Survivorship Deeds in Ohio

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The term "surviviorship deed" is commonly used in Ohio to describe a deed conveying land to two persons with express language that the survivor shall take the whole estate.1 No Ohio case dearly states exactly how the survivor takes.

The grantees in a "survivorship deed" might be (1) joint tenants; (2) tenants by the entirety if they are husband and wife; (3) tenants in common for life with (a) contingent remainders, or (b) a vested remainder in one subject to being divested by an executory interest in the other; (4) tenants in common in fee with executory interests.

At common law a transfer to A and B and their heirs without qualifying words created a joint tenancy if A and B were not husband and wife.2 If A and B were husband and wife, they would take as tenants by the entirety.3 If A and B took as joint tenants, on the death of either, the survivor had the whole estate,4 unless during their joint lives A or B had

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1 Cases in which the survivor takes the entire interest in personal property in accordance with a contract are clearly distinguishable from cases involving survivorship deeds.
2 2 BL. COMM. *180.
3 Id. at *182.
4 Id. at *183.
NOTES

destroyed the joint tenancy by conveyance of his undivided interest. Joint tenants have had the right to partition since 1540.

The common law favored the concentration of feudal obligations in a single individual and for that reason favored the creation of joint tenancies by requiring qualifying words to create tenancies in common. When the reason for this rule no longer existed, the preference—not joint tenancy—became inappropriate. This preference has been abolished in many states as to conveyances other than conveyances of trustees. In these states an intent to create a joint tenancy in persons who are not trustees must be expressed, otherwise a conveyance to A and B and their heirs will create a tenancy in common. Other states have abolished joint tenancies or have obtained the same result by abolishing the incident of survivorship.

At common law the same conveyance that would have made persons not husband and wife joint tenants, made husband and wife tenants by the entirety. Husband and wife took as one person. At the death of one spouse the other continued to own the whole estate. This right of survivorship in a tenancy by the entirety, unlike that in a joint tenancy, could not be destroyed by a conveyance by one spouse of his interest. Tenants by the entirety were not entitled to partition. Many states allow the creation of a tenancy by the entirety without any reference to this tenancy or to survivorship. But, some states require words indicating an intent to create a tenancy by the entirety. And a few states have abolished tenancy by the entirety either by statute or by judicial determination that this estate is not in accord with modern principles governing the rights of husband and wife.

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5 Id. at *185.
6 31 Henry VIII c.1, 32 Henry VIII c. 32.
7 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 20 (1895).
8 Often the preference was not in accord with the intent of the grantor. Many injustices resulted, especially where the grantees were not related by blood or marriage. Lyman, Survivorship Deeds, 38 YALE L. J. 605, at 606 (1929). The preference became extremely unpopular, especially with courts of equity. 2 BL. COMM. *186 n. 6.
9 2 TIFFANY, REAL PROPERTY § 424 (3d ed. 1939).
10 Ibid.
11 2 BL. COMM. *183.
12 Id. at *182.
13 Ibid. As to the effect of a conveyance under statute by one tenant by the entirety to the other, see Note, 8 A.L.R. 2d 634 (1949).
14 FREEMAN, COTENANCY AND PARTITION § 64 (1874).
15 2 TIFFANY, REAL PROPERTY § 433 (3d ed. 1939).
16 Ibid.
17 Ibid.
Survivorship is an incident of joint tenancies and tenancies by the entirety. However, as early as 1735 the courts recognized that the right of survivorship could be annexed to a tenancy in common by express grant. In his notes to Coke on Littleton, Mr. Butler warned:

Here Lord Coke speaks only of a joint tenancy for life; in which case the words and the survivor of them, are merely words of surplusage; as without them, the lands, upon the death of one jointenant, go to the survivor. But, in the creation of a jointenancy in fee, particular care must be taken not to insert these words. For the grant of an estate to two and the survivor of them, and the heirs of the survivor, does not make them jointenants in fee; but gives them an estate of freehold during their joint lives, with a contingent remainder in fee to the survivor.

The right of survivorship when expressly granted to tenants in common may be in the form of a contingent remainder, a vested remainder subject to being divested, or an executory interest.

Three theories have been advanced by courts which have held that the language of certain survivorship deeds created tenancies in common for life with contingent remainders.

1. When words of inheritance are required to create a fee, a conveyance to A and B, and to the survivor and his heirs would create in A and B a tenancy in common for their lives with a contingent remainder in fee in each. Statutes enacted in many states allowing the inter vivos conveyance of a fee without words of inheritance usually provide that a fee will be conveyed unless a contrary intent appears. Thus, where words of inheritance are attached to the grant to the survivor only, an intent to

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18 It has been held that married women's property acts have abolished tenancy by the entirety. Lawler v. Byrne, 252 Ill. 194, 96 N. E. 892 (1911); Cooper v. Cooper, 76 Ill. 57 (1875). But see Smith, Tenancy by the Entirety in Illinois, 14 CHI.-KENT REV. 1 (1925). In a majority of the jurisdictions an opposite result has been reached. 2 TIFFANY, REAL PROPERTY § 433 (3d ed. 1939).

19 Vick v. Edwards, 3 P. Wms. 371 (1735).

20 COKE ON LITTLETON § 191a n.1. (Hargrave and Butler's ed. 1812).

"It is true that a right of survivorship is an incident of a joint tenancy only. In the absence of statute changing the rule, it is implied from the creation of such an estate. But, while the right is not so incident to an estate in common, it may nevertheless be annexed thereto. All that is required is that the intent to create it be expressed." Burns v. Nollette, 83 N.H. 489, 496, 144 A. 848, 852 (1929).

21 2 POWELL, REAL PROPERTY § 180 (1950).

22 "It cannot be doubted that the grant from the patentee conveyed to Vanuxam and Lambert an estate for life, and a contingent remainder in fee to the survivor; for although there is no express limitation to them for life, the express limitation of the fee to the survivor necessarily implies it." Ewing's Heirs v. Savary, 6 Ky. (3 Bibb) 235, 237 (1813).

23 RESTATMENT, PROPERTY § 39, Special Note (1936). For example, see OHIO GEN. CODE § 8510-1 which provides that words of inheritance are unnecessary "and every grant or conveyance shall convey the fee simple of the whole estate or interest which the grantor could lawfully grant unless it clearly appears by the deed that the grantor intended to convey a less estate." (Italics added).
limit the fee to the survivor may be found. Words of inheritance have never been necessary to devise a fee, but some evidence that a fee was intended to pass was generally required.\textsuperscript{24} After enactment of the English Wills Act,\textsuperscript{25} which provided that a fee should pass unless a contrary intent appeared, a devise to two persons with words of inheritance attached only to the gift to the survivor was held to create a tenancy in common for their lives with a contingent remainder in fee in each.\textsuperscript{26}

2. Courts in some of the jurisdictions which allow joint tenancies as at common law, or allow joint tenancies if the intent to create such an estate is manifested, have held that a conveyance to A and B, and to the survivor and his heirs created a tenancy in common for life with contingent remainders in fee in each, rather than a joint tenancy.\textsuperscript{27} These decisions by the courts in jurisdictions allowing the creation of joint tenancies only if such an intent is shown have been criticized on the ground that words of survivorship were probably used to overcome the presumption in favor of tenancies in common.\textsuperscript{28}

3. The third theory is applicable only in jurisdictions in which joint tenancy or the incident of survivorship has been abolished. A conveyance

\textsuperscript{24}Powell, Real Property § 183 (1950); TIFFANY, Real Property § 31 (3d ed. 1939).
\textsuperscript{25}Quarm v. Quarm, [1892] 1 Q.B. 184.
\textsuperscript{26}Quarm v. Quarm, [1892] 1 Q.B. 184.
\textsuperscript{27}The cases in which this approach has been adopted may be separated into three categories. (1) Where the words of survivorship follow the words "as joint tenants." Ames v. Cheyne, 290 Mich. 215, 287 N.W 439 (1939); Jones v. Snyder, 218 Mich. 446, 188 N.W 505 (1922); Quarm v. Quarm, [1892] 1 Q.B. 184. These cases are open to criticism, especially in Michigan where a joint tenancy may be created by use of the words "as joint tenants." See note 28, infra. (2) Where the words of survivorship are used without the words "as joint tenants" it would seem to be a matter of intent. Finch v. Haynes, 144 Mich. 352, 107 N.W 910 (1906); Schulz v. Brohl, 116 Mich. 603, 74 N.W 1012 (1898). (3) Where the words of survivorship are preceded by the phrase "as tenants in common" the intent to create something more than a mere joint tenancy would seem to be clear. Taaffe v. Connell, 10 H. L. 64 (1862); Doe v. Abey, 1 M. & S. 428 (1813).
\textsuperscript{28}Comment, 38 Mich. L. Rev. 875, 880 (1939). In Hart v. Nagasawa, 218 Cal. 685, 24 P.2d 815 (1933), the court said: "The estate contended for by appellant—a joint life estate with contingent remainder to the survivor—is of such unusual nature that before a court would be justified in holding such an estate had been created, clear and unambiguous language to that effect would have to be used." Id. at 689. Where the words of survivorship were preceded by the phrase "as joint tenants" it has been held that joint tenancies were created. Swan v. Walden, 156 Cal. 195, 105 Pac. 951 (1909); Fladung v. Rose, 58 Md. 13 (1881). Other courts have reached the conclusion that words of survivorship alone are sufficient to overcome the presumption in favor of tenancies in common. Wood v. Logue, 167 Iowa 436, 149 N.W 613 (1914); Michael v. Lucas, 152 Md. 512, 137 Atl. 287 (1927); Weber v. Nedin, 210 Wis. 39, 246 N.W 307 (1933); Estate of Richardson, 229 Wis. 426, 282 N.W 585 (1938); Dewey v. Brown, 133 Misc. 69, 231 N.Y.S. 165 (1928).
to A and B, and to the survivor and his heirs will ordinarily be construed
to create a tenancy in common for their lives with a contingent remainder
in fee in each, since it cannot possibly create a joint tenancy.\textsuperscript{29}

A conveyance might be so worded as to create in A and B estates for
life as tenants in common with a vested remainder in fee in one that
would be subject to being divested upon the vesting of an executory
interest in the other. For example, a conveyance to A and B for their
lives, then to A and his heirs, but if A predeceases B, then to B and his
heirs should be so construed.\textsuperscript{30} No case has been discovered in which
such language has been used.

It has been stated that "Where two persons purchase property to be
owned by them in common during their joint lives and at the death of
either to become the property of the other each party has an undivided
one-half interest during their joint lives and each has a vested estate in
remainder in the one-half interest of the other."\textsuperscript{31} This statement ignores
the fact that under accepted terminology there cannot be alternate vested
remainders in fee, because one vested remainder cannot divest another
vested remainder.\textsuperscript{32} Also, words of survivorship in the form of a condition precedent are generally construed to create contingent interests.\textsuperscript{33}

\textsuperscript{29} Houghton v. Brantingham, 86 Conn. 630, 86 Atl. 664 (1913); Withers v. Barnes,
95 Kan. 798, 149 Pac. 691 (1915); Molloy v. Barkley, 219 Ky. 671, 294 S.W. 168
(1927); Truesdell v. White, 76 Ky. (13 Bush) 616 (1878); Erickson v. Erickson,
167 Ore. 1, 115 P.2d 172 (1941); McPherson v. McPherson, 163 Tenn. 124, 40 S.W
2d 1027 (1931). The same result has been reached where the words of survivor-
ship followed the words "as joint tenants." Arnold v. Jack's Executors, 24 Pa. 57
(1854). Even in a jurisdiction which allows the creation of an estate in joint ten-
cy, a grant which lacks one of the essential unities but includes words of sur-

\textsuperscript{30} See note 29, supra. It would appear from a careful reading of the Hutchison case
that the court: (1) used the word "vested" to mean "non-testamentary"; (2) used a
discredited test to determine "vested," 1 SIMES, LAW OF FUTURE INTERESTS § 67
et seq. (1936); and (3) failed to distinguish between cross remainders for life
which are vested, 2 SIMES, LAW OF FUTURE INTERESTS § 655 (1936), 2 POWELL,
REAL PROPERTY § 324 (1950), RESTATEMENT, PROPERTY § 157, comment f (1936),
and cross remainders in fee which must be contingent, 1 SIMES, LAW OF FUTURE
INTERESTS § 78 (1936).

\textsuperscript{31} 1 SIMES, LAW OF FUTURE INTERESTS §§ 65, 82, 93 (1936); 3 WALSH, COM-
MENTARIES ON THE LAW OF REAL PROPERTY 293 (1947); FEARNE, CONTIN-
GENT REMAINDERS § 187a (10th ed. 1844); RESTATEMENT, PROPERTY § 250
The right of survivorship may also be created by way of a tenancy in common in fee with executory interests. A grant to A and B and their heirs, and to the survivor of them might be construed to create in each grantee an undivided one half interest in fee subject to an executory interest in the other grantee.\textsuperscript{34}

It is important to distinguish the right of survivorship as an incident of a joint tenancy from that which is annexed to a tenancy in common for life or in fee. The survivorship incident to joint tenancy may be destroyed by either joint tenant, without the consent of the other, by an inter vivos conveyance of his interest, but the survivorship annexed to a tenancy in common may not be destroyed by one tenant in common without the consent of the other.\textsuperscript{35}

While the right of survivorship incident to a tenancy by the entirety is similar to that annexed to a tenancy in common in that neither can be destroyed by one tenant's conveyance to a third person, there are certain fundamental differences. One of these differences is that a divorce ordinarily terminates a tenancy by the entirety since that estate was based on the unity of husband and wife.\textsuperscript{36} However, the right of survivorship attached by express grant to a tenancy in common would not be terminated by divorce.

Since the decision of the Ohio Supreme Court in Sergeant v. Steinberger in 1826,\textsuperscript{37} it has often been said that neither joint tenancies nor tenancies by the entirety exist in this state.\textsuperscript{38} That case involved a devise to husband and wife and to their heirs and assigns. Upon the death of the wife, her heirs claimed an undivided one half interest in the lands. The husband contended that he was entitled to the fee by right of survivorship. The court held that the husband and wife were tenants in com-

\textsuperscript{34} Rowland v. Rowland, 93 N.C. 214, (1885). See 2 TIFFANY, REAL PROPERTY § 424 (3d ed. 1939).

\textsuperscript{35} Taaffe v. Connée, 10 H.L. 64 (1862). "A survivorship attached to a tenancy in common is indestructible except by the voluntary action of all the tenants in common to do so." Anson v. Murphy, 149 Neb. 716, 720, 32 N.W. 2d 271, 273 (1948). See Tenants in Common with Benefit of Survivorship, 168 Law Times 467 (Dec. 7, 1929).

\textsuperscript{36} 2 TIFFANY, REAL PROPERTY § 436 (3d ed. 1939). A recent Pennsylvania statute provides that a tenancy by the entirety shall become a tenancy in common upon the granting of a divorce to the parties. PURDON'S PA. STAT. ANN. tit. 68 § 501 (Supp. 1949), noted in 11 U. OF PITT. L. REV. 469 (1950).

\textsuperscript{37} 2 Ohio 305 (1826).

\textsuperscript{38} In re Estate of Hutchison, 120 Ohio St. 542, 166 N.E. 687 (1929); Farmers' and Merchants' National Bank v. Wallace, 45 Ohio St. 152 (1887); Wilson v. Fleming, 13 Ohio 68 (1844), and many other opinions of the Ohio courts. 2 TIFFANY, REAL PROPERTY §§ 419, 433 (3d ed. 1939); RESTATEMENT, PROPERTY § 66 Special note (1936); McDermott, OHIO REAL PROPERTY LAW AND PRACTICE § 13.12a (1950); OPS. ATT'Y GEN. [Ohio] 473 (1920); 11 Ohio Jur. 162-166.
mon and that the wife’s interest passed to her heirs. There was no statute expressly affecting the creation of joint tenancies or tenancies by the entirety, but the court ruled that a statute allowing joint tenants to have partition evidenced an intent on the part of the legislature to abolish joint tenancies. The court failed to note that joint tenants have had the right to partition since 1540, and that this right is not inconsistent with the estate. If the Ohio statute had provided for the partitioning of land owned by tenants by the entirety, there would have been sufficient reason for the Ohio Supreme Court to conclude that the legislature intended to alter tenancy by the entirety as it existed at common law. The court in the Stemberger case recognized the fact that the joint tenancy of husband and wife varies in many principles from other joint tenancies but failed to limit its remarks to tenancies by the entirety. If the court had so limited its consideration, it would have found no support for its decision in a statute that provided for involuntary partition by joint tenants.

The court in the Stemberger case also stated that the estate of joint tenancy was not in accord with “principles of justice, nor in any reasons applicable to our society or institutions.” The soundness of this statement when applied to tenancies by the entirety may be questioned in view of the fact that many jurisdictions allow the creation of a tenancy by the entirety without words of survivorship and in view of the fact that in Ohio most “survivorship deeds” are to husband and wife. The statement does express the overwhelming sentiment against the common law preference in favor of joint tenancies. Since tenants by the entirety are husband and wife, few injustices result from a rule allowing the creation of that estate without words of survivorship. If the court in the Stemberger case had restricted its opinion to the specific conveyance before the court and the decision of the court that the wife’s heirs took her undivided half interest in the fee at her death, it would have merely stated that a deed to husband and wife without words of survivorship creates a tenancy in common. And this is, in effect, all that the court held.

Miles’ Lessee v. Fisher, decided in 1840 involved a devise to three persons “to the survivors or survivor, to hold as joint tenants, and not as

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28 1 Chase’s Statutes 194 (1795). The present Ohio statute on partition, OHIO GEN. CODE § 12026, does not mention joint tenants. It would seem that this omission is in accordance with the statements that joint tenancy does not exist in Ohio.

40 See note 6, supra.

41 See note 14, supra.

42 2 Ohio 305, 306 (1826).

43 The language of the court can probably be explained by the ease with which a conveyance was construed to create a joint tenancy at common law. See Lyman, Survivorship Deeds, 38 YALE L. J. 605, at 606 (1929).

44 10 Ohio 1 (1840)
tenants in common, in trust. " At the death of one of the trustees, the heir of the devisor brought an action to oust the remaining trustees from possession of one third of the real estate. The court found that (1) the testator intended to give the trustees a life estate only, (2) the provision that the trustees should take as joint tenants was ineffectual since joint tenancy did not exist in Ohio, and (3) the trustees had the right of survivorship because it was expressly granted to them in the instrument. It is to be noted that even in jurisdictions which have expressly abolished joint tenancy by statute the devise of the Miles case, even without the words of survivorship, might have created a right of survivorship, for it has been held that such statutes do not affect joint tenancies for life.46 Also, statutes abolishing joint tenancy frequently except from their operation conveyances to trustees.46 A limited form of survivorship between fiduciaries is now allowed in Ohio by statute,47 but if survivorship is desired in the ordinary inter vivos trust it would seem that it must be expressly provided for.

The decision in the Miles case laid the groundwork for the more important decision that was to come two years later in 1842. In Lewis v. Baldwin,48 the court was confronted with a deed which conveyed land to a husband and wife, "to them jointly, their heirs and assigns, and to the survivor of them, his or her separate heirs and assigns." In holding that upon the death of the wife the husband took the fee, the court said:49

He holds title, not upon the principle of survivorship, as an incident to a joint tenancy, but as grantee in fee, as survivor, by the operative words of the deed. The entire estate, by the death of the wife, is vested in him and his heirs. This is the effect of the words of grant, contained in the instrument of conveyance.

This language, although seemingly quite conclusive, was not necessary to the result. The court could have reached the same result by stating that the grantees took as tenants by the entirety or as joint tenants.

The case has been cited, however, as one in which the grantees took as tenants in common for life with contingent remainders.50 The decision has been followed by the Ohio courts,51 but no court has ventured to make

46 Burton v. Cahill, 192 N.C. 505, 135 S.E. 332 (1926); Powell v. Allen and Terrell, 75 N.C. 450 (1876); Jones v. Cable, 114 Pa. 586, 7 Atl. 791 (1887).
47 2 TIFFANY, REAL PROPERTY § 424 (3d ed. 1939).
48 OHIO GEN. CODE § 10506-56 provides in part, "When two or more fiduciaries have been appointed jointly to execute a trust, and one or more of them dies the title shall pass to the surviving or remaining fiduciary or fiduciaries who shall execute the trust, unless. " For a definition of 'fiduciary' see OHIO GEN. CODE § 10506-1. A former statute, Ohio General Code Section 10595, made a similar provision for trustees appointed by will.
49 Lewis v. Baldwin, 11 Ohio 352, 355 (1842).
50 1 TIFFANY, REAL PROPERTY § 191 (2d ed. 1929) See notes 52, infra.
a clear statement as to how the survivor takes. The actual words used in
the Ohio cases have varied.\textsuperscript{52} It would seem, however, that in Ohio where
words of survivorship are used in a deed they will be given effect.

It has been stated that none of the Ohio decisions is inconsistent with
the rule followed in other jurisdictions that a tenancy in common will be
favored, but that by the use of appropriate language a joint tenancy or
tenancy by the entirety may be created.\textsuperscript{53} Another writer has gone so far
as to state that joint tenancies and tenancies by the entirety may be created
in Ohio by the use of words of survivorship.\textsuperscript{54} It must be admitted that
none of the decisions is inconsistent with a rule requiring words of sur-
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\textsuperscript{52} In re Estate of Hutchison, 120 Ohio St. 542, 116 N. E. 687 (1929); Ross v. Bowman, 32 Ohio Op. 27 (Comm. Pl. 1945); In re Estate of Dennis, 30 Ohio N.P (N.S.) 118 (1928)
\textsuperscript{53} In Lewis v. Baldwin, the conveyance was to husband and wife "jointly, their heirs
and assigns, and to the survivor, his or her separate heirs and assigns." Since in
this form the words of inheritance precede the limitation to the survivor and his
heirs it would be difficult to contend that joint life estates and contingent remain-
ders have been created. Yet, if joint tenancies and tenancies by the entirety do not
exist the language must mean something. It is suggested that what is actually
created in this case is a tenancy in common subject to cross executory interests.
The survivor takes by way of executory interest and not by way of contingent re-
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\textsuperscript{54} Martin, The Incident of Survivorship in Ohio, 3 OHIO ST. L. J. 48 (1936).
\textsuperscript{55} In re Estate of Hutchison, a certificate for pre-
ferred shares of stock was issued to a husband and wife "as tenants in common of an
undivided equal interest for their respective lives, remainder
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\textsuperscript{56} "Then it would seem to be the settled law of Ohio, that neither joint tenancies nor
tenancies by the entirety can be created except by the acts of the Parties, but that
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\textsuperscript{57} Conway, BRIEF ON CONCURRENT OWNERSHIP 56 (1938)
right of survivorship annexed to a tenancy in common for life or in fee, and in view of the fact that the Ohio courts have consistently maintained that the right of survivorship in a "survivorship deed" is not the result of a joint tenancy, or a tenancy by the entirety, it would seem that no positive statement can be made to the effect that a "survivorship deed" creates a joint tenancy or tenancy by the entirety.

The present status of the Ohio law may be demonstrated by two illustrations.

1. Suppose that O conveys land to H and W, husband and wife, using words of survivorship. H and W obtain a divorce and no transfer of property is made. H conveys his interest to C. Then H dies. C brings an action for partition claiming title to an undivided one half interest. What result?

   (a) The court could continue to reject the distinction between joint tenancies and tenancies by the entirety and hold that when words of survivorship are employed a joint tenancy is created. Thus, H's conveyance to C would have destroyed the joint tenancy and C would prevail.

   (b) The court might hold that when words of survivorship are attached to a grant to husband and wife, a tenancy by the entirety is created. Thus, it would be possible to hold that the divorce destroyed the tenancy by the entirety and that H's subsequent conveyance to C was effective to convey H's undivided one half interest. This result is desirable, for although it allows the destruction of the right of survivorship upon divorce of the parties, the right of survivorship may not be destroyed during the marriage by an inter vivos conveyance by one spouse to a third person. Such a holding, however, seems somewhat unlikely in view of the language in the Ohio cases that tenancy by the entirety does not exist in Ohio.

   (c) The court could hold that survivorship had been annexed to a tenancy in common for life or in fee, and that a joint tenancy or tenancy by the entirety was not created. In this case, the divorce would not have destroyed W's right of survivorship and the conveyance to C passed no more than H's contingent interest. This result, while not as desirable as a holding that a tenancy by the entirety had been created, seems the most likely in view of the decided cases.

2. The second illustration involves a conveyance of land to A and B (not husband and wife) with words of survivorship. During their joint lives A conveys his interest to C. A dies. What interest does C take? Here the court would be forced to hold either that a joint tenancy was created or that a right of survivorship had been annexed to a tenancy in common.

The first result would seem the more desirable, for if the second