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COMMENTS

SEVERANCE OF A JOINT TENANCY IN CALIFORNIA

By HAROLD J. ROMIG, JR. AND JOHN M. SHELTON

Some confusion has arisen in California as to what acts of a joint tenant will sever or terminate the joint tenancy relationship. California courts are generally in accord with the common law definition that an estate in joint tenancy is one held by two or more persons jointly with equal rights to share in its enjoyment during their lives. Such an estate requires unity of interest, unity of title, unity of time, and unity of possession.¹ A distinguishing incident of this estate is the right of survivorship,² by virtue of which the entire estate, upon the death of any of the joint tenants, goes to the survivors, who take an estate free from all charges made by the deceased cotenant.³

Historically the destruction of any one of the four unities listed above will change the nature of the joint estate and work a severance.⁴ The "four unities test," though constantly stated in California decisions as being determinative of the existence or non-existence of a joint tenancy, seems at times to have been disregarded in cases concerning severance. Instead the California courts have apparently favored a result placing greater emphasis upon the intentions of the parties involved, and making the distinguishing incident of the estate, survivorship, the paramount consideration.⁵

A joint tenancy in California, as elsewhere, can be severed either by the voluntary act of the parties, or involuntarily.⁶ Thus the question to be determined is: What specific acts or events, voluntary or involuntary in nature, will effect a severance of the estate in joint tenancy in this jurisdiction.⁷

I. Conveyances

Any interest in property which can legally exist in an individual may also be held in joint tenancy.⁸ Each joint tenant has the *power* to convey his interest therein.⁹ The interest jointly held, whether an estate in fee or some lesser estate, might therefore be conveyed to a third party by all the

¹ De Witt v. San Francisco, 2 Cal. 289 (1859); Swartzbaugh v. Sampson, 11 Cal. App. 2d 451, 54 P.2d 73 (1936); 2 TIFFANY, REAL PROPERTY § 418 (3d ed. 1939).

² McDonald v. Morley, 15 Cal. 2d 409, 101 P.2d 690, 129 A.L.R. 810 (1940); Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003 (1932); 13 CAL. JUR. 2d § 16 (1954).

³ Annot., 129 A.L.R. 813 (1940).

⁴ Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003 (1932); Swartzbaugh v. Sampson, 11 Cal. App. 2d 451, 54 P.2d 73 (1936).

⁵ Hammond v. McArthur, 30 Cal. 2d 512, 183 P.2d 1 (1947); Cole v. Cole, 139 Cal. App. 2d 691, 294 P.2d 494 (1956).

⁶ Swartzbaugh v. Sampson, 11 Cal. App. 2d 451, 454, 54 P.2d 73, 75 (1936).

⁷ See generally, Swenson and Degnan, *Severance of Joint Tenancies*, 38 MINN. L. REV. 466 (1954).

⁸ Lowenthal v. Kunz, 104 Cal. App. 2d 181, 231 P.2d 62 (1951); O'Neill v. O'Malley, 75 Cal. App. 2d 821, 171 P.2d 907 (1946).

⁹ *In re Harris Estate*, 9 Cal. 2d 649, 72 P.2d 873 (1937); Delanoy v. Delanoy, 216 Cal. 23, 13 P.2d 513 (1932).

joint tenants acting together, by any one of the tenants, or by any one of the joint tenants to a co-tenant, either in its entirety or in the form of the lesser interest.

A. Conveyance by One Joint Tenant of His Entire Interest

There are two basic rules which are settled. If any one joint tenant conveys away his entire interest to a third party the joint tenancy is severed as between the conveying party and his joint tenants, and the conveyee becomes a tenant in common with the remaining tenant.¹⁰ Also if a joint tenant conveys his entire interest to one of his co-tenants, there is a severance, the purchasing tenant holding this interest as a tenant in common with his remaining co-tenants.¹¹ In *Shelton v. Vance*¹² an application of these two basic and simple rules to a somewhat complicated set of facts is well illustrated. The property was held jointly by three parties, *A*, *B*, and *C*. *A* conveyed his interest to *B*; and *C* conveyed his interest to *X*, a stranger. *X* thereupon conveyed his interest to *B*, who was found to hold the entire property in severalty. The court reasoned that when *A* conveyed to *B*, *B* became a tenant in common with *C* as to a one-third interest in the property, and a joint tenant with *C* as to two-thirds,¹³ then when *C* conveyed his interest to *X*, this destroyed the joint tenancy between *B* and *C* as to the two-thirds interest, and *B* then held an undivided two-thirds interest as tenant in common with *X*, and owned a one-third interest in the property in his own right. Upon sale to *B* by *X*, the tenancy in common was terminated, and *B* became the owner in severalty of the property.

If after a joint tenant conveys away to a stranger, that stranger should reconvey to the same tenant, no revival of the joint tenancy occurs.¹⁴ Thus in the *Shelton* case above, if, after *C* had conveyed away to *X*, *X* had reconveyed to *C* rather than to *B*, the severance which occurred when *C* conveyed away would not be mended by the reconveyance, and *C* could only hold this interest in common with the remaining tenant, *B*.

In all of these cases the conveyance by one of the co-tenants necessarily destroys the unities, title and time. Thus, they become tenants in common and the right of survivorship no longer exists, since the grantee derives his title from a different conveyance than do his co-tenants, and acquires his interest at a different time.

Suppose the conveyance by one of the co-tenants to a stranger is in trust. In *Smith v. Lombard*¹⁵ a daughter held property jointly with her mother. The daughter, for the express purpose of terminating the joint tenancy, conveyed away her interest to a third party upon a trust to reconvey

¹⁰ *In re Harris Estate*, 9 Cal. 2d 649, 72 P.2d 873 (1937); *Reiss v. Reiss*, 45 Cal. App. 2d 740, 114 P.2d 718 (1941); *Swartzbaugh v. Sampson*, 11 Cal. App. 2d 451, 54 P.2d 73 (1936).

¹¹ *Hiltbrand v. Hiltbrand*, 13 Cal. App. 2d 330, 56 P.2d 1292 (1936).

¹² 106 Cal. App. 2d 194, 234 P.2d 1012 (1951).

¹³ *In re Galleto's Estate*, 75 Cal. App. 2d 580, 171 P.2d 152 (1946).

¹⁴ *Hammond v. McArthur*, 30 Cal. 2d 512, 183 P.2d 1 (1947).

¹⁵ 201 Cal. 518, 258 Pac. 55 (1927).

the interest to the daughter and her husband in joint tenancy. The court held that this clearly severed the joint tenancy relationship as between the daughter and her mother, and that upon the reconveyance to the daughter and her husband this one-half was then held in joint tenancy by them. Likewise the property might be conveyed by one of the co-tenants to a third party in trust to the use of the conveying tenant, and the same result would be reached.¹⁶ In either case the fact that the conveyance was in trust would in no way prevent the destruction of unities occurring in an unrestricted conveyance of the interest.

A conveyance by one joint tenant of his entire interest in the joint property to one of his co-tenants can sever the joint tenancy just as effectively as to that part, as a conveyance by one of the joint tenants to a stranger.¹⁷ If there are only two tenants, it is apparent that no joint interests of any nature still exist in the property. If there are three or more joint tenants, the conveyance by one of them to another works a severance as between these two tenants, with the conveyee remaining a joint tenant as to his original interest with the remaining co-tenants.¹⁸

B. *Conveyance of a Life Interest*

If joint tenants hold property in fee, the conveying away of a life interest by one of them to a third party for his own life or to one of the co-tenants for his own life would appear clearly to destroy the unity of interest, and thus effect a termination of the joint tenancy relationship as between the conveyor and his co-tenants. The Supreme Court of California in the oft-cited case of *Hammond v. McArthur*,¹⁹ however, seems to have disregarded the technicalities of the "four unities test," and attempted to give effect to the apparent intention of the parties, at least where the interference with the right of survivorship appeared to be at most a contingency. In this case *A* and *B* were joint tenants in fee. *A* conveyed to his co-tenant *B*, for *B*'s life. Upon *B*'s predeceasing *A*, *B*'s heir claimed title to an undivided one-half interest in the property, upon the theory that the joint tenancy had been severed by the conveyance from *A* to *B*, leaving *B* with an undivided one-half interest in fee as tenant in common with *A*. The majority found no severance had occurred. They stated that a conveyance by one joint tenant to a stranger for the stranger's life, or to a co-tenants would work only a contingent severance, that is, the right of survivorship would only be interfered with if the conveyor should predecease the conveyee. No notice seems to have been taken that under the facts of the *Hammond* case (conveyance from one joint tenant to his co-tenant) the death of the grantor of the life estate before his co-tenant and grantee might pose no real problem to survivorship, while the death of the grantor before a third

¹⁶ *Reiss v. Reiss*, 45 Cal. App. 2d 740, 114 P.2d 718 (1941).

¹⁷ *Hiltbrand v. Hiltbrand*, 13 Cal. App. 2d 330, 56 P.2d 1292 (1936).

¹⁸ *Shelton v. Vance*, 106 Cal. App. 2d 194, 234 P.2d 1012 (1951).

¹⁹ 30 Cal.2d 512, 183 P.2d 1 (1947).

party grantee would defeat the right of survivorship in the co-tenant of the grantor. Despite this possible distinction there seems to be no dissent to what might be called the "contingent severance theory" of the *Hammond* case, and thus it appears that the conveyance of an estate for the life of the conveyee by one joint tenant to either a stranger or to a co-tenant will work, at most, a contingent severance of the estate. The case of *Spahn v. Spahn*²⁰ is further evidence of this trend. There the court, pursuant to an agreement entered into by parties to a divorce action, ordered property to be held in joint tenancy, with the wife to give a lease to the husband for the life of the wife, the husband being required to pay a monthly rental to the wife. Against the contention that the absence of the unity of interest between the parties negated the possible existence of an estate in joint tenancy, the court held that the parties could hold in joint tenancy under these facts.

So in the instance of the conveyance of a life estate by a joint tenant, we see for the first time the tendency of the California courts to relegate the time-worn "four unities test" to a far less pretentious position as a determinative factor in finding the existence or non-existence of a joint tenancy.

C. Grant of a Term for Years

The problem presented as to severance of the joint tenancy held in fee, upon the conveyance by one of the joint tenants of a term for years, is the same as that encountered in the case of the conveyance of a life estate. For this reason, apparently, the California courts hold that in the case of a lease, any severance which does occur is at the most a contingent one, subject to revival if the lease terminates prior to the demise of the lessor. This rule is restated in numerous decisions,²¹ with the case of *Swartzbaugh v. Sampson*²² generally being referred to as the father of the rule in California. Strangely enough, the court in that case was only referring to the problem in dicta. The court merely said that the English cases applied the rule that a lease would work a severance of a joint tenancy, at least during the term of the lease, and that since no American cases could be found which actually followed the reasoning of the English cases, this fact, plus the reasoning applied in analogous American cases, made the adoption of the English rule in this country doubtful. The case of *Spahn v. Spahn, supra*, appears to leave little doubt that a finding of, at most, a contingent severance will likewise be the result where the term for years is granted to a co-tenant rather than to a stranger. The court there said:

"That there exists no legal inconsistency between a joint tenancy and a contractual relation of landlord and tenant entered into by the joint tenants, seems clear."²³

²⁰ 70 Cal. App. 2d 791, 162 P.2d 53 (1945).

²¹ *Hammond v. McArthur*, 30 Cal. 2d 512, 183 P.2d 1 (1947); *Spahn v. Spahn*, 70 Cal. 2d 791, 162 P.2d 53 (1945).

²² 11 Cal. App. 2d 451, 54 P.2d 73 (1936).

²³ *Spahn v. Spahn*, 70 Cal. App. 2d 791, 801, 162 P.2d 53, 58 (1945).

D. *Conveyance of a Remainder Interest*

A conveyance by a joint tenant of a remainder interest has been held to effect a severance of the joint tenancy if it takes effect before the death of the conveying tenant and before the accrual to the survivor of the right of survivorship.²⁴ There seem to be no grounds for questioning this rule as to a vested remainder presently conveyed; however, as to a remainder contingent upon the conveyee surviving the conveyor, it is entirely possible that the conveyee will predecease the conveying tenant, in which case the right of survivorship in the remaining co-tenant will not be impaired. Upon this reasoning it is conceivable that cases involving contingent remainder interests might be likened to the cases of grants of life estates or terms for years, and the severance found to be a partial one, with the joint tenancy capable of being revived upon the contingent remainderman's predeceasing the conveying joint tenant.

II. *Agreement*

A joint tenancy may be terminated by express agreement between the tenants, and such an agreement, at least with respect to personal property held in joint tenancy, may be oral.²⁵ An agreement between the tenants which, although it does not expressly terminate the tenancy, is inconsistent by its terms with one or more of the four essential unities, will also be adjudged a severance.

Illustrating this point is *Pike v. Pike*,²⁶ where a separate maintenance agreement was found to be repugnant to the unities of possession and interest, giving the wife exclusive possession and power to rent, and the husband exclusive power to sell. The court held that a severance had taken place upon the execution of the agreement. The dissent on denial of a rehearing,²⁷ however, could see no distinction between this case and the *Spahn* and *McArthur* cases (discussed *supra*), giving impetus to the idea that the intent shall govern.

Any interference with the right of survivorship by the terms of an agreement will also sever the joint tenancy relationship,²⁸ the right of survivorship being the all important incident to such an estate.²⁹ In *McDonald v. Morley*,³⁰ the tenants agreed "that in the event of the death of either of them, then his or her share and interest therein shall become the property of their daughter."³¹ This agreement has held to be so inconsistent with an

²⁴ *Green v. Skinner*, 185 Cal. 435, 197 Pac. 60 (1921).

²⁵ *Lagar v. Erickson*, 13 Cal. App. 2d 365, 56 P.2d 1287 (1936); *Young v. Young*, 136 Cal. App. 306, 14 P.2d 580 (1932).

²⁶ *Pike v. Pike*,Cal. App. 2d....., 208 P.2d 380 (1949).

²⁷ *Pike v. Pike*,Cal. App. 2d....., 209 P.2d 154 (1949).

²⁸ *McDonald v. Morley*, 15 Cal. 2d 409, 101 P.2d 690, 129 A.L.R. 810 (1940); *California Trust Co. v. Anderson*, 91 Cal. App. 2d 832, 205 P.2d 1127 (1949).

²⁹ See note 2 *supra*.

³⁰ 15 Cal. 2d 409, 101 P.2d 690, 129 A.L.R. 810 (1940).

³¹ *McDonald v. Morley*, 15 Cal. 2d 409, 410, 101 P.2d 690, 691, 129 A.L.R. 810, 811 (1940).

estate in joint tenancy that despite an expressed provision in the agreement that the property should remain in joint tenancy until it could be sold, a severance was effected and thereafter a tenancy in common existed.

The question is then presented as to what extent the California courts will adhere to an agreement which clearly expresses that no severance is intended by the tenants. Clearly, as seen above, if the court finds that the terms of the agreement interfere with the right of survivorship, the intent of the parties will not govern, and a severance will be declared.

However, with respect to an interference with the unity of possession, the courts have not been so consistent in casting aside the intent of the parties in determining whether a severance has occurred. The courts have generally held that an agreement between the tenants concerning the exclusive possession of property will "not necessarily terminate the tenancy,"³² the theory being that such an agreement does not in and of itself indicate that the tenants intended to effect a severance. Hence we might conclude, that no severance will result except where, from the language of the agreement, the parties indicate an intent to sever, or else the court finds that regardless of the intent of the parties, the agreement interferes with the rights of survivorship.

III. Commencing Partition Action

The law is settled in California that the mere commencement of an action to partition will not sever the joint tenancy relationship, but only a judgment during the lifetime of the joint tenants will have this effect.³³ The court's reasoning is that the action could be abandoned prior to judgment, resulting in no legal effect upon the estate itself.³⁴

IV. Judgment Lien

California cases are in accord that a mere judgment lien against the interest of a joint tenant is not, of itself, sufficient to operate as a severance of the joint tenancy.³⁵ In case of death of the debtor prior to execution sale, the surviving joint tenants will take the property free of any claims by the judgment creditor.³⁶ The theory is expressed in the case of *Zeigler v. Bonnell*:

"The judgment lien of respondent creditor could attach only to the interest of his debtor . . . (and) that interest terminated upon . . . death. . . . Although the title of the execution purchaser dates back to the date of his lien, that

³² *Hammond v. McArthur*, 30 Cal.2d 512, 183 P.2d 1 (1947); *Cole v. Cole*, 139 Cal. App.2d 691, 294 P.2d 494 (1956); *Gillette v. Nicholls*, 121 Cal. App. 2d 185, 262 P.2d 856 (1952).

³³ *Teutenberg v. Schiller*, 138 Cal. App. 2d 18, 291 P.2d 53 (1955); *Dando v. Dando*, 37 Cal. App. 2d 371, 99 P.2d 561 (1940); 13 CAL. JUR. 2d § 18 (1954).

³⁴ See note 33 *supra*.

³⁵ *Young v. Hessler*, 72 Cal. App. 2d 67, 164 P.2d 65 (1945); *Zeigler v. Bonnell*, 52 Cal. App. 2d 217, 126 P.2d 118 (1942); *Pepin v. Stricklin*, 114 Cal. App. 32, 299 Pac. 557 (1931); *Hilborn v. Soale*, 44 Cal. App. 115, 185 Pac. 982 (1919); Annot., 111 A.L.R. 171 (1937).

³⁶ *Zeigler v. Bonnell*, 52 Cal. App. 2d 217, 126 P.2d 118 (1942).

doctrine only applies when the rights of innocent third parties have not intervened. Here the rights of the surviving joint tenant intervened between the date of the lien and the date of the sale. On the latter date the deceased joint tenant had no interest in the property, and his judgment creditor has no greater rights."³⁷

Although a judgment lien will not sever the tenancy, an execution sale while all the tenants are alive may be had upon the interest of the debtor, and upon the purchase of the interest, a severance will be effected, and the purchaser will hold as a tenant in common with the other joint tenants.³⁸ It logically follows that no right of survivorship exists in the purchaser.³⁹

The question arises, however, whether the tenancy would be revived with the exercise by the debtor of his right of redemption within the prescribed period after the execution sale. Although there are no California cases in point, the answer is suggested by section 703 of the California Code of Civil Procedure, which reads in part:

" . . . If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate."

Combining this provision with the contingent severance doctrine, discussed previously, the answer should be in the affirmative. That is, during the period in which the debtor-joint tenant might redeem, the tenancy with the right of survivorship would be suspended, subject to reinstatement by the exercise of the redemption right. However, upon expiration of this period, an absolute vesting of the interest in the purchaser would result, effecting a total severance of the joint tenancy and necessarily a complete destruction of the right of survivorship as to the purchased interest.

V. Mortgage by One of the Co-Tenants

Although no California cases are to be found directly on the point here involved, it is clear that a mortgage in this state, as distinguished from a common law mortgage which passed legal title, creates merely a lien upon everything that would pass by a grant of the same property.⁴⁰ An analogy might then be made to the cases of a judgment lien, and the courts might hold that the creation of the lien itself will not work a severance of the joint tenancy, but severance will be effected only upon foreclosure. The application of this analogy would force the courts to find that upon the mortgagor's predeceasing his co-tenant, the lien of the mortgagee would be a nullity as against the right of survivorship of the remaining joint tenant.

Walsh, in his "Commentaries on the Law of Real Property," claims that

³⁷ 52 Cal. App. 2d 217, 220, 126 P.2d 118, 119 (1942).

³⁸ *In re Rauer's Collection Co.*, 87 Cal. App. 2d 248, 196 P.2d 803 (1948); *Pepin v. Stricklin*, 114 Cal. App. 32, 299 Pac. 557 (1931); Annot., 111 A.L.R. 171 (1937).

³⁹ *Young v. Hessler*, 72 Cal. App. 2d 67, 164 P.2d 65 (1945); *Hilborn v. Soale*, 44 Cal. App. 115, 185 Pac. 982 (1919).

⁴⁰ CALIF. CIVIL CODE § 2926.

in states where the mortgage is deemed merely to create a lien in the mortgagee,

"The mortgagee acquired a lien at law which is not subject to defeat by survivorship of the other co-tenants; the unity of interest is broken, and therefore the mortgagor's interest is converted into a tenancy in common."⁴¹

The unity of interest is destroyed, however, just as clearly in the case of a judgment lien, and this has not compelled a finding of severance in those cases.⁴²

It has also been stated that there is a distinction to be noted between a mortgage and a judgment lien,

" . . . In that a mortgage is normally but not necessarily executed voluntarily, while judgment, levy, and sale, usually, but again not necessarily, are taken against the will and over the protest of the debtor."⁴³

It is submitted that an even greater objection to the analogy is the fact that while the judgment creditor may realize upon his interest by a levy upon the property and sale upon execution at his will, the mortgagee, in the absence of a default on the part of the mortgagor-joint tenant, does not have the benefit of such an election. On the contrary, in the ordinary situation he faces the possibility of losing his security without the ability to settle for a lesser (though certain) interest in the property as security. The practical effect of treating the mortgage lien and the judgment lien similarly for the purposes of determining the continued existence of the joint tenancy

"Would be that joint tenants, though they may convey their interests as they please, could not mortgage them, since no one would accept such precarious security, dependent as it would be on the mortgagor's surviving his co-tenants."⁴⁴

As pointed out above, the destruction of the unities in California has not prevented the courts from finding, in effect, that the estate in joint tenancy might continue to exist, though in a dormant form, subject to being revived upon the happening of an event which eliminates the threat which existed to the right of survivorship. Hence it appears quite probable that when confronted with the direct question of the effect of a mortgage by one joint tenant, the California courts will utilize this theory of contingent severance. The most desirable result, it is submitted, could be achieved in this manner. At the time of the mortgage and the creation of the lien in the mortgagee, a so-called contingent severance would occur. This would become a complete severance if and when the right of survivorship was

⁴¹ II WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY 116 (1947).

⁴² See note 35 *supra*.

⁴³ Swenson and Degan, *Severance of Joint Tenancies*, 38 MINN. L. REV. 466, 497 (1954).

⁴⁴ WALSH, *op. cit.* *supra* note 41, at 13.

definitely, as distinguished from contingently, interfered with, that is, in the event that the mortgagor should predecease his co-tenant. In such case the severance would defeat any right of survivorship in the remaining tenant. This seems the result most consistent with the fact that the mortgage is a voluntary act of the tenant, and that he has the power to effect a severance by his own voluntary act without reference to the desires of his co-tenants. But on the other hand, if the mortgage lien should be satisfied by the mortgagor before the death of either him or his co-tenant, then the co-tenancy could be revived in its full vitality. If the mortgagor should outlive his co-tenant, then the event has not occurred, *ie.*, the satisfaction of the mortgage, which would revive the joint tenancy in its original form. Thus the estate would still be in its state of contingent severance and there would be no right of survivorship in the mortgagor, and the mortgagee's security would still be represented by an undivided one-half interest, the undivided one-half interests of the deceased tenant passing to his heirs. It is believed that by the utilization of this theory the rights of all the parties would be best protected, and a result achieved which would be most consistent with the decisions of the courts in the cases of conveyances.

If the security transaction takes the form of a trust deed, which it commonly does in California, the legal result of such a transaction is essentially that of a mortgage with a power of sale.⁴⁵ Although the title is actually conveyed in the case of a trust deed, this is said to be solely for the purpose of security, leaving in the trustor or his successor a legal estate in the property as against all persons except the trustee and those lawfully claiming under him.⁴⁶ Therefore, the same reasoning applicable to the execution of a mortgage should be applied, and the identical result reached with respect to a contingent severance as in a trust deed conveyance.

VI. Conclusion

California, as opposed to most modern jurisdictions, has at least to some extent apparently chosen to follow the example of the common law in treating the estate in joint tenancy as a desirable rather than an undesirable legal relationship.⁴⁷ They have protected, indeed to some extent nurtured, the estate, where many other jurisdictions have avoided it wherever possible.⁴⁸ California has in practice ignored in varying degrees the "four unities test," while constantly paying it lip service. The courts have ignored it in favor of what is felt to be a much more desirable formula, which is to follow the intent of the parties wherever possible, and to preserve the joint tenancy so long as the essential characteristic thereof, survivorship, has not been fatally interfered with. Although some inconsistency may result in

⁴⁵ *Tyler v. Currier*, 147 Cal. 31, 36, 81 Pac. 319, 321 (1905); *Sacramento Bank v. Alcorn*, 121 Cal. 379, 383, 53 Pac. 813, 814 (1898).

⁴⁶ *Bank of Italy v. Bentley*, 217 Cal. 644, 656, 20 P.2d 940, 944 (1933).

⁴⁷ For collection of statutes see, II AMERICAN LAW OF REAL PROPERTY 14 (footnote) (1952).

⁴⁸ *Ibid.*

the opinions, this would appear to be nothing more than normal where an antiquated formal rule of law, easy of application, is to be discarded in favor of a test which is possibly more difficult of application (though certainly not impossible) and which arrives at a result more in keeping with the modern concepts of property law.