 81[50] which, by sub-section (2) thereof, is stated to extend to a covenant implied by virtue of Part II of that Act, section 80 whereby certain covenants bind the real estate of the covenantor, and section 83 dealing with the construction of implied covenants. Further, if, pursuant to section 72 (2)[51] of the Act, A conveys to himself and B, section 82 thereof enables the implied covenants to be given:

> (1) Any covenant, whether express or implied, or agreement entered into by a person with himself and one or more other persons shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone.
>
> (2) This section shall apply to covenants or agreements entered into before or after the commencement of this Act, and to covenants implied by statute in the case of a person who conveys or is expressed to convey to himself and one or more other persons, but without prejudice to any order of the Court made before such commencement.

In *Stewart v. Hawkins*[52] the court held that section 72 of the Conveyancing Act 1919-1954 (N.S.W.) which provides that 'a covenant . . . made by a person with himself and another or others . . .' applied to a covenant made by A and B, with B and C. Though there may

[48] Watts, 'Covenants for Title by Joint Tenants' (1929) 2 *Australian Law Journal* 343, 345. It is, however, not easy to appreciate a suggested explanation of the decision, namely that the vendors had contracted without disclosing their separate interests. [49] See p. 150 *supra*. [50] Discussed p. 324 *infra*.

[51] See generally *Rye v. Rye* [1962] 2 W.L.R. 361; see p. 157 *supra*.

[52] (1959) 76 W.N. (N.S.W.) 144.

be difficulty in applying the reasoning of a decision on covenants to section 72 of the Property Law Act 1958 which deals with conveyances,[53] it is considered that without undue straining of words, a like result is both possible and desirable, and that accordingly A and B ought to be able to convey to B and C.[54] If this is so, then *Stewart v. Hawkins* is clear authority for the application of section 82.

A further problem is involved in the construction of section 76 (1) (which sub-section is set out above) first raised by a *dictum* of Lord Greene M.R. in *Fay v. Miller*[55] and repeated by a *dictum* of Harman J. in *Pilkington v. Wood*.[56] Section 76 (1) (a) provides:

> In a conveyance for valuable consideration, other than a mortgage, a covenant by a person who conveys and is expressed to convey as beneficial owner in the terms set out in Part I of the Fourth Schedule to this Act;

The subsequent paragraphs of the sub-section are framed in similar terms and provide for covenants to be implied by persons who convey and are expressed to convey in the capacities prescribed. While it is clear that a vendor must *expressly convey* as beneficial owner,[57] the doubt which exists is whether there are two vital prerequisites for the section's operation, namely that the vendor should in fact be the beneficial owner (or as the case may be) and also that he should expressly convey as such. In *Pilkington v. Wood*,[58] Harman J. in a *dictum* stated:

> . . . it being a sine qua non that the covenantor must be in fact, as well as being expressed to be, the beneficial owner; compare the observation of Sir Wilfrid Greene M.R. in *Fay v. Miller, Wilkins & Co.*, where he was discussing the covenant implied in an assurance as personal representative.[59]

For the covenants for title to be implied the *dicta* would require that the vendor must be expressed to convey in a capacity in which he in fact holds; so that, for example, it would seem that no covenant for title at all would be implied in a conveyance by a person expressed to convey as beneficial owner who in fact had no title.[60] This construction could cause difficulty in practice: for example, a pur-

[53] *Ibid., per* Owen and Ferguson JJ. at 146: 'We have already shown that an agreement made by A and B jointly with B and C is nonetheless an agreement made by B with B and C. The fact that another has contracted jointly with him is nothing to the point.'

[54] Or it may be that such a result can be attained by s. 72 (4) validating that part of the disposition which relates to the transfer by A and B, to B.

[55] [1941] Ch. 360. [56] [1953] Ch. 770.

[57] (1934) 8 *Australian Law Journal* 256-257, 288-289.

[58] [1953] Ch. 770. [59] *Ibid.* 777.

[60] If the facts were known to the vendor he may be liable for damages in deceit; see Sweetman, 'Good Right to Convey' (1954) 18 *Conveyancer and Property Lawyer* 362.

chaser may wish that trustees for sale should convey as beneficial owners.[61] The desired result could be achieved if, being agreed in the contract, a clause is inserted in the conveyance to the effect that the same covenants should be implied therein as if the vendors had assured, and had been expressed to assure, as beneficial owners.[62]

The English authorities have been reviewed and whether the *dicta* provide a correct reading of the section has, rightly it is submitted, been much doubted.[63] No Australian case is known where the point has been directly in issue. In *Discount & Finance Ltd v. Gehrig's N.S.W. Wines Ltd and Others*:[64]

> A mortgaged property to the plaintiff as beneficial owner, the defendants and B joining as sureties. The plaintiff sought to recover from the defendants moneys claimed to be due under the deed.

The case concerned New South Wales moratorium legislation, the details of which are not relevant for present purposes. The defendants alleged that the mortgagor was not in fact the beneficial owner but that a trust existed inconsistent with the terms of the mortgage deed, to which plea the plaintiff raised the issue of estoppel. Of present interest are the observations of Jordan C.J. who, reviewing the authorities decided on estoppel, stated:

> If these considerations be applied to the facts of the present case, I am, in the first place, unable to find in the deed of 16th June, 1930, any statement of fact with respect to the matters in respect of which the defendants are alleged to be estopped. It was contended that such a statement was to be found in the phrase "as beneficial owner," as it is contained in the provision that "the mortgagor as beneficial owner hereby charges all its estate and interest in the lands . . . with the repayment to the mortgagee of the said sum. . . ." But this phrase is clearly not a statement of fact at all. It is inserted for the purpose of entitling the mortgagee, as against the mortgagor, to the benefit of the covenants for title which are implied in a mortgage by virtue of s. 78 (1) (c) of the Conveyancing Act 1919, whenever the mortgagor is expressed to convey "as beneficial owner". So far even from implying that there is no other person beneficially interested, the phrase imports a covenant by the mortgagor that every other person having or claiming any estate or interest in the subject matter of the conveyance will on request perfect the conveyee's title.[65]

[61] If so agreed the trustees for sale could convey 'as trustees' and the beneficiaries could join in the conveyance to give additional covenants for title 'as beneficial owner'. See *Australian Encyclopaedia of Forms and Precedents* xiii, 785.

[62] *Prideaux's Forms and Precedents in Conveyancing* (25th ed. 1958) i, 439; (1943) 17 *Australian Law Journal* 11.

[63] Bicknell, 'Implied Covenants for Title' (1942) 7 *Conveyancer and Property Lawyer* (N.S.) 3; Sweetman, *loc. cit.*; (1943) 17 *Australian Law Journal* 11. *Cf. Prideaux's Forms and Precedents in Conveyancing, op. cit.* i, 188; *Williams on Title* (2nd ed. 1957) 641.

[64] (1940) 40 S.R. (N.S.W.) 598. [65] *Ibid.* 604.

And in *Allsop and Others v. Marshall and Others*[66] no objection was taken to the fact that the mortgagor who had conveyed as beneficial owner was in fact entitled, apparently, in equity only.

It cannot, therefore, be said with certainty whether the vendor must in fact occupy the capacity in which he purports to convey, as a strict reading of the section would seem to require. The view of Jordan C.J. appears clearly inconsistent with that expressed in the English cases and, until this question is authoritatively resolved, is, it is submitted, to be preferred as the sensible and practical construction of the section.

Unlike the position in English law[67] there is no provision corresponding to section 76 of the Property Law Act 1958 applicable to land under the Transfer of Land Act 1958. Contractual obligations may nevertheless exist. An unregistered instrument cannot, in itself, operate to pass either a legal or equitable interest,[68] but such an instrument may before registration have effect as a contract between the parties thereto.[69] It appears, however, that instruments intended to affect lands subject to the provisions of the Act are necessarily executed subject to an implied condition that if, owing to any infirmity in the grantor's title the instrument cannot be registered, such a contract shall be at an end.[70] But if the transfer is preceded by a contract, then other obligations express or implied may be thereby created.[71]

C. Leases

(i) *By one co-owner*

A tenant in common is entitled to an undivided share, and this he can lease either to a third party or to one or more of the other

[66] (1942) 42 S.R. (N.S.W.) 267.

[67] *The Law and Practice of Registered Conveyancing* (1958) 343 ff.

[68] *Brunker v. Perpetual Trustee Company Ltd* (1937) 57 C.L.R. 555, 581, *per* Latham C.J.: 'Thus a contract for the sale of land may create an equitable interest in accordance with the rules of the general law of property. But no instrument of transfer until registered can itself be effectual to pass any estate or any interest in land under the provisions of the Real Property Act (sec. 41 (1)). Thus the instrument of transfer in itself cannot be effectual to vest in the defendant either a legal or an equitable interest in the land. . . . But where there is a transaction for value which is recorded in a contract followed by an instrument of transfer, or where there is a transaction for value which itself is recorded in a transfer . . . , then "the transaction behind the instrument" and upon which it rests may create an equitable interest in land which will be recognized in the courts, such interest being subject to the risk of being defeated by a transfer to a bona fide purchaser for value which obtains prior registration. As Isaacs J. says in *Barry v. Heider* ((1914) 19 C.L.R. 197, 216.), sec. 41 of the Real Property Act 1900 "in denying effect to an instrument until registration, does not touch whatever rights are behind it".'; also *Travica v. Travica* [1955] V.L.R. 261.

[69] *Mathieson v. Mercantile Finance and Agency Co. Ltd* (1890) 17 V.L.R. 271.

[70] *Waitara v. McGovern* (1900) 18 N.Z.L.R. 372.

[71] *West v. Read and Another* (1913) 13 S.R. (N.S.W.) 575; *Travica v. Travica* [1955] V.L.R. 261.

co-owners.[72] If there is a lease between A and B, and A deals with the fee simple so as to pass an undivided share to C, the view has been judicially expressed that the effect thereof is not that there has been an assignment of part of the reversion to C, but that such a transaction when followed by the acceptance of rent by A and C gives rise to an implication of a new tenancy between A and C as lessors and B as lessee,[73] although it is not easy to see why this should inevitably be so.

A joint tenant although in fact entitled to the entirety of the land is nevertheless, as has been discussed above, potentially entitled *inter vivos* to an aliquot share, in that his interest is alienable *inter vivos,* an alienation operating to pass not the entirety, but only his equal share.[74] One joint tenant may, therefore, grant a lease either to a stranger or to one or more of the other joint tenants,[75] but cannot by himself, even if he purports to lease the whole, demise more than his equal share, a result which still follows notwithstanding that as events turn out he subsequently becomes entitled to the entirety.[76] Whatever may be the effect of such an act upon the joint tenancy,[77] the other joint tenants will be bound to respect the rights of the lessee during the currency of the lease, even if the term does not commence until after, or extends beyond, the death of the joint tenant-lessor.[78]

A lease by a joint tenant, even though it may extend beyond his death, is essentially a transaction concerning only his equal share, while a lease by a tenant in common is a dealing only with his undivided share. A co-owner clearly cannot confer upon his lessee greater rights over the land than he himself possesses, and every co-owner, whether a joint tenant or a tenant in common, is entitled to possession of the whole of the land. These principles, considered together, regulate the relationship between a lessee of one co-owner and the other co-owners or their respective lessees. Sholl J., in *Frieze v. Unger,*[79] stated this relationship most clearly:

> It follows that the lessee of one joint tenant cannot exclude the lessor's co-owner himself, or the co-owner's separate tenant, from all such use and enjoyment of the land as co-ownership authorizes. Similarly, each of two tenants in common may demise his share only to a stranger,

[72] *Leigh v. Dickeson* (1884) 15 Q.B.D. 60; *re Marcellos* (1941) 41 S.R. (N.S.W.) 154.
[73] *Nelson-Hauer v. Calman* (1954) 73 W.N. (N.S.W.) 449, 454. And see *Ex parte Anderson; re Green* (1946) 46 S.R. (N.S.W.) 389, cited by the Court.
[74] See p. 312 *supra.*
[75] *Cowper v. Fletcher* (1865) 6 B.S. 464; *Parker v. Sell* (1890) 16 V.L.R. 271. See p. 158 *supra;* also (1944) 17 *Australian Law Journal* 292.
[76] *Frieze v. Unger* [1960] V.R. 230, 245, and the authorities there considered.
[77] Discussed in next issue.
[78] *Frieze v. Unger* [1960] V.R. 230, 244, and the authorities there considered.
[79] [1960] V.R. 230.

though being a different person in each case, whereupon the two lessees are treated as themselves tenants in common, and trespass will not lie by one against the other for such acts as one co-owner must allow another to do in the enjoyment of the land; see *Jacobs v. Seward* (1872), L.R. 5 H.L. 464. In Preston, Abstracts, vol. II, at p. 63, it is further stated, with respect to a lease by one joint tenant only, that notwithstanding it imports to be of the entirety, it will not pass more than a moiety, even if the *lessor* (and of course the same is true *a fortiori* of his companion) should eventually become seised of the entirety by release, or by survivorship.[80]

The facts of this case were that A and B were joint tenants of prescribed premises under the Landlord and Tenant Act 1958. A entered into an arrangement with X relating to the use of certain portions of the premises, including, *inter alia,* the exclusive use of a bedroom. A died and B served upon X a notice purporting to determine X's rights under the arrangement and subsequently claimed possession of the premises from X. Sholl J., after a most thorough examination of the authorities, held that on its proper interpretation the arrangement between A and X amounted to a licence agreement only and did not create a tenancy at common law; further, that this licence did not, on the facts, fall within the provisions of section 46 (1) of the Landlord and Tenant Act 1958 and was not thereby deemed to be a lease but terminated upon the death of A. On these findings, B's claim succeeded.

There had, however, been argument on the problems which would have arisen had the Court held the licence to fall within section 46 (1) of the Act; that is, *inter alia,* the extent of the operation of section 46 (1), the effect of a lease by one joint tenant upon the rights of the other, and the effect of the joint tenant-lessor predeceasing the other joint tenant during the currency of the lease. These problems were also subjected to a most thorough and detailed analysis in the judgment. Assuming (contrary to the finding) that the licence between A and X did fall within section 46 (1), Sholl J. was of the view that while A was alive, B would have been required to recognize the right of X as if he were a weekly tenant. On the other hand, however, X could not have objected to B entering into possession of the premises, residing in them or letting them to another person to use in common with X, even with respect to the room of which A had promised X exclusive use. Further, that on the death of A the licence would, as has been stated, at common law determine, but that section 46 (1) would have conferred upon X the protection of the Act. X, therefore, would have become a statutory tenant and the same position would have continued unless the definition of 'lessor' in

[80] *Ibid.* 245.

section 43 (1) should be so construed in relation to section 82 (1), that in the result the common characteristic of all forms of co-ownership, the right to possession of the entirety of the land (subject, of course, to the like rights of the other co-owners or their lessees) was suspended by the Act. Section 82 (1) provides:

> Notwithstanding anything in this Act, except as provided by this Division, the lessor of any prescribed premises shall not give any notice to terminate the tenancy or take or continue any proceedings to recover possession of the premises from the lessee or for the ejectment of the lessee therefrom.

Section 43 (1) defines 'lessor' to mean, *inter alia*, the parties to a lease, or their respective successors in title.[81] In considering the interpretation of the sub-sections, Sholl J. stated most persuasively:

> On the whole, I should not think that the definition of 'lessor' in the Act should be so construed as to bind the survivor of two joint tenants to observe in respect of his own undivided moiety in the land a statutory tenancy in favour of a person who had been a lessee of his deceased co-tenant only. Even if I were wrong in that view, however, I should doubt whether the prohibitions contained in Division 3 of Part V of the Act would have any application to an entry by a surviving joint tenant, or his own lessee, to enjoy merely concurrent rights of occupation with, and without seeking to eject, the 'statutory tenant' of the deceased co-owner.[82]

The right to possession of the entirety of the land being a characteristic of all forms of co-ownership, it appears that this reasoning is equally applicable to a tenancy in common.

(ii) *By all co-owners acting together*

Co-owners, it appears, may in combination grant a lease not only to a stranger, but also to one of their number,[83] though in *Rye v. Rye* the House of Lords has recently held that they cannot grant a lease to themselves.[84]

Although a joint tenant can himself alienate only his equal share, a demise by joint tenants acting in combination is regarded as being

[81] Co-ownership has raised some questions of construction in the Landlord and Tenant Act 1958. For example, in s. 43 (1) 'lessor' and 'lessee' have been construed to include all co-lessors or co-lessees, as the case may be: see *Fode v. Taylor* [1954] V.L.R. 696 and the cases therein referred to. *Cf.* s. 82 (7), s. 92 (2). 'Owns' in s. 93 (1) (d) (ii) does not it seems include co-ownership but means owns the entirety. In *Nelson-Hauer v. Calman* (1954) 73 W.N. (N.S.W.) 449, the Court, construing New South Wales legislation analogous to s. 85, held that the purchase of an undivided share did not come within the section. See generally Kevin Anderson and R. Brooking, *Landlord and Tenant—Victoria* (3rd ed. 1959).

[82] *Frieze v. Unger* [1960] V.R. 230, 245.

[83] *Parker v. Sell* (1890) 16 V.L.R. 271, and the authorities there cited. See p. 158 *supra*. Also (1944) 17 *Australian Law Journal* 292.

[84] [1962] 2 W.L.R. 361, expressing a different view from that expressed by the Court of Appeal, [1960] 3 W.L.R. 1052. See p. 158 *supra*.

not only a demise by each joint tenant of his equal share, but also as being a demise by all the joint tenants of the whole.[85] Upon the death of a joint tenant-lessor, by virtue of the right of survivorship, the tenancy does not determine, even if it be a tenancy at will,[86] and the surviving joint tenants become entitled to the whole rent.[87] Similarly, if a lease is granted to joint tenant-lessees, upon the death of one the lease likewise continues, the surviving joint tenant-lessees becoming alone entitled to the remainder of the term.[88] The effect of a joint demise by joint tenants was stated by Lord Tenterden C.J. in *Doe d. Aslin v. Summersett*[89] as follows:

> Upon a joint demise by joint-tenants upon a tenancy from year to year, the true character of the tenancy is this, not that the tenant holds of each the share of each so long as he and each shall please, but that he holds the whole of all so long as he and all shall please; and as soon as any one of the joint-tenants gives a notice to quit, he effectually puts an end to that tenancy. . . .[90]

It follows, therefore, that (subject perhaps to the terms of the lease) a notice to quit, even if given by only one joint tenant-lessor, may be effective to determine a *periodic* tenancy, a proposition accepted by the Supreme Court of New South Wales in *Bradley v. Moorhead*.[91] On the same principle it appears that (again subject perhaps to the terms of the lease) one joint tenant-lessee may alone by notice determine a *periodic* tenancy.[92]

In *Leek and Moorlands Building Society v. Clark and Others*,[93] however, the Court of Appeal considered the principle comprised in the portion of the judgment of Lord Tenterden above cited, and stated:

> If the property or rights are held jointly, prima facie a transfer must be by or under the authority of all interested. The answer suggested to this is the principle laid down in *Doe d. Aslin v. Summersett*. That case, for reasons which we have given, is not in our view an exception to the rule we have just stated. It is an illustration, in a highly technical field, of the general principle that if a joint enterprise is due to terminate on a particular day, all concerned must agree if it is to be renewed or continued beyond that day. To use Lord Tenterden's phrase, it will only be continued if "all shall please".[94]

Interpreted in this way it seems that all the joint tenants must join

[85] *Doe d. Aslin v. Summersett* (1830) 1 B. & Ad. 135.
[86] *Henstead's* case (1594) 5 Co. R. 10a.
[87] *Doe d. Aslin v. Summersett* (1830) 1 B. & Ad. 135.
[88] *Cunningham-Reid v. The Public Trustee and Another* [1944] K.B. 602.
[89] (1830) 1 B. & Ad. 135.
[90] *Ibid.* 140; applied in *Bradley v. Moorhead* (1952) 52 S.R. (N.S.W.) 128.
[91] (1952) 52 S.R. (N.S.W.) 128.
[92] *Leek and Moorlands Building Society v. Clark and Others* [1952] 2 Q.B. 788.
[93] [1952] 2 Q.B. 788.
[94] *Ibid.* 795, *per* Somervell L.J.; see (1952) 26 *Australian Law Journal* 414, 415.

to exercise a right to renewal or a right to determine a term certain before the expiration of the full period for which it was initially granted.[95] In *Leek and Moorlands Building Society v. Clark and Others*[96] the Court held that one of two joint tenant-lessees could not, in the absence of express words or authority, alone surrender the term.[97] One joint tenant-lessee can clearly assign his interest to the lessor and it may be that likewise he can surrender his interest, a partial merger of the term resulting, and the lessor and the surviving joint tenant-lessee becoming tenants in common, the former by virtue of his fee simple estate to which a right to immediate possession now attaches and the latter by virtue of his interest in the term initially granted.

A tenant in common is entitled only to an undivided share, and it seems established that tenants in common cannot in combination make a *joint* lease of the whole of the common property.[98] Why this should be so may be questioned, but in any event it is clear that tenants in common can in combination effectively grant exclusive possession of the entire land to a lessee. The effect of tenants in common combining to lease the whole of the common property was stated by Walsh J. in *Nelson-Hauer v. Calman*[99] as follows:

> . . . a demise by two tenants in common was regarded as amounting to a demise by each of them of his share, and as a confirmation by him of the demise by the other of the other's share.[1]

It follows, therefore, that one tenant in common acting alone may deal only with his undivided share, for example give notice to quit in relation thereto, but cannot, in general, effectively deal with the entirety. It appears, however, that at common law a notice to quit given by one tenant in common will be effective as to the entirety if he was acting as an agent for the other co-owners; or, it is stated, if the tenants in common had made a joint demise and the notice is

[95] In the case of a clause in a lease conferring a right to determine a term certain before the expiration of the full period for which it was granted, the rights of the parties must be sought from an interpretation of the clause. If this problem is not so solved, it appears that all must join to exercise the right to determine: 'they all have the right to the full term, and all must concur if this right is to be abandoned'. *Leek and Moorlands Building Society v. Clark and Others* [1952] 2 Q.B. 788, 794, *per* Somervell L.J. For an interpretation of an option clause see *MacDonald v. Robins* (1954) 90 C.L.R. 515.

[96] [1952] 2 Q.B. 788.

[97] Nor can one joint tenant exercise a right of disclaimer: see *re Schär; Midland Bank Executor and Trustee Co. v. Damer* [1951] Ch. 280.

[98] *Heatherley d. Worthington and Tunnadine v. Weston* (1764) 2 Wils. K.B. 232; *Doe d. Poole v. Errington* (1834) 1 Ad. & E. 750; *Burne v. Cambridge* (1836) 1 M. & Rob. 539.

[99] (1954) 73 W.N. (N.S.W.) 449.

[1] *Ibid.* 454. See the authorities therein cited. Also (1941) 15 *Australian Law Journal* 114-115.

given by one on behalf of all,[2] the concept of a joint demise being, it would appear, interpreted in the light of the principles above mentioned.

(iii) *Benefit and burden of covenants*

A question may arise as to the nature and extent of the benefits and of the burdens affecting co-lessees, or co-lessors, under the covenants in a lease.

(A) ORIGINAL PARTIES

Privity of contract exists between the original parties to a lease, and the nature of their relationship is therefore contractual. If there are co-lessees or co-lessors, the extent of their liability, that is whether it is a joint, or a several, or a joint and several liability, depends upon the construction of the covenant, as similarly does the extent of the benefits to which they are entitled.[3]

Discussing the liability of co-covenantors, Lord Herschell stated in *White v. Tyndall*:[4]

> I take it to be clear that where several persons covenant with another in terms which import without ambiguity a joint and not a several obligation, the covenant must be held to be a joint one. Where the terms are ambiguous and may import either a joint or a several obligation, you may no doubt look at the other parts of the deed, the interests of the covenantors and indeed any other circumstances appearing on the face of the instrument which will aid in the determination of the intention of the parties.

In *Grimley and Others v. Permanent Trustee Co. of N.S.W. Ltd*[5] this case appeared to the court to contain 'a definite statement of the law . . .',[6] and, following *Read v. Price*,[7] is was there pointed out that at common law the mere inclusion in a covenant of the words executors, administrators or assigns or permitted assigns by themselves raise no ambiguity and make no difference to the construction of the covenant where the lessees have otherwise clearly entered into joint obligations.

In relation to land under the Transfer of Land Act 1958, section 67 of the Act provides that the covenants therein specified shall be implied in any instrument of lease under Division 7. Sub-section (2) of this section contains covenants which shall be implied in every transfer of a registered lease (and this may be compared with section 77 (1) (c) of the Property Law Act 1958 which contains like provisions

[2] *Foa's General Law of Landlord and Tenant* (8th ed. 1957) 606; *Hill and Redman's Law of Landlord and Tenant* (12th ed. 1955) 509.

[3] Foa, *op. cit.* 117-119; *Woodfall's Law of Landlord and Tenant* (25th ed. 1954) 576-579; *Halsbury's Laws of England* (3rd ed. 1955) xi, 448-452.

[4] (1888) 13 App. Cas. 263, 276. [5] (1935) 35 S.R. (N.S.W.) 384.

[6] *Ibid.* 387. [7] [1909] 1 K.B. 577.

relating to the assignment of leases under the general law). Section 71 (4) contains additional covenants which shall be implied in every sub-lease under the Act. These provisions must, however, be read with section 112 of the Act which provides:

> (1) Every covenant and power to be implied in any instrument by virtue of this Act shall have the same force and effect as if set out at length in such instrument but may be negatived or modified by express declaration in the instrument.
>
> (2) Where in any instrument there are more covenantors than one, such covenants as are by this Act declared to be implied in instruments of the like nature shall be construed to bind the parties jointly and severally.

The extent of the benefits accruing to co-covenantees likewise involves a question of construction. The guiding principle appears to be that a covenant will be construed to confer benefits of the same nature as their interest if the words of the deed are capable of such construction.[8] Initially, however, the 'erroneous doctrine'[9] existed that the extent of the benefits corresponded necessarily with the nature of the co-covenantees' interests notwithstanding clear and unambiguous words to the contrary. This doctrine is now disregarded but its influence still persists in that a covenant in form joint may nevertheless be construed as conferring several benefits if the covenantees are tenants in common, but this is so only where 'the covenant is to several for the performance of several duties to each of them'.[10] It may finally be noted that although it has been stated that as a matter of common law a covenant made with co-covenantees could not be made with them both jointly and severally,[11] this has been doubted.[12] And in any event, reference must now be made to section 81 (1), (2) and (3) of the Property Law Act 1958:

> (1) A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this Part, imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond or obligation devolves, and where made after the commencement of this Act shall be construed as being also made with each of them.
>
> (2) This section shall extend to a covenant implied by virtue of this Part.

[8] *Sorsbie v. Park* (1843) 12 M. & W. 146, 158; see also *Bradburne v. Botfield* (1845) 14 M. & W. 559, 572; *Thompson v. Hakewill* (1865) 19 C.B. (N.S.) 713.
[9] Woodfall, *op. cit.* 578.
[10] *White v. Tyndall* (1888) 13 App. Cas. 263, 277, *per* Lord Herschell.
[11] *Halsbury's Laws of England, op. cit.* xi, 448.
[12] Woodfall, *op. cit.* 579.

(3) This section shall apply only if and as far as a contrary intention is not expressed in the covenant, contract, bond or obligation, and shall have effect subject to the covenant, contract, bond or obligation, and to the provisions therein contained.

This section does not apply to all covenants: it applies only to covenants made or implied after 31 January 1905,[13] and only to covenants where the covenantees are the persons to or for whose benefit the act is to be done. In the case of covenants to which the section does apply, it is clear that if only a joint, and not a joint and several obligation is desired, a contrary intention must be stated pursuant to sub-section (3).

The extent of the liability of co-lessees, and the extent of the benefits to which they are entitled, depends, therefore, upon the construction of the covenants of the lease and not, *by itself,* upon whether the parties are joint tenants or tenants in common. By clear wording obligations and benefits can be created under the covenants in a lease which differ in their nature from the interest of the parties. Thus in *White v. Tyndall*[14] itself the court held that covenants imposed upon the tenant in common-lessees a joint liability, while in *Burns v. Bryan*[15] joint tenant-lessees were held to be severally liable. If A and B are joint tenants of a lease containing joint covenants, upon A's death the lease and the obligations under the tenants' covenants (and also the benefits under the lessor's covenants) accrue to B alone.[16] If, however, the covenants were joint and several, upon A's death the lease would still accrue to B alone, but the several aspect of the obligation may enable the lessor to maintain an action against A's estate.[17] In *Cunningham-Reid v. Public Trustee and Another*:[18]

A and B were joint tenant-lessees at law and in equity, the lease containing joint and several covenants. A died and B claimed that A's estate should contribute to the rent thereafter due under the lease.

B's claim failed, the Court holding that even though the liability under the covenant was joint and several, A's estate being therefore liable to a claim by the lessor, nevertheless B became by survivorship absolutely entitled both at law and in equity to the lease, and that it would be inequitable to enforce a claim for contribution against A's estate. This suggests that had A's personal representatives been sued by the lessor they could have sought indemnity from B.[19] If, as in *White v. Tyndall,*[20] A and B were entitled as tenants in

[13] Except as otherwise expressly provided, s. 81 (4) Property Law Act 1958.
[14] (1888) 13 App. Cas. 263. [15] (1887) 12 App. Cas. 184.
[16] *Grimley and Others v. Permanent Trustee Co. of N.S.W. Ltd* (1935) 35 S.R. (N.S.W.) 384. [17] *Burns v. Bryan* (1887) 12 App. Cas. 184.
[18] [1944] K.B. 602. [19] Foa, *op. cit.* 118. [20] (1888) 13 App. Cas. 263.

common, the lease containing joint covenants, then upon A's death his undivided share would pass to his estate, while the contractual obligations under the covenants would accrue to B alone. In such a case, however, there seems no reason why the assignee of A's undivided share should not be liable to the lessor for breaches, committed after the death of A, of those covenants in the lease which touch and concern the land under the doctrine of privity of estate.[21]

(B) ASSIGNEES

Contractual relations exist only between the original parties to a lease. If there are co-assignees their liabilities and their benefits are not contractual in nature but are derived from the tenurial relationship of privity of estate. By this relationship the benefit and the burden of those covenants in the lease which touch and concern the land pass upon the assignment of the lease[22] or the reversion[23] as the case may be. But liability exists only for breaches of such covenants committed during the continuance of privity of estate.[24] And for privity of estate to itself exist it is necessary that the assignment should operate to pass the term *at law*.[25] In *Goddard v. Lewis*[26]

> L leased Blackacre to T, who later assigned the term to A and B, who thereby became joint tenants, at least during their joint lives and the life of the survivor. A and B carried on business in partnership at the premises until B retired from the partnership, A and B entering into an agreement whereby B assigned to A all his interest in the lease and undertook to execute a formal agreement, but no such formal agreement was so executed. A later died and B survived him. The assignees of L's reversion now sued the executors of A to recover rent which had accrued due after A's death.

[21] *White v. Tyndall* (1888) 13 App. Cas. 263, 277, where Lord Herschell cited the following extract from the judgment of FitzGibbon L.J. in the Court below: 'What could be more unnatural than that if one of these tenants in common became insolvent and the other died wealthy, the executors of the latter could remain in possession of half the demised premises free from all liability upon the covenant?' After this extract, Lord Herschell stated: 'I may observe that it is not clear that if the executors of one of these tenants in common remained in possession of the demised premises the lessor would be without his remedy. It may be that he would then be able to enforce obligations upon the executors of the deceased lessee by reason of privity of estate. But in the present case the executors have assigned all their interest, and have discharged all obligations down to the time of such assignment. The only question is not whether someone can be made liable for the performance of the covenant, but whether the covenant is a several personal covenant so that the representatives of a deceased covenantor may be made liable upon the contract so entered into.' [22] Foa, *op. cit.* 422 ff. [23] *Ibid.* 439 ff.

[24] *Renshaw v. Maher* [1907] V.L.R. 520; Foa, *op. cit.* 434.

[25] *Cox v. Bishop* (1857) 8 De G. M. & G. 815; *Friary Holroyd & Healey's Breweries Ltd v. Singleton* [1899] 1 Ch. 86 (reversed on appeal but on facts only: [1899] 2 Ch. 261); *Freeman v. Hambrook* [1947] V.L.R. 70: purchaser of land under the Transfer of Land Act 1958, entitled only in equity as the transfer had not been lodged for registration held not entitled to give notice to quit; also *Gilshenan and Another v. Hancox; Ex parte Hancox* [1958] St. R. Qd. 111.

[26] (1909) 101 L.T. 528.

The Court held that the agreement between A and B severed the joint tenancy in equity, but not having been an assignment by deed did not effect a severance at law. On the death of A, B alone remained entitled to the legal estate and, therefore, as privity of estate existed only between the plaintiffs and B, and not between the plaintiffs and A's executors, they were unable to maintain the action for rent. As is pointed out in the case, however, had the plaintiffs chosen to bring their action against B, it may be that he would have been able to claim indemnity from A's estate.

But an assignee entitled only in equity may be liable upon the covenants in the lease by estoppel,[27] or a new tenancy may arise by implication,[28] and if such an assignee is entitled, as between himself and his assignor, to all the assignor's rights and, if necessary for enforcing them, entitled to use his assignor's name, it may be that the absence of privity of estate will not preclude, for example, an action by him to enforce an option to purchase contained in the lease.[29]

As the nature of co-assignees' liabilities and benefits is not contractual, the extent thereof depends not upon the wording of the covenants in the lease but must be otherwise deduced. As each joint tenant is entitled to the whole estate it has been held that privity extends thereto and that accordingly each joint tenant-assignee is liable in full upon the covenants in the lease.[30] In *United Dairies Ltd v. Public Trustee*[31] the plaintiffs were assignees of the reversion of a lease which had become vested in A and B as tenants in common. The plaintiffs alleged breach of covenant to repair and proceeded against both A and B claiming that each was liable in respect of the whole of the damages they alleged they had sustained by reason of the breach. Greer J., upholding this contention of the plaintiffs, reviewed the earlier cases and stated:

> It seems to me on the authorities that it has never been conclusively established that an assignee holding with other tenants under the terms of the original lease is not liable jointly with those other tenants for the whole rent. He has an interest in the whole of the land leased, though it is only a partial interest; his estate extends over the whole land leased; and I see no valid reason why tenants in common should be in a position as regards liability for rent different from that of joint tenants. I am inclined to think that each of the tenants in common has the privity of estate with the landlord in the whole of the land leased.[32]

[27] *Friary Holroyd & Healey's Breweries Ltd v. Singleton* [1899] 1 Ch. 86; *Rodenhurst Estates Ltd v. Barnes Ltd* [1936] 2 All E.R. 3.
[28] *Buckworth v. Simpson and Benner* (1835) 1 C. M. & R. 834.
[29] *McMahon v. Swan* [1924] V.L.R. 397.
[30] *Dooner v. Odlum* [1914] 2 I.R. 411; *Re Shand; Ex parte Corbett* (1880) 14 Ch. D. 122. See generally *United Dairies Ltd v. Public Trustee* [1923] 1 K.B. 469.
[31] [1923] 1 K.B. 469. [32] *Ibid.* 476.

There seems, as stated, no reason why the liability of a tenant in common-assignee should differ from that of a joint tenant-assignee. But there is a question whether either ought to be liable for the whole of the damages sustained by a breach of covenant in the lease. The estate of a tenant in common relates only to his undivided share, but it confers a right to possession extending over the whole of the land leased. That this is so is a peculiarity not simply of the law of landlord and tenant, but of co-ownership in general, and there seems no reason to increase liability under privity of estate by relating its extent to the area of land over which possession is enjoyed, particularly when it is recalled that for other purposes a co-owner's rights are moulded by reference to his interest.[33] And although a joint tenant is entitled to the whole estate granted, to hold mechanically that therefore a like privity exists, seems once more to treat this issue in isolation. Apart again from denying the realities of co-ownership it curiously uses the concept of each joint tenant being entitled to the one estate, favoured in early times as it *reduced* the services due from individual land-holders,[34] to impose upon joint tenant-assignees obligations over and above the extent of their interest. And nor is it considered should the notion of the indivisibility of obligations under particular covenants be here imported.[35]

To the view that co-assignees ought to be liable for breaches of covenant only to the extent of their interest, it might be objected that by so doing the rights of the lessor would be adversely affected, for whereas, before an assignment he could recover full damages against one party, he must thereafter sue both assignees. But land demised can be physically divided, one part being assigned to A and the other part to B, each being liable for a breach of covenant in relation only to the land the subject-matter of his assignment.[36] And in any event it must be remembered that the lessor has a remedy in that the original lessee may notwithstanding the assignment still remain liable under privity of contract.[37]

(iv) *Covenants relating to possession*

Co-owners are entitled to possession of the whole of the land, and it appears to be settled that a covenant not to part with possession

[33] A co-owner must account to his fellows for benefits which he receives as co-owner, see p. 140 *supra;* he may be restrained from committing acts of destruction, see p. 141 *supra;* and in the event of partition he is entitled to but a moiety, and it is only this moiety which he can alone alienate.

[34] *Fisher v. Wigg* (1700) 1 Ld. Raym. 622, 631, *per* Lord Holt: 'Now jointenants are but as one tenant; but in case of tenancy in common all the intire services are multiplied, 6 Co. 1, 2, *Bruerton's case;* for which reason jointenancy is favoured.' And see *Attree v. Scutt* (1805) 6 East, 476.

[35] *Cf. United Dairies Ltd v. Public Trustee* [1923] 1 K.B. 469, 476.

[36] *Ibid.* 472, 473. See generally Foa, *op. cit.* 420.

[37] Woodfall, *op. cit.* 585; and see Property Law Act 1958, s. 78 and s. 79.

of the land is not broken by one co-tenant retiring from possession of the demised premises leaving his co-tenant in sole possession.[38]

A question may, however, arise as to whether an assignment by one co-tenant to another without the consent of the lessor constitutes a breach of a covenant against assignment without such consent. In *MacDonald v. Robins*[39] the High Court was of the opinion that a legal assignment by one co-tenant to another would have this result, or at all events, that it had been so held.

In *Cook v. Rowe*,[40] decided by the Victorian Supreme Court very shortly before *MacDonald v. Robins*,[41] A and B were granted a lease of prescribed premises, being entitled thereto as tenants in common in equity. A assigned his share in the lease to B. The lessor, *inter alia*, served a notice upon B claiming possession under the provisions of earlier legislation, now section 82 (6) (p) of the Landlord and Tenant Act 1958: that is, that the lessee had become a lessee of the premises by virtue of an assignment or transfer which had not either expressly or by implication been consented to or approved by the lessor. The Court held that ground (p) had not been established, and in so doing considered, as a matter of common law, the present issue. In reviewing the authorities,[42] Dean J., after discussing *Langton v. Henson*,[43] stated:

> Again, it will be observed that the defendant and Henson were assignees of the original lessee, and accordingly the result of the assignment was to terminate the liability of defendant upon his covenants. Buckley J. treated *Varley v. Coppard* as binding upon him and distinguished *Corporation of Bristol v. Wescott* on the ground that there was in that case no assignment. . . . In the result, therefore, none of the cases to which I have referred covers a case like the present where the assignment is by one of two or more original tenants in common. In each of the cases cited the rights of the landlord had been affected, and in each case the Court considered that this was material to consider in determining whether there had been a breach of the covenant against assignment without consent.[44]

The Court pointed out that the cases decided under the General Law relied upon such considerations as whether the rights of the lessor had been in some way affected by the assignment, as for example, by introducing a new tenant or by releasing an existing tenant from liability, and that in its view they afforded a like guidance in cases arising under the Act. And that as no new person had been admitted as lessee, as both A and B remained liable by virtue of privity of

[38] *MacDonald v. Robins* (1954) 90 C.L.R. 515, 521, *per* Dixon C.J., citing *Corporation of Bristol v. Wescott* (1879) 12 Ch. D. 461.
[39] (1954) 90 C.L.R. 515. [40] [1954] V.L.R. 309. [41] (1954) 90 C.L.R. 515.
[42] *O'Mullane v. Wilson* (1856) 1 V.L.T. 86; *Varley v. Coppard* (1872) L.R. 7 C.P. 505; *Corporation of Bristol v. Wescott* (1879) 12 Ch. D. 461; *Langton v. Henson* (1905) 92 L.T. 805. [43] (1905) 92 L.T. 805. [44] [1954] V.L.R. 309, 314.

contract on the covenants of the lease and as the possession of B remained unaffected by the assignment, A merely losing his right to possession, ground (p), as has been stated, had not been established.

In the early Victorian case of *O'Mullane v. Wilson*[45] it was held that an assignment by one joint tenant-lessee to another constituted a breach of covenant although they were the original lessees. In *Cook v. Rowe*[46] this case was distinguished as having no application to circumstances where the parties were tenants in common, but it was there pointed out that in *O'Mullane v. Wilson*[47] the Court proceeded upon the basis that the quality of the tenancy was affected by the assignment which operated to destroy the joint tenancy. The principles upon which the Court acted do not appear to be easily discernible, and from the report of the case it is not clear whether the wording of the covenants was such that the lessees would be liable for breaches notwithstanding an assignment. If, however, the lessees would remain so liable, the rights of the lessor would seem to remain unaffected by the assignment, and the position would appear in no material respect to differ from circumstances where the original lessees are tenants in common.

The reason for the insertion of a covenant against assignment seems to be a desire on the part of the lessor to preserve the rights initially his under the lease. It is clear that the rights of a lessor would be affected if the co-tenants were assignees for a legal assignment by one co-tenant, even if to another co-tenant, would thenceforth destroy privity of estate between the co-tenant assignor and the lessor, thus terminating the former's liability for future breaches of the covenants contained in the lease. It is also clear that, if the co-tenants were the original parties to the lease, there would be both privity of contract and privity of estate between the co-tenants and the lessor, and though an assignment by one would thenceforth destroy privity of estate, it would leave unaffected privity of contract. The co-tenant assignor would, therefore, notwithstanding the assignment, remain liable to the original lessor on the covenants; that is, unless the wording of the covenants restricts his liability to breaches occurring while he holds the lease.[48] This distinction was accepted by the High Court in *MacDonald v. Robins*[49] inasmuch as the Court held that an assignment by one co-tenant to another operating in equity only, and not at law, did not constitute a breach of covenant as privity of estate and liability on the covenants in the lease all remained. It was, however, rejected in that Dixon C.J., referring to *Varley v. Coppard*[50] in a *dictum,* stated:

[45] (1856) 1 V.L.T. 86. [46] [1954] V.L.R. 309. [47] (1856) 1 V.L.T. 86.
[48] Property Law Act 1958, ss. 78, 79.
[49] (1954) 90 C.L.R. 515. [50] (1872) L.R. 7 C.P. 505.

> . . . the co-tenants themselves took by assignment and a reason given for the result was that one co-tenant by assigning to the other destroyed the privity of estate between himself and his landlord. It may be remarked that in the case of lessees, parties to the lease, the liability on the covenants is not affected by the assignment. But probably this is an insufficient ground for distinguishing the decisions.[51]

Whether an assignment by one co-tenant to another without consent constitutes a breach of a covenant against assignment without such consent cannot, therefore, be stated with certainty. The Victorian case was decided so shortly before *MacDonald v. Robins*[52] as to preclude it being cited to the High Court. If the question should arise for decision, it is respectfully submitted that the view of Dixon C.J. in *MacDonald v. Robins*[53] is to be preferred,[54] for the reason that although, as pointed out above,[55] if the co-tenants were the original parties to the lease, an assignment by one to the other would not affect the rights of the *original* lessor to sue either party for breach of covenant, such an assignment would affect the lessor's rights in that it could reduce the marketable value of the reversion as it would preclude an *assignee of the lessor* from enforcing a breach of covenant against the co-tenant assignor.

(v) *Recovery of possession*

If, in the event of a breach of covenant, a landlord wishes to recover possession against co-tenants he must obtain judgment for possession against them all. In *Gill v. Lewis,*[56] A and B held a lease as joint tenants. The lessor brought an action claiming possession against both A and B alleging arrears of rent, but proceedings were served on A alone and judgment was signed against A alone. A and B claimed relief from forfeiture under section 212 of the Common Law Procedure Act 1852 and section 46 of the Judicature Act 1925. The former section confers a right upon a tenant to obtain relief from forfeiture if, in effect, he has paid or tendered all the rent and arrears together with the costs at any time before the trial. The Court held that the reference to 'the trial' in this section was a reference to an effective trial binding upon all necessary parties, and, an effective judgment binding upon all necessary parties. In holding that there had been no completed trial within the meaning of the section, Jenkins L.J. stated:

> Judgment for possession of premises held by joint tenants was thus obtained against one only of those joint tenants. There has been a good deal of discussion in the course of the hearing before us as to the effect of a judgment for possession against one only of two joint

[51] (1954) 90 C.L.R. 515, 520. [52] (1954) 90 C.L.R. 515. [53] *Ibid.*
[54] *Cf. Edwards v. Hall* [1949] 1 All E.R. 352. [55] See p. 330 *supra.*
[56] [1956] 2 Q.B. 1.

> tenants, and it raises a question of some difficulty; but it seems to me that the right view must be that in order to get an effective judgment for possession against joint tenants, judgment must be obtained against both of them. I cannot see that a judgment against one only, both being equally entitled to possession of the whole premises as joint lessees thereof, can have any effect at all.[57]

As all co-owners are entitled to possession of the whole of the premises, it seems that this principle applies to tenants in common in the same way as it applies to joint tenants. It should, however, be noted that proceedings for possession had been instituted against both A and B. Had proceedings for possession been instituted against only one, it may be that a judgment for possession against that one could have effectively precluded him from exercising his right to possession.

Section 212 of the Common Law Procedure Act 1852 and section 46 of the Judicature Act 1925 contain provisions analogous, though not identical, to sections 116 and 123 of the Supreme Court Act 1958 respectively. Section 116 of the Supreme Court Act 1958 refers not to 'at any time before the trial', but to 'at any time before the hearing in such action for the recovery of the land'. It is, however, considered that in this respect the difference is one of form and not of substance: that the section also requires that the action for the recovery of the land must be such that an effective judgment binding upon all necessary parties can thereby be obtained.

If proceedings are instituted against all co-tenants, must they all concur in an application for relief against forfeiture, or can such relief be granted upon the application of one only? In *T. M. Fairclough and Sons Ltd v. Berliner*:[58]

> A and B were joint assignees of a lease of certain premises. In a possession action, based on breach of covenant to repair, A alone sought relief from forfeiture under section 146 (2) of the English Law of Property Act 1925, which contains provisions similar to the like subsection of the Property Law Act 1958.

The Court, construing the phrase 'lessee' in section 146 (2), as defined by section 146 (5), held that the sub-section could only be applied upon the application of all joint lessees, and therefore that it had no jurisdiction to grant relief upon the application of A alone. It does not appear clear from the case whether A and B were entitled as joint tenants or as tenants in common, but this difference is not, it is considered, in this context material.

If relief were granted upon the application of A alone the effect

[57] *Ibid.* 8.

[58] [1931] 1 Ch. 60; see *In Equity and Law Life Assurance Society v. Gold and Holden* (1953) *Current Law Yearbook* s. 1955; *Gill v. Lewis* [1956] 2 Q.B. 1, 15.

would be to restore the lease as though it had never been forfeited,[59] with the consequence that B would continue to remain liable upon the covenants in the lease. This result appears to have influenced the Court, Maugham J. stating:

> . . . there seems to me to be a very great objection to a provision which would enable him to apply to the Court, unless the provision also in some way enabled the Court in granting relief to absolve the other joint lessee from future liability.[60]

But to require the participation of all co-tenants is to enable one, by refusing to co-operate, to destroy in all cases the power of the others to obtain relief. Under section 146 (2) the court has a discretion as to whether it will grant relief, and may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future as the court or judge, in the circumstances of each case thinks fit. If therefore the section could be construed to allow an application by one only of co-lessees, and this reading of the section appears in no way extravagant, it is suggested that relief, if otherwise available in the circumstances, could be granted upon the terms that the applicant forthwith take an assignment from the other co-tenants of their interest in the lease. This would prevent the liability of the other co-tenants from future breaches of covenant, the onus being on the applicant to satisfy the court that if relief is so granted they would be willing to make such an assignment. And if the assignment requires the consent of the lessor, which consent is refused, the court, it is considered, would not so grant relief if in the circumstances this refusal is reasonable.[61]

D. Mortgages

(1) *Co-Mortgagors*

Any of co-mortgagors may redeem,[62] but they must redeem the whole of the property and cannot force the mortgagee to accept a partial redemption extending only to their interest.[63] If, however, a dispute arises and redemption proceedings are necessary, it appears that all co-mortgagors, and similarly all co-mortgagees, must be made parties thereto.[64]

[59] *Dendy v. Evans* [1910] 1 K.B. 263.

[60] *T. M. Fairclough and Sons, Ltd v. Berliner* [1931] 1 Ch. 60, 66.

[61] Specific performance may be awarded of a contract to assign a lease notwithstanding that the consent of the lessor, though required, is not yet given: *Ferguson v. Hullock* [1955] V.L.R. 202.

[62] *Cholmondeley v. Clinton* (1820) 2 Jac. & W. 1, 134; *Pearce v. Morris* (1869) L.R. 5 Ch. App. Cas. 227; *Stevenson v. Byrne* (1897) 3 Argus L.R. 198, 250.

[63] *Hall v. Heward* (1886) 32 Ch. D. 430.

[64] *Bolton v. Salmon* [1891] 2 Ch. 48, 52, *per* Chitty J.: 'where a mortgage is made by two tenants in common, both of them must be parties to the action to redeem; one cannot redeem in the action of the other.' And see Rules of the Supreme Court O. xvi rr. 8, 9; *Jennings v. Jordan* (1881) 6 App. Cas. 698, and O. xviii r. 2.

Difficulties which may arise in relation to covenants for title by co-mortgagors have already been discussed.[65] It should also be mentioned that in the case of land under the Transfer of Land Act 1958, section 75 of the Act provides, *inter alia,* that the covenants therein specified shall be implied in a mortgage of land under the Act. Further, that section 46 (2) of the Act provides that in a transfer of land which is subject, *inter alia,* to a mortgage, there shall be implied a covenant with the transferor by the transferee binding the latter to pay the interest secured by the mortgage at the rate and times and in the manner specified in the mortgage, and to indemnify the transferor against all liability in respect of the principal sum secured by the mortgage and any of the covenants therein contained or by the Act declared to be implied therein on the part of the transferor. Both section 75 and section 46 (2) must be read subject to section 112 of the Act set out above.[66]

(ii) *Co-Mortgagees*

(A) PAYMENT TO ONE

If two or more persons lend money on mortgage, whether in equal or in unequal shares, there is a presumption in equity that they will take the mortgage as tenants in common: this notwithstanding that the mortgage may be made to them jointly so that, at law, they take as joint tenants.[67] This rule of equity could have led to inconvenience: for example, if trustees advanced trust money on mortgage. The mortgage might have been made to the trustees jointly, but upon the death of one, the survivor alone would have been unable to have given a good discharge as this would have required the intervention of the personal representatives of the deceased trustee-mortgagee.[68] A way around this difficulty was to insert a 'joint account clause' into the mortgage, that is, a clause which declared that the money belonged to the mortgagees on a joint account in equity as well as at law. The insertion of such a clause enabled a surviving trustee-mortgagee to give a good discharge upon the redemption of the mortgage by the mortgagor. It is no longer considered necessary to insert such a clause, for section 112 of the Property Law Act 1958 provides:

(1) Where—

(a) in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or

[65] Pp. 312-317 *supra.*
[66] See p. 324 *supra.*
[67] *Petty v. Styward* (1631) 1 Eq. Ca. Abr. 290; *Rigden v. Vallier* (1751) 2 Ves. Sen. 252; *Steeds v. Steeds* (1889) 22 Q.B.D. 537.
[68] *Vickers v. Cowell* (1839) 1 Beav. 529.

any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account; or

(b) a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly and not in shares—

the mortgage money, or other money or money's worth, for the time being due to those persons on the mortgage or obligation, shall, as between them and the mortgagor or obligor, be deemed to be and remain money or money's worth belonging to those persons on a joint account; and the receipt in writing of the survivors or last survivor of them, or of the personal representative of the last survivor shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

(2) This section shall apply if and so far as a contrary intention is not expressed in the mortgage, obligation or transfer, and shall have effect subject to the terms of the mortgage, obligation, or transfer, and to the provisions therein contained.

(3) This section shall apply to any mortgage, obligation or transfer made after the thirty-first day of January One thousand nine hundred and five.

(4) In the case of mortgages under the *Transfer of Land Act* 1958 or any corresponding previous enactment this section shall apply subject to the provisions of that Act or enactment relating to the registration of a discharge.

Apart from the provisions of sub-section (4), section 86 of the Property Law Act 1958 provides, by implication, that *inter alia* section 112 applies to mortgages under the Transfer of Land Act 1958 effected by instruments of mortgage under that Act. The section applies only if and so far as a contrary intention is not expressed in the mortgage, and has effect subject to the terms of the mortgage and to the provisions therein. contained. If a contrary intention is expressed, for example if a mortgage recites that the mortgagees contributed the amount advanced in unequal proportions, there is nothing in the Transfer of Land Act 1958 to prevent the registration of the mortgagees as other than joint proprietors.[69] It should also be noted that the section is restricted to regulating the relations between the mortgagor and the mortgagees only, and does not regulate the rights of the mortgagees *inter se*: so that notwithstanding the section, or the existence of an express joint account clause, the mortgagees may, as between themselves, be beneficially entitled as tenants in common.[70] Further, the section operates only upon the *death* of a co-mortgagee

[69] *Drake v. Templeton* (1914) 16 C.L.R. 153; see also *Perpetual Executors and Trustees Association of Australia Ltd v. Hosken* (1912) 14 C.L.R. 286; *Mahony v. Hosken* (1912) 14 C.L.R. 379. A mortgagee is now a registered proprietor, see p. 343 *infra*.

[70] *Re Jackson* (1887) 34 Ch. D. 732; *Gebhardt v. Dempster and Others* [1914] S.A.S.R. 287; *Niles v. Lake* [1947] 2 D.L.R. 248.

in that if there is no death it has no application to the situation where a receipt has been obtained from one only of co-mortgagees. At common law payment to one of joint, but not several, creditors discharges the entire debt, and in this respect equity follows the law.[71] Whether or not mortgagees are entitled as joint, or as several, creditors would seem to depend upon the construction of the covenants in the mortgage,[72] although from the cases it appears to follow that the contractual obligations created by the deed invariably correspond to the manner in which the mortgagees initially held the money advanced. But if co-mortgagees, though entitled jointly at law, hold as tenants in common in equity, it appears from *Steeds v. Steeds*[73] that payment to one discharges not the whole of the debt but works only a partial discharge equivalent to the interest of the payee, for since the Judicature Act, if there is a conflict between the rules of equity and those of common law, equity prevails.[74] In *Bell v. Rowe*[75] the mortgagees had signed a memorandum of discharge and the question, *inter alia,* there in issue was whether a particular sum had been properly paid off. The mortgage was to co-mortgagees and contained a joint account clause stating that the money belonged to the mortgagees on joint account in equity as well as in law. The Supreme Court of Victoria, following *Steeds v. Steeds,*[76] held that payment to one was a good discharge of the joint debt. Earlier, however, in *Matson v. Dennis,*[77] not apparently cited to the Court in *Bell v. Rowe,*[78] a distinction was drawn between the effect of payment to one of co-mortgagees upon the contractual obligations under the mortgage deed and the effect of such payment upon the continuance of the security thereby created. There payment had been made to one of, allegedly, joint mortgagees. Stuart V.-C. held that no law other than that of debtor and creditor was applicable and that accordingly the mortgage debt had been properly discharged. On appeal this judgment was disapproved, Knight Bruce L.J. stating:

> The question is, whether when an equitable charge is vested in two persons—and as I will assume as joint-tenants—the money can be paid to one without any special authority from the other so as to discharge the estate. I am not speaking of an action. I am speaking of discharging an equitable burden upon an estate, and so discharging the estate.
>
> In my judgment, and in the absence of special circumstances such as are not shewn to exist in the present case, that cannot be done.[79]

[71] *Powell v. Brodhurst* [1901] 2 Ch. 160, 164.
[72] As is the case with regard to leases; see p. 323 *supra.* [73] (1889) 22 Q.B.D. 537.
[74] *Steeds v. Steeds* (1889) 22 Q.B.D. 537, as explained in *Powell v. Brodhurst* [1901] 2 Ch. 160.
[75] (1900) 26 V.L.R. 511. As to whether a discharge operates to discharge the mortgagor from his covenants in the mortgage, see P. Moerlin Fox, *The Transfer of Land Act 1954* (1957) 98. [76] (1889) 22 Q.B.D. 537. [77] (1864) 4 De G. J. & S. 345.
[78] (1900) 26 V.L.R. 511. [79] *Matson v. Dennis* (1864) 4 De G. J. & S. 345, 350.

This distinction was adopted in *Powell v. Brodhurst*[80] where a joint account clause was implied into the transfer of mortgage by a provision corresponding to section 112. Farwell J., in holding that payment to one of the mortgagees operated to discharge the security only to the extent, if any, of the payee's beneficial interest, even though the payee ultimately became the survivor, stated:

> The fallacy of the defendant's argument consists in the assumption that the question whether the money covenanted to be paid is recoverable at law is the only relevant consideration in foreclosure or redemption proceedings and in a disregard of the principles of equity that underlie foreclosure and redemption. . . . If a mortgagor chooses to pay otherwise than in strict accordance with the terms of his contract he does so at his own risk. The proviso for redemption in a mortgage to several is never expressed to take effect on payment to the mortgagees or either of them, but to the mortgagees or the survivor of them; and if a mortgagor pays to one, although such payment may be a good discharge in law, yet the matter is at large when he comes into equity, and the Court takes into consideration all the facts of the case, and ascertains whether the payee was beneficially entitled to the whole or to a part only, or whether he was a trustee with the other mortgagee, and treats the payment as good in whole, or in part, or altogether bad accordingly. It is not a question of fixing the mortgagor with notice of a trust, but it is the enquiry that the Court makes to satisfy itself that it is just and equitable under all the circumstances to deprive the mortgagee of his legal title to the property comprised in the mortgage. This is an answer to the argument of the defendant—that James Ingram was the actual survivor, and therefore could have received the money and given a valid receipt at a later date. The mortgagor did not, in fact, pay to the survivor, but to one of two. He can rely only on the receipt as at the time when it was given, and he has only himself to thank because he chose to pay otherwise than in accordance with the contract.[81]

On the facts of the case the mortgagees were trustees, and while it may be that payment to one, even though he survives, should not be allowed to prejudice the rights of those beneficially entitled, it would seem curious to insist that this same result should follow where it is known at the time of the action that the surviving mortgagee is himself entitled to the whole beneficial interest.

But in *Bell v. Rowe*[82] a memorandum of discharge had been lodged. And further this case was concerned with a mortgage of land under the Transfer of Land Act and there is a difference, less pronounced since the Act of 1954,[83] between a mortgage of land under the General Law and a mortgage of land under the Act, a distinction first, it seems, expressed by the Supreme Court of Victoria in *Greig v.*

[80] [1901] 2 Ch. 160, explaining *Steeds v. Steeds* (1889) 22 Q.B.D. 537, as having no application to circumstances in which it is clear that a joint obligation exists.

[81] *Powell v. Brodhurst* [1901] 2 Ch. 160, 167.

[82] (1900) 26 V.L.R. 511.

[83] See pp. 338, 340 *infra*.

Watson.[84] Under the General Law a mortgage of land passes the legal estate to the mortgagee and after the contractual date for repayment has passed, the mortgagee's title is unassailable at law. It is only in equity, in a redemption action, that a mortgagor who wishes thereafter to pay off the mortgage debt can force a conveyance of the legal estate. And *Powell v. Brodhurst*[85] decides that there is a principle of equity which requires a mortgagor, who pays to one only of co-mortgagees, the payee not accounting in the proper way to his fellows, to pay a price for redemption, the amount thereof depending upon the extent, if any, of the payee's interest. In contrast, a mortgage of land under the Act has effect as a security but does not operate as a transfer of the land, and until the Act of 1954 did not perhaps create an interest in land, a difference regarded in earlier cases as producing distinctions of substance.[86] Thus in *Perry v. Rolfe*,[87] Fullagar J., construing the Act of 1928, was of the view that a mortgage of land thereunder created no equity of redemption because the Act conferred a legal right to redeem at any time.[88] The learned judge stated:

> And rules which are appropriate and understandable in a redemption suit have no application in a proceeding to enforce such a right. . . . A right which exists in a redemption suit does not exist in a proceeding which is not a redemption suit but a suit to enforce a legal right.[89]

On this basis it could well have been argued that, in a mortgage of land under the Act, no room existed for the imposition of equitable principles;[90] from which it would have followed that, with regard to a mortgage subject to a joint account clause or otherwise creating a joint obligation, payment to one of the mortgagees would have entitled the mortgagor to require that the mortgage should be completely discharged. But a contrary view was discernible in the authorities,[91] now vindicated, it would seem, by the decision of the

[84] (1881) 7 V.L.R. (Eq.) 79. [85] [1901] 2 Ch. 160.

[86] *Greig v. Watson* (1881) 7 V.L.R. (Eq.) 79; *Long v. Town* (1889) 10 L.R. (N.S.W.) 253; *Cape v. The Trustees of the Savings Bank of New South Wales* (1893) 14 L.R. (N.S.W.) (Eq.) 204; *McColl v. Bright* [1939] V.L.R. 204; also *Smith v. National Trust Co.* (1912) 1 D.L.R. 698; *Thompson v. Yockney* (1912) 8 D.L.R. 776, affirmed (1913) 14 D.L.R. 332, affirmed (1914) 16 D.L.R. 854.

[87] [1948] V.L.R. 297; (1949) 22 *Australian Law Journal* 461.

[88] But in *Greig v. Watson* (1881) 7 V.L.R. (Eq.) 79, 85, Stawell C.J. stated: 'if he does not he is subject to an equity suit to obtain, not a redemption, but an order to compel him to receive the money and have the encumbrance taken off the register'.

[89] *Perry v. Rolfe* [1948] V.L.R. 297, 303.

[90] *Cape v. The Trustees of the Savings Bank of New South Wales* (1893) 14 L.R. (N.S.W.) (Eq.) 204; *McColl v. Bright* [1939] V.L.R. 204. Generally, P. Moerlin Fox, 'The Redemption of Torrens System Mortgages after Default' (1950) 24 *Australian Law Journal* 311; (1928) 2 *Australian Law Journal* 50; (1929) 3 *Australian Law Journal* 76.

[91] In *Barry v. Heider* (1914) 19 C.L.R. 197, 213, Isaacs J. stated: 'Such a contention is absolutely opposed to all hitherto accepted notions in Australia with regard to the Land Transfer Acts. They have long, and in every State, been regarded as in

Full Court of the Supreme Court of Victoria in *Re Forrest Trust; Trustees Executors & Agency Co. Ltd v. Anson.*[92] In this case the issue was whether the words 'a suit to redeem the mortgage' which appeared in section 300 of the Property Law Act 1928[93] were applicable to a mortgage of land under the Transfer of Land Act of 1928. The Court held that they were so applicable, and in a joint judgment Gavan Duffy and Dean JJ., after pointing out the differences between the two types of mortgages here discussed, stated:

> But the significant thing is that, whether the mortgage be one under the general law or under the Transfer of Land Act, the real beneficial owner is the mortgagor, not the mortgagee, and the transaction is simply one by way of security. Upon payment of the amount due by him the mortgagor is entitled to have his property released from the security. It is of little importance from a practical point of view where the legal title resides. The formalities of the transaction differ in the two cases, but all the realities are the same. It, therefore, seems appropriate enough to describe the right of the mortgagor, as Parliament has described it, as an equity of redemption in each case, and equally appropriate to describe the proceeding whereby a mortgagor enforces such right as a suit to redeem the mortgage. It is a right derived from the general principle of equity where property is charged to secure a debt. The relief claimed by a mortgagor of land under the Transfer of Land Act differs from an ordinary redemption action only in that, instead of a direction to reconvey the land, the Court orders the execution of a discharge, having the same effect in freeing the land from the charge upon it. . . .
>
> What has been said supports the view that the formal changes effected by the Transfer of Land Act in the case of a mortgage effected and registered under that Act are more apparent than real. If substance and effect be regarded, and not form (and equity has always so regarded mortgages), it appears that, as between mortgagor and mortgagee, and subject to the express provisions of the Act, the differences are not great. . . .
>
> It is unnecessary to do more than refer to the well-known statement of the mortgagor's rights expounded by Lord Parker in *Kreglinger v. New Patagonia Meat & Cold Storage Co. Ltd.*, [1914] A.C. 25, at p. 48, and the distinction there drawn between the contractual right to redeem which arises only upon the day stipulated for payment and the equitable interest which arises upon the execution of the mortgage. . . . An equity of redemption arises also in the case of the conveyance of equitable interests where there is an express proviso for redemption—(1914) A.C., at p. 52. In such cases,

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the main conveyancing enactments, and as giving greater certainty to titles of registered proprietors, but not in any way destroying the fundamental doctrines by which Courts of Equity have enforced, as against registered proprietors, conscientious obligations entered into by them.' And *Robert Reid & Co. v. The Minister for Public Works* (1902) 2 S.R. (N.S.W.) 405; *Gunn v. Commonwealth Bank of Australia and Another* (1922) 18 Tas. L.R. 26.

[92] [1953] V.L.R. 246; (1953) 26 *Australian Law Journal* 310.

[93] Repealed by s. 2, and replaced by Limitation of Actions Act 1955, s. 15; now Limitation of Actions Act 1958, s. 15.

> 'the right to redeem is from the very outset a right in equity only, and it is merely the right to have the property freed from the charge on payment of the moneys charged thereon.'

The words quoted are a very apt description of the right of a mortgagor under a Transfer of Land Act mortgage.[94]

Further, in the Transfer of Land Act 1954 the provisions of the Act of 1928 were generally redrafted. Section 75 (c) of the Act of 1958 contains the only reference to 'redemption' that now remains, but of more importance is considered the redrafting of the provisions prescribing the effect of a mortgage of land under the Act. Section 74 (2) of the Act of 1954 (now the like provision of the Act of 1958) provided for the first time that such a mortgage should be an interest in land. This amendment is consistent with the disinclination of the Full Court in *Re Forrest Trust; Trustees Executors & Agency Co. Ltd v. Anson*[95] to draw differences of substance between a mortgage of land under the Act and a mortgage of land under the General Law.

Although no certain answer can be given it seems, therefore, that the principle of *Powell v. Brodhurst,*[96] and indeed equitable principles in general, do, and should, have application to a mortgage of land under the Act in the same way, and to the same extent, as they have application to a mortgage of land under the General Law. But it must be noted that section 84 of the Transfer of Land Act 1958 requires, as the mechanics for the discharge of a mortgage, the production of a memorandum of discharge signed by the mortgagees,[97] who are now registered proprietors.[98] And, for example, it will be recalled that in *Bell v. Rowe* such a memorandum of discharge had been executed by the co-mortgagees. In *Re S. E. and R. W. Nicholas,*[99] there was a mortgage of land under the Real Property Act 1900 (N.S.W.) to joint mortgagees. On the death of one the survivor did not become registered as proprietor pursuant to section 101 (c) of the Act (which contains like provisions to section 50 of the Transfer of Land Act 1958) but alone signed a memorandum of discharge. The Registrar-General refused to register this memorandum, and his view was upheld by the Court, Sugerman J. stating:

[94] *Re Forrest Trust; Trustees Executors & Agency Co. Ltd v. Anson* [1953] V.L.R. 246, 271-272; see also 257, *per* Herring C.J.: 'Equity would certainly, in view of the legislative direction that a mortgage under the Act is to take effect as a security, raise a right to redeem if need be, whilst if, as I am inclined to think is the case, it is proper to regard such right as by implication conferred on the mortgagor by the provisions of the statute, it would lend its aid to a mortgagor should its enforcement require the assistance of a Court for the purpose, though in such a case it *might* not impose terms upon the mortgagor such as it was wont to impose on a mortgagor exercising a right to redeem that equity itself had raised.' (Italics supplied.)

[95] [1953] V.L.R. 246.

[96] [1901] 2 Ch. 160.

[97] Acts Interpretation Act 1958, s. 17: singular includes the plural.

[98] See p. 343 *infra*.

[99] (1951) 51 S.R. (N.S.W.) 201.

> It is difficult to reconcile the object and scheme of the Real Property Act with the notion that a registered estate or interest may be dealt with or effected by a registered instrument executed otherwise than by the registered proprietor. The object of the Act is "to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity": *Gibbs v. Messer.* The scheme of the Act envisages that, in general, successive stages in the history of the registered title will all be recorded in the register-book, including events which affect the registered title by operation of law as well as dealings therewith by act of parties. The presence of Part XI and s. 101 in the Act is intelligible only as part of such a scheme.[1]

This clearly seems the correct and practical reading of the section, a reading which is consistent with section 112 (4) of the Property Law Act 1958 (set out above) and which appears equally applicable to section 84 of the Transfer of Land Act 1958[2] (although there seems no reason why an application under section 50 of the Act for registration as sole proprietor could not be lodged simultaneously with a discharge signed by the surviving mortgagee). Therefore, even if, contrary to the view above expressed, payment to one of co-mortgagees does bind the others and does enable a mortgagor to *require* that the mortgage should be completely discharged, the *memorandum of discharge* must in any event be signed by all co-mortgagees, and an application to the Court would be the remedy of the mortgagor if one co-mortgagee refuses to sign.

(B) PROTECTION OF A PURCHASER

The insertion of a joint account clause did not remedy a further inconvenience that could arise from a mortgage to trustees. Such a clause was of itself never notice of a trust,[3] but if a purchaser had notice thereof then, if the trustees were not the original trustees, he could require them to deduce their title.[4] This situation is now provided for by section 113 of the Property Law Act 1958 which contains, *inter alia,* provisions protecting a person dealing in good faith with the mortgagee:

> (1) A person dealing in good faith with a mortgagee, or with the mortgagor if the mortgage has been discharged, released or postponed as to the whole or any part of the mortgaged property, shall not be

[1] *Ibid.* 202.
[2] *Cf.* Real Property Act 1886-1936 (S.A.), s. 143, and *Gebhardt v. Dempster and Others* (1914) S.A.L.R. 287.
[3] *In re Harman and Uxbridge and Rickmansworth Ry Co.* (1883) 24 Ch. D. 720.
[4] *In re Blaiberg and Abraham's Contract* [1899] 2 Ch. 340; *In re Balen and Shepherd's Contract* [1924] 2 Ch. 365; *In re Chafer and Randall's Contract* [1916] 2 Ch. 8, 15.

concerned with any trust at any time affecting the mortgage money or the income thereof, whether or not he has notice of the trust, and may assume unless the contrary is expressly stated in the instruments relating to the mortgage—

(a) that the mortgagees (if more than one) are or were entitled to the mortgage money on a joint account; and

(b) that the mortgagee has or had power to give valid receipts for the purchase money or mortgage money and the income thereof (including any arrears of interest) and to release or postpone the priority of the mortgage debt or any part thereof or to deal with the same or the mortgaged property or any part thereof—

without investigating the equitable title to the mortgage debt or the appointment or discharge of trustees in reference thereto.

(2) This section shall apply to mortgages made before or after the commencement of this Act, but only as respects dealings effected after such commencement.

(3) This section shall not affect the liability of any person in whom the mortgage debt is vested for the purposes of any trust to give effect to that trust.

It should be noted that the section is mainly concerned with relieving persons from investigating titles and is not intended to affect interests acquired. Therefore it has no application in the determination of priorities among persons entitled to equitable interests.[5] Further, section 86 of the Property Law Act 1958 provides that section 113 does not apply to a mortgage of land under the Transfer of Land Act 1958. Section 43 of the latter Act, however, contains its own provisions protecting a person dealing with a registered proprietor.[6]

(C) Power of Sale

Section 101 (1) (a) of the Property Law Act 1958 confers upon a mortgagee a power of sale, which by section 106 (1) may be exercised by any person for the time being entitled to receive and give a good discharge for the mortgage money. Discharge must, it is considered, refer to the security and not merely to the debt. If this is so, all living co-mortgagees must, on the principles above discussed, combine to exercise the power of sale, and, unless section 112 of the Act applies or unless a joint account clause is expressly inserted in the

[5] *Beddoes v. Shaw* [1936] 2 All E.R. 1108.

[6] Transfer of Land Act 1958, s. 43: 'Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any land shall be required or in any manner concerned to inquire or ascertain the circumstances under or the consideration for which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.'

mortgage deed, on the death of one co-mortgagee, a valid exercise of the power requires the concurrence of his personal representative.

In the case of a mortgage of land under the Transfer of Land Act 1958, section 76 of the Act enables, in the case of default, a mortgagee to serve a notice in writing on the mortgagor. If within one month after service of such notice, or such other period as is fixed in the mortgage deed, the mortgagor does not comply therewith, section 77 confers upon the mortgagee a power of sale. In *Stevenson v. Byrne*[7]

> A, B, C and D were co-mortgagors of a registered mortgage under the Transfer of Land Act 1890. The mortgage contained a joint and several covenant by the mortgagors to repay the amount of the advance. On the amount becoming due the whole of the balance then outstanding was paid off by A and B who took, and registered, a transfer of the mortgage to themselves. Subsequently A and B caused to be served upon themselves and C and D a notice to repay the moneys due under the mortgage and, payment not being made, they sold the property.

The Supreme Court of Victoria, construing section 116 of the Act of 1890, held that there had been a default within the meaning of the section, and that on the facts there had been a valid exercise of the power of sale, not only for the purpose of giving title to the purchaser, but also as between the co-mortgagors. That the principle of this case is of continued application seems clear, as section 4 (2) of the Act of 1958 provides that, unless inconsistent with the context or subject-matter, any description of or reference to any person as, *inter alia,* 'mortgagee' shall extend to his executors administrators successors transferees and assigns to the intent that every right power authority liability or obligation vested in or imposed on any such person by or under the Act shall devolve upon any such executor administrator successor transferee or assign.

It may be asked whether, on the facts of *Stevenson v. Byrne,* A or B could have alone exercised the power of sale. Section 106 (1) of the Property Law Act 1958 does not apply to a mortgage of land under the Act.[8] But although the wording of this section and of section 4 (2) of the Transfer of Land Act 1958 is dissimilar, it would seem that, in this context, both provisions aim at achieving the same object. And it must be noted that a mortgage being an interest in land, co-mortgagees are registered proprietors within the meaning of section 4 (1) of the Act.[9] Therefore, even if, contrary to the view above expressed, it is considered that one co-mortgagee can

[7] (1897) 3 Argus L.R. 198, 250.

[8] Property Law Act 1958, s. 86.

[9] S. 4 (1): '. . . "Registered proprietor" means any person appearing by the Register Book or by any registered instrument to be the proprietor of any estate or interest in land.'

alone receive the mortgage money thereby entitling the mortgagor to require a proper discharge, in the same way that a memorandum of discharge requires the signature of all mortgagees,[10] so it is considered a transfer by mortgagees must be executed by them all.

E. Easements and Restrictive Covenants

(i) *Easements*

(A) By One Co-owner to a Stranger

One co-owner may, it seems, alone grant an easement over the common property which will be binding against his interest, the benefit of which will apparently pass with the dominant tenement and be enforceable against the grantor or his successor in interest, or against a stranger, at the suit of the grantee or his successor in title. However, as discussed below,[11] one co-owner cannot grant more than his interest, and a grant by one will not in any way preclude the other co-owners from the ordinary enjoyment of the common property.

If the parties are joint tenants and the grantor survives the other co-owners, presumably the easement thereafter enures in the same manner as if it had initially been granted by an absolute owner. But it would appear that a grant of an easement does not sever the tenancy, and, if the grantor dies first, the easement will not, unlike a lease,[12] thereafter be enforceable against the surviving joint tenants. In *Mansfield v. Mansfield*[13]

> A, one of two joint tenants, executed a conveyance containing, *inter alia*, a grant of a right of way to X. The plaintiff was a successor in title to X, and in the present action claimed damages from the defendant, a stranger, for the obstruction of the easement.

The Full Court of the Supreme Court of Victoria stated that there was nothing to show that the grantor was dead and held that the plaintiff's claim succeeded. The Court stated:

> We think that the authorities which have been cited show that a joint owner has power to alienate his own share so as to bind himself, and to give, as regards himself, to the grantee a good title to the incorporeal hereditament created by one of the joint owners. A passage from Coke has been cited at p. 185A, Vol. II, which implies that although the grant of a right of way may not bind the survivor of two joint tenants yet it does bind the grantor. . . . We hold on these authorities that this grant was good as against Fawkner during his lifetime, and we do not know that he is dead, and such grant would be valid to the grantee as against a stranger, and the defendant in this case is a mere stranger.

[10] See p. 340 *supra*.
[11] See p. 318 *supra*.
[12] See pp. 312-318 *supra*.
[13] (1890) 16 V.L.R. 569.

It may be that the grant may be shown to be invalid against another person, but that has not been shown in this case.[14]

(B) BY ONE CO-OWNER TO ANOTHER CO-OWNER

Disputes between co-owners relating solely to the common property are determined by their rights *qua* co-owners and, even if conceptually possible, the law of easements seems necessarily excluded. Accordingly it is not considered that any agreement between co-owners can impose a fetter on the user of the land which will be binding upon a purchaser from one, although of course the co-owner vendor may himself be liable for breach of contract.

But where a right is claimed in connection with other property held severally, the law of co-ownership will not necessarily afford appropriate relief, and there is therefore a question whether, in these circumstances, an easement may be created between co-owners. In *R. J. Finlayson Limited and Others v. Elder Smith & Company Limited,*[15] A and B (who obtained title from A) owned adjoining strips of land and in 1890 each contracted to transfer to the other an undivided moiety of his strip, it being agreed that the strips should together be used to form a private road. The transfer was made in 1892. A owned adjoining land which would be benefited by such a road. B later acquired the undivided shares held by A. The plaintiffs were successors in title of A and claimed, *inter alia,* that B had interrupted their enjoyment of an easement over the adjoining strips, which easement they alleged had been created by the transaction of 1892. In holding that the agreement between A and B did not create an easement, the Court stated:

> Under the agreement Murray did not cease to be owner of the 13-foot 9-inch strip—he was still a co-owner—and he became co-owner of the 1-foot 3-inch strip. As was pointed out by Lord *Esher* M.R. in *Metropolitan Railway Co. v. Fowler,* [1892] 1 Q.B. 165, at p. 171, one cannot have an easement over his own land. See also per *Isaacs J.* in *Nelson v. Walker,* (1910) 10 C.L.R. 560, at p. 582. It is true that one tenant in common may effectively grant a lease of the land to his co-tenant in common. This is well established by the cases cited in Redman on Landlord and Tenant, 7th ed., at p. 61, referred to by Mr. *Villeneuve Smith.* See especially *Leigh v. Dickeson,* (1884) 15 Q.B.D. 60. But the reason was explained in that case by *Cotton* L.J., at p. 66, as being that, in such circumstances, the lessee is given exclusive possession, which formerly he had not. Each of two tenants in common has the possession of the land, with full right of occupation and use, provided he does not, in effect, oust the other (*Jacobs v. Seward,* (1872) L.R. 5 H.L. 464, at p. 472, and *Job v. Rotton* [*sic*] (1875) L.R. 20 Eq. 84, at p. 93); but he may, by agreement, surrender to the other his use and occupation; and that is what the co-tenant acquires by his lease. But a right of way is a

[14] *Ibid.* 571. [15] [1936] S.A.S.R. 209.

> *jus in re aliena,* a right to make use of the subject-matter of *another's* right of property. It follows that the agreement of 1890 did not create an easement. Murray had, by virtue of his co-ownership, full right to use H. as a roadway, and the agreement added nothing to that right, i.e. as a right of user by himself; it merely restricted the defendant's and his rights of user.[16]

It seems, therefore, that the Court denied the possibility that an easement could exist between co-owners, on two grounds. First, that an easement is a *jus in re aliena,* and secondly, that unlike a lease, the grant of an easement would add nothing to the pre-existing rights of a co-owner, but would merely restrict the rights of the co-owner-grantor. The difference in this respect between a lease and an easement would, however, appear to be only a matter of degree. In the case of a lease, the co-owner-lessor entirely surrenders his right of enjoyment of the common property: in the case of an easement, the surrender is partial in that the right of enjoyment remains, but cannot be exercised in a manner inconsistent with the existence of the easement. Further, as the facts of the above case indicate, an easement would be a convenient method by which one co-owner could permanently ensure the enjoyment of his neighbouring land in a manner in which he would not otherwise be entitled: at least in the case of a positive obligation,[17] there seems no other means of ensuring that a successor in title of the would-be grantor will *necessarily* be bound by an arrangement between the co-owners.

As stated by the Court, however, an easement is basically a right enjoyed over the land of another, and whether the co-owners be joint tenants, or tenants in common and so entitled to undivided shares, to hold that an easement could be created between co-owners would seem to do violence to this basic principle. But this principle was settled to regulate the rights of neighbouring land owners and it may be questioned whether, in its formulation, the Court had in mind the position of co-owners: and also whether the principle should, particularly in the light of section 72 (4) of the Property Law Act 1958, be applied automatically to cases of co-ownership, where both justice and convenience would seem to be better served by its non-application. In *Stevens and Evans v. Allan and Armanasco,*[18] although not directly in issue, no objection was apparently taken to the existence of an easement in the circumstances here discussed. And in the Canadian decision of *McDonald v. McDougall,*[19] Henry J., affirmed on appeal, stated:

> It is not necessary to decide, and I do not decide, the question whether in such a case, where a right of way over land granted is 'reserved,' as

[16] *Ibid.* 227-228.
[17] As to restrictive covenants, see p. 347 *infra.*
[18] (1955) 58 W.A.L.R. 1.
[19] [1897] 30 Nova Scotia Reports (Canada) 298.

> here, for the benefit of one of two grantees that grantee thereby acquires an easement over the land granted, as to which he is one of the two tenants in common. . . . Applying the reasons for the law, that, where there is a unity of ownership of the dominant and servient tenements, there can be no easement either created or maintained, one would be inclined, at first, to say that these reasons applied here since M. could, as tenant in common, exercise the right of way in question as one of the owners of the soil itself. I incline to the opinion, however . . . that one tenant in common of land may acquire and maintain a right of way over such land as appurtenant to other land owned by him severally.[20]

It is considered that this is the better view and that, without undue straining of meaning, the interests of co-owners should be regarded as sufficiently distinct to enable the creation of easements between them which either benefit or impose a burden upon (as the case may be) other land held by one in severalty. For example, if A and B are co-owners of land and B alone is entitled to other property, it is considered that A should be able to grant an easement binding his interest to B; alternatively, and this it is thought is the better method, that A and B should, pursuant to section 72 (4) of the Property Law Act 1958, be able to grant to B an easement binding the whole of the common property. And conversely, it is considered that B should be able to grant an easement over his property to A and himself for the benefit of the land held in co-ownership.

(ii) *Restrictive covenants*

In *R. J. Finlayson Limited and Others v. Elder Smith & Company Limited*,[21] the plaintiffs further claimed, *inter alia*, that the transaction of 1890 had created a restrictive covenant, the benefit of which had attached to, and ran with, their land. This claim, on considerations not here relevant, also failed. But, unlike the claim to an easement, the Court did not proceed upon the basis that a restrictive covenant could not, from its very nature, have been created in the circumstances there considered.

In the absence of direct authority, and having regard to section 82 of the Property Law Act 1958,[22] it is difficult to see why the same considerations as discussed above in relation to easements should not have like application in relation to restrictive covenants.

(To be concluded)

[20] *Ibid.*; see *The Canadian Abridgement* (1939) xvii, 15. *Cf. Wright v. Wright* (1892) 31 New Brunswick Reports (Canada) 476.

[21] [1936] S.A.S.R. 209.

[22] See p. 314 *supra*.