IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2004HCV01803

BETWEEN	BERTRAM COOPER (As Executor in the ESTATE LUCILLE ADELA COLEMAN)	CLAIMANT
AND	LINFORD COLEMAN	DEFENDANT

Mrs. Hilma McNeil instructed by Hilma McNeil & Co. for the claimant.
Mr. Carlton Williams instructed by Williams, McKoy & Palmer for the defendant.

January 30, February 16 & June 15, 2007

McDONALD-BISHOP, J (Ag.)

1. This claim involves the question as to whether a joint tenancy has been severed for the purposes of succession. This action is brought by the claimant as executor in the estate of Lucille Adela Coleman (the deceased) for, *inter alia,* a declaration that the joint tenancy ownership by the deceased and Linford Coleman (the defendant) in a parcel of land being part of Garden Hill in the parish of St. Catherine was severed during the lifetime of the deceased and that the deceased's estate is entitled to a half interest share in the said land.

2. The defendant, in his defence, avers that any bequest purportedly made by the deceased with respect to this land fails as the principle of *jus accrescendi* applies and so he is the sole owner of the property.

THE FACTS

3. The deceased and the defendant were husband and wife having been married in England in 1962. In or around 1962, they purchased the plot of land in dispute

with the intention to build their matrimonial home for them to occupy when they returned to Jamaica. They returned to Jamaica in or around 1967. In 1967, by Deed of Conveyance, the property in question was conveyed to both parties and the father of the deceased, Raymond Cooper (his name added as a matter of convenience) as joint tenants. Upon the death of Raymond Cooper in 1972, the deceased and the defendant became the undisputed proprietors of the property by virtue of the right of survivorship.

4. The deceased and the defendant lived together on the property until around 1994 when the defendant left the matrimonial home. The deceased, who by this time had become ill, remained in the matrimonial home.

5. On February 15, 2001, the deceased wrote to the defendant, through her attorneys-at-law, Hilma McNeil & Co., indicating her desire to purchase his interest in the property. Given the pivotal role this letter plays in these proceedings, it is necessary that its full terms be disclosed. It reads as follows:

> February 15, 2001
>
> **BY HAND**
>
> **Mr. Lynford Hugh Coleman**
> Browns Hall District
> Point Hill P.O.
> St. Catherine
>
> Dear Sir,
>
> **Re: Division of Matrimonial Property**
> **Our Client- Lucille Adela Coleman**
>
> We represent Mrs. Lucille Adela Coleman who has instructed us that she, along with yourself are joint owners of unregistered property at Garden Hill, on which the matrimonial home stands.
>
> Our client has further instructed us that she has been living in the home for years but that you have vacated same and have been living elsewhere. Our client is desirous of buying your one half interest in the property. However, in order that an acceptable purchase price be fixed, it will be necessary to have the property assessed by a reputable valuer. You are therefore asked to agree one of the following valuers.

1) V. B. Williams Realty Co. Ltd
Real Estate Dealers & Valuers
7 Tangerine Place
Kingston 10

2) Allison Pitter &Co.
Chartered Valuation Surveyors
1 Tremmain Road
Kingston 6

3) C. D. Alexander & Co. Realty Ltd.
164 Harbour Street
Kingston

Please indicate at your earliest convenience which of the above you will agree to provide a Valuation Report, so that we can move forward without delay. You will then be paid one half of the value of the property net of necessary deductions.

Yours faithfully,
HILMA McNEIL & CO.

PER: (sgd):........................
HILMA McNEIL

6. On March 21, 2001, the defendant replied through his attorneys-at law, Williams, McKoy & Palmer. Again, the terms of the reply are critical to my deliberations and so it is absolutely necessary that the terms of this letter also be disclosed. It reads:

March 21, 2001

Hilma McNeil & Company
Attorneys-at-Law
77 Knutsford Boulevard
Kingston 5

ATTENTION: MRS. HILMA McNEIL

Dear Madam,

Re: Division of Matrimonial Property
Our Client- Lucille Adela Coleman

We act for Mr. Lynford Coleman who has instructed us to indicate to you that Allison Pitter & Company is his choice of valuators.

You may proceed to order the valuation report with a view to entering into an agreement for the sale to your client of our client's interest in the premises.

Yours truly,
WILLIAMS, McKOY & PALMER

PER (sgd) --------------------------------
CARLTON G. WILLIAMS
Attorney-at-Law

7. On June 20, 2001, the deceased's attorneys- at- law wrote to the defendant's attorneys indicating the following:

BY FAX

June 20, 2001

Messrs. Williams McKoy & Palmer
Attorneys-at-Law
1 Eureka Crescent
Kingston 5

ATTENTION: MR. CARLTON WILLIAMS

Dear Sirs:

Re: Divorce- Lucille Adela Coleman vs. Lynford Coleman- Suit No. F/2001 C-028

We refer to your letter to us dated March 21, 2001 regarding division of Matrimonial Property between captioned parties. However, the issue of Divorce is to be addressed. We have filed Petition and have in hand the copy for service on the Respondent.

Would you be good enough to get your client's instructions as to whether you can accept service of the copy Petition on his behalf. We would be grateful.

Yours faithfully,
HILMA McNEIL & CO.

PER: (sgd).........................
For HILMA McNEIL

8. This letter signaled the end of correspondence between and on behalf of the parties. On July 25, 2001 the deceased died. She left a will dated March 9, 2001 in respect of which probate was granted by this Court. By this will, she purports to devise her one- half interest in the property to her three sons.

9. It is contended on the claimant's behalf that the intention expressed by the deceased to purchase the interest of the defendant and the defendant's choice of a valuator towards that end was sufficient to sever the joint tenancy and therefore oust the operation of the right of survivorship in favour of the defendant. Accordingly, it is argued, there was a severance of the joint tenancy during the lifetime of the deceased and so the estate is entitled to half- share interest in the property

10. The defendant, in his defence filed, denies that the letter dated February 15, 2001 by the deceased was an offer by the deceased to purchase his interest in the property. According to his averments, there was no offer to sell; there was no acceptance and no agreement between them. The letters were no more than to seek consensus as to the preference of a valuator for the purpose of having the property valued. He also avers that, in any event, the deceased had brought to an end any further discussions or intention to entertain any transaction as regards the matrimonial home by the letter of her attorneys-at-law dated June 21, 2001(the last letter). Curiously, although this was pleaded, the defendant gave no evidence of what the dealing was between the deceased and himself or of his intention pertaining to the joint tenancy. The resolution of the case rests purely then on the interpretations to be accorded to the written documents exchanged between the parties and the inferences to be drawn, if any, from their conduct in relation to the common property.

THE ISSUE

11. The ultimate question that falls for determination is whether there was a severance of the joint tenancy with the parties entering into negotiation for the sale of the defendant's share in the property to the deceased.

12. I must confess from the outset that this is a question that does not admit of an easy answer without a thorough examination of the relevant law on the question of severance of a joint tenancy. The authorities on the question, as will be demonstrated, are themselves conflicting and are not readily reconcilable one with

the other. This is primarily because, ultimately, the resolution of the question as to whether there is a severance hinges substantially on a finding of fact.

THE LAW

13. It is well established that the essence of joint tenancy is that each joint tenant is wholly entitled to the whole of the estate which is the subject of the co-ownership. In joint tenancy, no joint tenant holds any specific or distinct share himself, but each is, together with the other joint tenant or tenants, vested with the entire interest in the property in question. In the words of Bracton, 'each joint tenant *totum tenet et nihil tenet*: each holds everything and yet holds nothing." They hold as one single owner as against the whole world. It is, therefore, characterized by the presence of the four unities- unity of time, possession, interest and title.

14. It has, however, been said that the right of survivorship (or *jus accrescendi*) is the 'grand and distinguishing incident of joint tenancy'. By the right of survivorship, the entitlement of each joint tenant is eliminated on his death. This right takes precedence over any testamentary disposition made by a joint tenant. This is the core of the defendant's contention.

15. The right of survivorship, however, may be destroyed by severance of the joint tenancy during the lifetime of the joint tenants. This would mean a severance of at least one of the essential unities. When this occurs, the joint tenancy becomes a tenancy in common and each party is entitled to a distinct share. With severance, the right to survivorship is totally and irrevocably destroyed and so testamentary dispositions may take effect. This is the core of the claimant's contention.

16. It is no bar to severance that the joint tenants are husband and wife: **Bedson v Bedson** [1965] 2 Q.B. 666. So, there can be severance in a case of this nature where the dispute relates to an issue between husband and wife. However, the onus of proving that there is severance lies wholly on the party asserting it and so in this case it is on the claimant (**Re Denny** (1947) 177 L.T. 291, at 293).

17. It must be noted at the very outset that the U.K. **Law of Property Act, 1925** does not apply to our jurisdiction and so our position on severance has to be guided by the pre -1926 law of the U.K. Accordingly, a joint tenancy in our jurisdiction can be severed at law or in equity. The methods of severance of a joint tenancy before 1926 was authoritatively laid down by Sir Page Wood, V-C (later became Lord Hatherly) in **Williams v Hensman** (1861) vol. 70 E.R. 862 at 867. This judgment has been widely accepted as the applicable pre-1926 law. It was stated thus:

> "A joint tenancy may be severed in three ways. In the first place, an act of anyone of the persons interested operating upon his own share may create a severance as to that share. The right of each joint tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the *jus accrescendi.* Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund- losing, of course, at the same time, his own right of survivorship. Secondly, a joint tenancy may be severed by mutual agreement. And in the third place, there may be severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention with respect to the particular share, declared only behind the backs of the other persons interested. You must find in this class of cases a course of dealing by which the shares of all the parties to the contest have been effected, as happened in the cases of *Wilson v Bell* (1843) 5 Eq. R 501 and *Jackson v Jackson* (1804) 9 Ves. Jun, 591."

18. The resolution of the issue in this case must, of necessity, begin and end with the application of the rules as laid down by Sir Page Wood, V-C in **Williams v Hensman.** The facts must, therefore, fit within at least one of those rules before a finding of severance in equity can properly be made. In **O'Connor Estate v Lindsay** (1987) 51 Man R. 2(d) 65, the Manitoba Court of Queen's Bench (Canada) after re-affirming the **Williams v Hensman** formulations, stated: *"these principles have been applied in many cases, the outcome generally speaking, being determined by each court's finding of fact."* A thorough examination of the facts of this case within the ambit of **Williams v Hensman** is, therefore, imperative.

19. Mrs. McNeil, on behalf of the claimant, has prayed in aid **Williams v Hensman** in support of her contention that there was a severance of the joint tenancy during the lifetime of the deceased. In this regard, she submitted:

> "It is very clear that the law does not require any special words or indeed any formality to sever a joint tenancy. In many cases, the act of severance has to be inferred from the conduct of the parties. The present case is one such instance where there was no express mutual agreement by the parties but on an examination of the course of dealings of the parties the inescapable conclusion is that the joint tenancy here was severed during the lifetime of LUCILLE ADELA COLEMAN."

20. Mr. Williams, however, argued, on behalf of the defendant, that the circumstances in this case do not fit into any of the three limbs of **Williams v Hensman** in order to support a finding that the joint tenancy was severed during the lifetime of the deceased. This divergence in view now takes me to an analysis of the facts within the applicable legal principles extrapolated from some relevant authorities.

ANALYSIS OF THE LAW AND THE FACTS

Is there an act severing the joint tenancy?

21. The first rule of **Williams v Hensman** stipulates that any act of any of the joint tenants operating upon his share is enough to sever his share; this is usually by alienation or by any act that affects the beneficial interest. Based on the evidence in this case and the argument of counsel for the claimant, it is accepted that the claim of severance is not made within the first rule of Sir Page Wood, V-C's formulations as there is no act on the part of any of the parties operating on his share so as to create a severance of that share.

The effect of a unilateral declaration of intention to sever

22. The deceased had initiated correspondence to the defendant offering to purchase his share. This was in writing. The submissions of both counsel have raised the issue as to whether this action of the deceased constituted a notice of her intention to sever the joint tenancy and so would be effective in severing it. It cannot be questioned that there was a clear intention expressed by the deceased in her letter dated February 15, 2001 to have the joint tenancy severed. Also, there can be no dispute that this was communicated to the defendant. The question at this point then

becomes: what is the legal effect, if any, of the deceased's offer to purchase the defendant's share in the property?

23. Under the common law, a mere declaration of an intention to sever without the agreement of the other joint tenant was not effective to sever a legal joint tenancy. As Lord Hardwicke, LC said:

> "If no agreement then there must be an actual alienation to make it amount to a severance. The declaration of one of the parties that it be severed, is not sufficient, unless it amounts to an actual agreement."(**Partriche v Powlet** (1740) 2 Atk. 54.)

24. This principle was followed in **Re Wilks, Child v Bulmer** [1891] 3 Ch. D. 59 and **Nielson- Jones v Fedden** [1974] 3 All E.R. 38. In **Re Wilks**, a fund had been carried over in an administration action for the benefit of three infant plaintiffs "as joint tenants." One of the plaintiffs (Wilks) upon attaining twenty one instructed his solicitors to have his one-third share paid out to him. The solicitors actually obtained leave to add an application to a pending summons for payment of his one-third share to him. Wilks' evidence was completed but the amended summons was not reached. He died and the question was whether there had been a severance of his share. The court held that there had not been a severance as nothing was done by Wilks or on his behalf to amount to a severance. Stirling, J. stated that in order to bring about severance, the act of the joint tenant must be of a final and irrevocable character which effectively stops him from claiming any interest in the subject matter of the property.

25. **Nielson-Jones v Fedden** examined the question, as in this case, as to whether there was severance of a joint tenancy held by a husband and wife in a house acquired by them during the course of their marriage. The facts are summarized as follows:

> The plaintiff (formerly Mrs. Todd) owned a house as joint tenant with her late husband, Mr. Todd. The marital relationship broke down with no hope of reconciliation. The plaintiff left the matrimonial home with the children and the husband was left in occupation of it. The house was too big for the husband alone to

occupy and it became obvious to the couple that the husband would need a smaller place. It was recognized by them that it would have been necessary to sell the jointly owned house so that the husband could be enabled to purchase a smaller house for his own benefit. The parties entered into discussions and subsequently signed a memorandum for the husband to "use his entire discretion & free will' to sell the house and to use the funds realized to his new home if it was decided to sell "in order to provide a home of substance for his children when visiting to stay and for himself to live." The wife was formally a party to that agreement.

After discussions and correspondence between the parties and their legal advisers, both parties made it plain that they were both looking forward to an ending of the joint tenancy in the proceeds of sale of the house. The negotiations did not result in any actual agreement apart from an agreement whereby sums of £200 were paid to each of the parties by the purchaser out of the deposit of £1000 on the house and two small bills that were paid for work done on the house. The husband died suddenly and the sale of the house was completed in due course by the wife and a co-trustee whom she appointed. The husband by will had left the residue of his estate to his children. The wife brought proceedings for a declaration that, by survivorship, she had become entitled to the proceeds of sale. The husband's executors, however, contended that the joint tenancy had been severed before the husband's death.

26. One of the grounds on which the defendants argued that there was a severance, and which is immediately relevant to my deliberations at this point, was that the correspondence disclosed an unequivocal declaration by the husband that he wished to sever the joint tenancy so as to make himself master of a one-half share of the proceeds of sale. Walton, J. held that the wife had become, by survivorship, beneficially entitled to the whole of the net proceeds of sale, except for the portion that had already been distributed. One of his reasons for denying that there was a severance was that a unilateral declaration of intention was not sufficient to sever a joint tenancy. He declared (p.45):

> "As to (ii), I shall first of all assume in favour of counsel for the executors that the correspondence does indeed disclose an unequivocal declaration by Mr. Todd to the effect that he wishes to sever the joint tenancy so as to make himself master of a one-half share of the net proceeds of sale of the property.

The question then is, can such a declaration- a unilateral declaration- ever be effective to sever a beneficial joint tenancy? It appears to me that in principle there is no conceivable ground for so saying that it can. So far as I can see, such a mere unilateral declaration does not in any way shatter any one of the essential unities. Moreover, if it did, it would appear that a wholly unconscionable amount of time and trouble has been wasted by conveyancers of old in framing elaborate assignments for the purpose of effecting a severance, when all that was required was a simple declaration."

27. These cases serve to reinforce the common law principle that there must be a final and irrevocable act of severance where the act is unilateral and so mere unilateral declaration of intention is not enough. Walton, J., after an examination of the history of a line of cases on the point, concluded that *"the whole current of the authority was against severance by means of such a declaration."*

28. There is, however, another line of authority that supports the view that a unilateral declaration of intention of one joint tenant to sever that is communicated to the other is sufficient to sever the joint tenancy in equity: **Hawksley v May** [1955] 3 All E.R., 353; **Re Draper's Conveyance, Nihan v Porter and Another** [1967] 3 All E.R., 853 and **Burgess v. Rawnsley** [1975] 3 All E.R., 142, per Lord Denning, M.R.

29. In **Hawksley v May,** Havers, J., in determining the issue whether there was severance of a trust fund, found that a letter written by one of the beneficiaries directing the trustees to pay her share of the income from the trust fund into an account was a sufficient act on her part to constitute a severance of the joint tenancy. He made to reference to the decision in **Re Wilks** in coming to his findings.

30. In **Re Draper's Conveyance,** the wife issued a summons under the Matrimonial Property Act, 1882 asking for a determination of all questions between herself and her husband in respect of their respective interests in the former matrimonial home owned by them as joint tenants and for an order for sale and for the proceeds to be distributed in accordance with their respective interests. The wife, in her affidavit in support of the summons, claimed to be entitled to a half share in the home. The order for sale was made and it was declared that the wife was entitled

to a half interest in the property but the husband died before the sale could be effected.

31. Plowman, J., after considering the dictum of Havers, J. in **Hawksley v May** and without any reference to the decision in **Re Wilks**, concluded that the beneficial joint tenancy was severed during the lifetime of the deceased husband. He maintained that the severance was effected not by the order of sale of the property but by the summons and affidavit of the wife served on the husband before he died. He stated that the summons and the affidavit in support of it clearly evinced an intention on the part of the wife that she wished for the property to be sold and for the proceeds to be divided half to her and half to the deceased. The wife's unilateral declaration of her intention, communicated to the husband through the summons and affidavit, was thus taken as effective to sever.

32. Walton, J. disapproved both the decisions of Havers, J. in **Hawksley v May** and that of Plowman, J. in **Re Draper's Conveyance.** However, in **Burgess v Rawnsley**, Lord Denning, M.R., albeit obiter, approved the dicta of Havers, J. in **Hawksley v May** and that of Plowman, J. in **Re Draper's Conveyance** and re-asserted the principle that a unilateral declaration of intention by one joint tenant, communicated to the other, is sufficient to sever the joint tenancy. He stated (p.147):

> "It is sufficient if there is a course of dealing in which one party makes clear to the other that he desires that their shares should no longer be held jointly but be held in common. I emphasize that it must be made clear to the other party. That is implicit in the sentence in which Page Wood V-C says-
>
> > 'It will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other person interested'."

33. This view, as expressed by Lord Denning, is endorsed as the preferred view by Sampson Owusu in **Commonwealth Caribbean Land Law,** at page 350. The learned author maintains that what is required for a unilateral declaration to be effective is that it should have been communicated, even if the other joint tenant is not in agreement with the proposal. This view, he noted, is supported by the learned

authors of Snell's Equity where it is reportedly stated: *"it seems that a unilateral declaration by a joint tenant communicated to the other joint tenants will effect a severance."*

34. It is important to note though that this view that is said to be the preferred view by Owusu has not been accepted by some courts of coordinate jurisdiction in the U.K., Canada and Australia. Indeed, it seems that the weight of authority is against this view. The Australian position, for instance, was authoritatively asserted by the Supreme Court of New South Wales in **Corrin v Patton** (1990) 169 C.L.R., 540. The head notes read as follows:

> "A joint tenant of land registered under the Torrens system in New South Wales executed a transfer of her interest to a trustee to be held on trust for herself. She died before the transfer was registered. The certificate of title to the land was held at all times by a mortgagee. On the issue as to whether there was severance of the joint tenancy it was held that the joint tenancy was not severed by the execution of the transfer. According to Mason, CJ and McHugh, J a unilateral declaration of intention or other unilateral act inconsistent with joint tenancy does not sever joint tenancy."

Mason, C.J. and McHugh, J., in disapproving **Burgess v Rawnsley,** stated at page 548:

> "There is no evidence in the present case of Mrs. Patton's intention to sever the joint tenancy having been communicated to Mr. Patton. But in any event there are powerful reasons for declining to adopt in Australia the approach which was taken in *Burgess v Rawnsley.* First, as the judgment of Sir John Pennycuick makes clear (38), the decision turned on the construction of s 36 (2) of the Law of Property Act 1925 (UK) which permits the severance of a joint tenancy by notice in writing by one joint tenant to the other, rather than on the state of the pre- existing law. Secondly, as a matter of history and principle, the severance of a joint tenancy can only be brought about by the destruction of one of the so called four unities: see Blackstone *Commentaries on the Law of England* (1778), vol. 2 pp. 185-186. Unilateral action cannot destroy the unity of time, of possession, or of interest unless the unity of title is also destroyed, and it can only destroy the unity of title if the title of the property acting unilaterally is transferred or otherwise dealt with or affected in a way which results in a change in the legal or equitable estates in the relevant property. A statement of intention, without more, does not affect the unity of title. Thirdly, if statements of intention were held to effect a severance, uncertainty might follow; it would become more difficult to identify precisely the ownership of interest in land which had been the subject of statements said to amount to declaration of intention. Finally, there would be no point in maintaining as separate means of severance the making of mutual agreement between the joint tenants."

35. In the Canadian case **Walker v Dubord** 92 D.L.R. (4th) 257, Rowles, J.A., in delivering the judgment in the British Columbia Court of Appeal, stated:

> "A joint tenancy may be severed by an act of one of the joint tenants operating on his own share. However, despite English authorities to the contrary, in British Columbia, a unilateral declaration of intent to sever does not result in a severance, regardless of whether notice of that intent is given to the other joint tenant(s)."

36. The seemingly conflicting state of the English position on the question is noted to have been apparently settled, however, in **Harris v Goddard** [1983] 3 All E.R. 242, a case decided in the U.K. Court of Appeal almost a decade after **Burgess v Rawnsley** was decided (see: Professor A.J. McLean, "Severance of Joint Tenancies" (1979) 57 Can. Bar Rev.1 at page 25). **In Goddard v Harris,** Lawton L.J. stated:

> "unilateral action to sever a joint tenancy is now possible, Before 1925 severance by unilateral action was only possible when one joint tenant dispose of his interest to a third party. When a notice in writing of a desire to sever is served pursuant to section 36(2) it takes effect forthwith."

37. In **Walker v Dubord**, Rowles J.A., declared:

> "Any uncertainty about the law as it existed before 1925 in respect to unilateral declarations of intent now appears to have been dispelled by **Harris v Goddard.**"

Megarry & Wade, **The Law of Real Property,** 6th edition, page 495, also expressed the view that the better view is as stated in **Harris v Goddard** that severance by a unilateral act only occurs where a joint tenant alienates his interest or in some other way act so that there is a change in the equitable interest in the property. A unilateral intention to sever would, therefore, not be sufficient in and of itself. Megarry & Wade's view clearly does not accord with that of Owusu's who sees Lord Denning's view in **Burgess v Rawnsley** as the preferred one but then Owusu made no reference to the decision in **Harris v Goddard.**

38. At the risk of getting caught in the maelstrom of opinions on this point, I would simply say that having looked at the relevant authorities within the framework of **Williams v Hensman's** methods of severance, (the starting point), I am persuaded to share the view that falling short of an act of alienation or a similar unilateral act affecting the beneficial interest so as to preclude the operation of the right of survivorship, a unilateral act or declaration of intention, without more, even if communicated, is not enough to sever the joint tenancy within the principles of **Williams v Hensman.**

39. It is my view that when one considers the methods of severance within the formulations of **Williams v Hensman,** the only rule that indicates the acceptance of a unilateral act of one joint tenant operating on his share is rule one. Where there is no such act, then unilateral intention, without more, cannot suffice for rule one. When one goes on to consider rule two, this rule speaks to mutual agreement for severance. Clearly, this would oust any unilateral act or intention communicated or otherwise. Then, when one proceeds to consider rule three, this rule speaks to a course of dealing that evinced an intention that the <u>interest of all is mutually treated</u> as a tenancy in common (emphasis added). The fact that this third method also speaks to mutuality strongly indicates that there is some element of mutuality needed on the part of the interested parties in relation to their treatment of the common property. As such, unilateral action or intention would not be sufficient. This to my mind explains the reason for Page Wood, V-C going on further to say that when it is a matter of inference to be drawn in finding severance, it is not sufficient to rely on an intention with respect to the particular share declared only behind the backs of the other joint tenants. Mutuality of intention and communication of intention seem necessary.

40. This leads me to conclude that, given that Jamaica does not have a legislative provision similar to section 36(2) of the **Law of Property Act, 1925** that provides for severance by one joint tenant giving notice in writing to the other, the deceased's

communication of her offer to purchase the defendant's share, without more, would not be a sufficient act to sever the joint tenancy.

41. Mr. Williams, on behalf of the defendant, maintained that the circumstances of this case do not amount to a severance. While I do accept that a unilateral declaration of intention might not have been enough to sever the joint tenancy, I have considered the factual circumstances of this case and I think it safe to conclude that the facts do not point merely to a unilateral intention on the part of the deceased that was communicated to the defendant, without more. This case involves written communication and conduct on the part of both parties that signaled the commencement of negotiations between them for rearrangement of their interests in the common property. This raises the issue as to the effect of such communication and conduct between the parties. This takes me to a consideration of the second and third methods of severance laid down by Sir Page Wood, V-C in **Williams v Hensman**.

Is there severance of the joint tenancy by mutual agreement?

42. It is established that joint tenants by acting together may effectively agree *inter se* to sever their joint tenancy: **Staples v Maurice (1774)** 2 ER 395 at 399. Kevin Gray and Susan Francis-Gray, **Elements of Land Law,** third edition, (2001) p. 865, noted that this provides a flexible and informal mode of severance and may either be expressed or implied. According to Megarry &Wade (supra):

> "Joint tenancy may be severed by the mutual agreement of the tenants. This is now acknowledged to be a distinct category of severance and it is no longer necessary that the agreement should be enforceable as a contract."

43. In this case, written communication was commenced by the deceased through her legal advisers for rearrangement of the parties' interest in the property in question. In contemplation of dissolution of the marriage between them, she offered to purchase the defendant's half share. She told him to select a valuator to determine the value of the property for the purchase price to be arrived at. The defendant himself responded in writing through his legal advisers. He selected a valuator and

advised the deceased, through her attorneys-at-law, to go ahead and get the valuation so that they could enter into the agreement for him to sell her his share. At the time of the deceased's death, a formal sale agreement was not executed as they were awaiting the valuation report. The report became available after the death of the deceased.

44. In **Nielson-Jones v Fedden**, Walton, J. also made the point that there was no mutual agreement to sever or any such conduct evincing a common intention to sever from the negotiations between the parties in that case. He expressed the view that the conduct of the parties in negotiating an agreement could not lead to the implication of an agreement to sever and thus severance. For, according to him, *"when parties are negotiating to reach an agreement and never do reach any final agreement, it is quite impossible to say that they have reached any agreement at all."* In fact, his view is that no conduct is sufficient to sever unless it is irrevocable.

45. I am a bit hesitant to wholly embrace this proposition as one applicable to all situations, without exception. It appears too narrow a view in light of the terms of limbs two and three of **Williams v Hensman.** To totally adopt it could lead to an inflexible position when dealing with matters of equity. We must always be guided in these matters by the maxims that equity abhors joint tenancy and that equity looks to the substance rather than the form. As Lord Denning reminded us in **Burgess v Rawnsley,** *"the thing to remember today is that equity leans against joint tenants and favours tenancies in common."* It is thus the substance and intended effect of the negotiations between the parties and not the form that should matter since the mutual agreement may be expressed or implied. I do not think that inconclusive negotiations should be ruled out as circumstances from which an agreement to sever may possibly be found simply on the basis that a final agreement has not been reached. I am prepared to accept Sir John Pennycuick's dictum in **Burgess v Rawnsley** that the significance of the mutual agreement is not that it binds the parties but that it serves as an indication of a common intention to sever. As such, there need not be a specifically enforceable agreement or a binding one or a formal one.

46. In considering the second method of severance, the central question must be whether the negotiations, inconclusive as they are, clearly and unambiguously point to an agreement between both parties and communicated between them that the joint tenancy should no longer continue. In the Australian case of **Corrin v Patton**, Deane, J. expressed the view that the *"valuable consideration for such an agreement is that each party agrees to relinquish the beneficial interest of joint tenant of the common property including the right of accretion by survivorship, in return for the share of a tenant in common."* This view does not seem to suggest that there has to be a final and irrevocable act relinquishing the beneficial interest but that both parties' agreement to do so would be sufficient as a valuable consideration to sever. It would be the mutual agreement that effect the severance and not an act of the parties, in and of itself.

47. Despite all the debate, **Burgess v Rawnsley** still stands as authority for the principle that negotiations between joint tenants which do not result in any agreement but which indicate a common intention that the joint tenancy should be regarded as severed effect a severance. **Burgess v Rawnsley** is also authority for the view that there is severance even though the agreement is revocable and may never be carried out to performance. This runs counter to the views of Walton, J in **Nielson- Jones** that inconclusive negotiations can never effect severance. It is useful to summarize the facts of **Burgess v Rawnsley.** The head notes, which I accept as reflecting the substance of the case, reveal the following facts:

> Mr. Honick was a sitting tenant of a house. The owner offered to sell him the house. He told Mrs. Rawnsley, who was a widow. She said she would go half share. Mr. Honick had the house conveyed in his name and Mrs. Rawnsley as joint tenants. The reason for that was that Mr. Honick firmly believed he was going to marry Mrs. Rawnsley and it was his intention that the house should be the matrimonial home. He had never mentioned marriage to Mrs. Rawnsley and she never contemplated marrying him. Her reason for joining in the purchase was to acquire the upstairs flat in the house while Mr. Honick would occupy the downstairs. They contributed to the purchase price in equal shares. The expectations of neither party were fulfilled. Mrs. Rawnsley would not marry Mr. Honick and he refused to let her occupy the upstairs flat. Subsequently Mr. Honick made an oral agreement to purchase Mrs. Rawnsley's interest in the house for £750.00. He instructed his solicitors to prepare the necessary documents. Mrs. Rawnsley changed her mind that she was not satisfied with £750.00 but wanted £1000.00. Mr. Honick decided to leave things as

they were. He continued to live in the house paying all the outgoings. He died three years later.

The house was sold and the plaintiff, as Mr. Honick's administratrix, claimed that she was entitled to half share in the proceeds of sale on the grounds, inter alia, that because the separate contemplation of the parties at the time of the purchase had failed, the objects of the trust had failed and there was a resulting trust in favour of the plaintiff, as administratrix, of half the beneficial interest in the house.

48. The majority found (Lord Denning dissenting) that there was no resulting trust. However, on the issue of severance, Their Lordships all agreed that the plaintiff's claim should succeeded. It was found that Mr. Honick and Mrs. Rawnsley had effected a severance of their joint beneficial interest in the house as a result of the oral agreement whereby Mr. Honick was to buy Mrs. Rawnsley's interest in the house. It was the opinion of the court that although the agreement was unenforceable, it established that the parties themselves no longer intended the tenancy to operate as a joint tenancy and they had automatically effected a severance. It was immaterial that the agreement had subsequently been repudiated. Lord Denning went further and stated, in the alternative, that even if there was no firm agreement between the parties, the course of dealing between them had clearly evinced an intention by them both that the property should be held in common and not jointly.

49. The position taken that there was a mutual agreement to sever has not gone without criticism. **Burgess v Rawnsley's** example of mutual agreement has been disapproved in other jurisdictions (Canada and Australia) and by some writers as being too broad a construction of mutual agreement. This might well be so on the particular facts of that case, but some of the principles enunciated by the judges as to the possible effects of inconclusive negotiations leading to an agreement to sever are, nevertheless, sound and I adopt them. I adopt, in particular, in relation to rule two, the words of Sir John Pennycuick when he stated at page 152:

"Rule 2 applies equally, I think, whether the agreement between the two joint tenants is expressly to sever or is to deal with the property in a manner which involves severance. Counsel for Miss Rawnsley contended that in order that rule 2

should apply, the agreement must be specifically enforceable. I do not see any sufficient reason for importing this qualification. The significance of an agreement is not that it binds the parties; but that it serves as an indication of a common intention to sever, something which it was indisputably within their power to do. It will be observed that Page Wood V-C in his rule 2 makes no mention of specific enforceability." (Emphasis added.)

50. The facts of this case are clearly different from that as obtained in **Burgess v Rawnsley** and in all the cases cited thus far. In fact, it has proven extremely difficult to extract consistent principles from the many cases in this area. The position of inconclusive negotiations as effecting severance is very unsettled. There is thus no clear precedent. Each case turns on its own peculiar facts and so this case too, like any other, will have to be resolved on its own peculiar facts in light of the applicable law. The presence of mutual agreement is said to be, ultimately, a question of fact dependent on the circumstances of each case (**Slater v Slater** (1987) 4 BPR 9431 at 9434 as noted in Kevin Gray and Susan Francis Gray, **Elements of Land Law**, p.865.)

51. In the midst of the unsettled state of the law, Gray and Francis Gray (supra) have noted, and it has been demonstrated on several authorities, 'that the better and more modern approach is to deny severing effect to negotiations which reached a 'mere agreement in principle', if there is evidence that the parties reserved the right to alter their respective bargaining power in light of future developments.' Citing **Slater v Slater** (supra), the said authors noted that the conduct of contractual negotiations can amount to mutual agreement only if the parties unequivocally express a common intention to sever and irrespective of the outcome of the negotiations, their mutual attitude in relation to this matter is unchanging.

52. This is clearly illustrated on the facts of the U.K. case, **Gore and Snell v Carpenter** (1990) 60 P. & C.R., 456. The facts are summarized as follows:

> The wife and husband had separated but owned two properties as joint tenants. The parties entered into negotiations for rearrangement of their interests in the property. The husband made certain proposals through his solicitors to the wife concerning the properties. The wife's solicitors replied by saying that the wife had agreed in principle but that there was ancillary financial matters that had to be addressed

> before final agreement could be reached. The outstanding issues were not fully resolved between the parties and so a final agreement was not reached. The husband later died after divorce papers were served. The question arose as to whether there was a severance of the joint tenancy during his lifetime.

It was held that on the facts there was no severance of the joint tenancy. It was found that there was no mutual agreement between the parties that the joint tenancies of the property should be severed for although they had reached an agreement in principle, each party had reserved his or her rights and it was opened to either of them to argue for some other financial arrangements at the divorce hearing. Neither was there a course of dealing between the parties whereby they had evidenced their intention to treat the properties as being held under tenancies in common. The court argued that although it was possible to have a course of dealing even where negotiations broke down, there was, on the facts, no evidence that Mrs. Carpenter had committed herself to a tenancy in common prior to the property division in the divorce proceedings.

53. A similar conclusion was arrived at in the Canadian case of **O'Connor Estate v Lindsay** (supra). The court found that although there were initial negotiations between the joint tenants, the negotiations had eventually terminated and seemed to have gone in abeyance. The wife also gave evidence that prior to the death of her husband, there was the possibility of reconciliation between them and this was accepted as showing that the intention to sever was not settled. The court held that the joint tenancy was not severed.

54. It seems safe to conclude then that where there is an 'agreement in principle' and there is no evidence of any of the parties revoking such agreement or reserving the right to alter their respective positions in light of any future development, then the agreement could be sufficient to effect a severance, unless the contrary is proved.

55. This brings me to consider whether there is evidence of such a mutual agreement in this case. Here one joint tenant had left the matrimonial home. The parties then lived separate and apart for many years. The deceased fell very ill and

rendered virtually incapacitated. She decided to divorce the defendant. In the context of the contemplation of divorce proceedings, she communicated to the defendant, through her attorneys- at- law, her desire to purchase his share in the common property. This was a clear decision initially formed on the part of one joint tenant to sever. This also demonstrates that she had conceptualized the shares in the property as separate and distinct and was prepared to deal with it as such. She was, therefore, treating the property as if it were a tenancy in common whether or not in ignorance of the characteristics of a joint tenancy.

56. This decision to sever was communicated to the defendant, the other joint tenant, unlike in **Corrin v Patton** where there was no such communication. It cannot be said then that this was a unilateral statement or intention declared behind the back of the defendant. The deceased's intention, having been communicated and declared to the defendant, did not 'fall on deaf ears'. The defendant evidently sought legal advice and he then instructed his attorneys-at-law to respond to the deceased's offer to purchase his share. His response did not amount to a rejection of the proposal of the deceased to buy his share neither was there a counter offer or a reservation. He proceeded to select a valuator as proposed by the deceased in order for an acceptable purchase price to be determined. This was what was conveyed to him as the purpose for the valuation. In selecting the valuator, the defendant implicitly agreed to the deceased suggested mode of arriving at an acceptable purchase price. Up to then he raised no objection and expressed no conditionality on the selection of the valuator or on the reason for obtaining such a valuation report. He knew then that it was on the basis of the valuation that the purchase price would be determined.

57. The deceased had gone further and had clearly indicated to him that upon receiving the valuation report, she would pay to him half of the value as determined by the valuator less necessary deductions (emphasis added). She did not say that when the report was received, she would have made him an offer. She had actually indicated what she would be paying him, that is, half the value of the property as

would be determined by the valuator agreed by them. It must be noted in this context, that Walton, J in **Nielson-Jones v Fedden** was not willing to find severance on those facts because as he observed *"the memorandum in question dealt solely with the use by the husband of the whole of the proceeds of sale and, qua ownership, use was wholly ambiguous."* He maintained that it could not be implied from the fact that the husband was to have the use of the whole of the money that he was entitled to have his own half absolutely and the wife her own half absolutely.

58. The situation in the case at bar is clearly distinguishable from the circumstances as observed by Walton, J. in **Neilson-Jones v. Fedden.** In this case, the deceased had made it quite clear that the defendant would get his half -share in monetary form. This, in effect means, that she would become sole owner of the property upon paying him. Clearly, the intended ownership of the property after sale was clearly indicated. The deceased expressed no conditions or reservation to pay for the defendant's share on the terms proposed. The defendant expressed no objection. An agreement in that form as to how the property would be dealt with would naturally effect a severance as the property would no longer be held jointly. The wife would be entitled to her share absolutely and the defendant entitled to his share absolutely, albeit in the form of money. With the deceased becoming sole owner of the property, the future right of survivorship would thus be excluded.

59. With all this being implicit in the terms of the deceased's proposal, the defendant went ahead and selected the valuator. The deceased had indicated that she wished to proceed without delay. There was thus no indication of any reservation on her part. The defendant, with full knowledge of the deceased's intention, expressly advised the deceased, through his attorneys-at- law, to go ahead and take steps to obtain the valuation report with a view to entering into the agreement for him to sell his share to her. This strongly implies his acceptance of the deceased's intention to sever the joint tenancy on the terms proposed. This in my view shows, on his part, a clear intention and an unconditional acceptance of the deceased's proposal that their interests in the property be rearranged. The proposed manner of the rearrangement

of their interests would necessarily involve severance. I find that the two joint tenants had arrived at a consensus, communicated between them, that the joint tenancy be severed. The deceased on the basis of this agreement proceeded to refer the matter to the valuator whose report was received after her death.

60. Clearly, there is no agreement in the express terms saying "let us sever the joint tenancy" but, then, the correspondence between them amounted to just that. **Williams v Hensman** does not speak to the form the agreement should take. In my view, it may be expressed or implied provided it is mutual. It all depends on the facts of a particular case and whether there is evidence of both joint tenants arriving at a consensus, expressed or implied, to sever the joint tenancy. Again for emphasis, I will reiterate the words of Sir Pennycuick with which I have found favour:

> "Rule 2 applies equally, I think, whether the agreement between the two joint tenants is expressly to sever or is to deal with the property in a manner which involves severance."

On the basis of this dictum, Gray and Francis Gray (supra) summed it up neatly when they stated at page 866:

> "A 'mutual agreement' may either contemplate severance in express terms or comprise merely an agreement that the joint tenants should deal with the property in a manner which necessarily involves severance."

61. In this case, I find a mutual agreement between the parties, as deduced from their words and conduct, that there be a severance of the joint tenancy, or, alternatively, that they deal with the property in a manner which necessarily involves severance. Indeed, once there is such a mutual agreement, whether it is expressed or implied, it does not ultimately matter; whether it is contained in a formal contract or not, it does not matter. The question must be whether the parties have arrived at a consensus that the joint tenancy be severed or that they deal with the property in a manner that would necessarily involve severance.

62. Having found an 'agreement in principle' that the joint tenancy be severed, the next consideration is whether there is evidence to show that any of the parties or both, during the lifetime of the deceased, had revoked such an agreement or had

reserved the right to do so in light of any future development. Having examined the circumstances, there is no evidence that the deceased had revoked her expressed offer to buy out the defendant's share. There is no evidence that the defendant's acceptance of her proposal was met with any reservation and made subject to any condition precedent or subsequent. There was no 'without prejudice' communication between the parties on the issue. There is no evidence coming from the defendant that he had done or said anything to indicate to the deceased before she died that he was not agreeing to sell his share to her. In fact, he gave no evidence that he did not intend or agree to sell his share to her or that he had changed his mind about it. He has given no evidence to rebut the evidence contained in the correspondence between them.

63. After the correspondence as to division of the property, the next step undertaken by the deceased or on her behalf was to indicate to the defendant's legal advisers that the petition for dissolution of the marriage was ready to be served on the defendant. This piece of correspondence has nothing to do with the initial correspondence to purchase the defendant's share. It was merely to ascertain if his attorneys-at-law would accept service of the petition for the defendant. The act of the deceased in proceeding with the divorce is by no means consistent with reverting to the original position to hold as joint tenants. If anything, it is totally inconsistent with such an intention.

64. There is also evidence that after indicating her intention to purchase the defendant's share in February, 2001, the deceased also executed a will on March 9, 2001 devising her half share interest to her named beneficiaries. While the will cannot sever the joint tenancy, it is merely relevant to the question of the conduct of the deceased following on her communication to the defendant for rearrangement of their interests. The will was executed prior to her getting a response from the defendant. The will was prepared on March, 9th but the defendant replied on March, 21st. The terms of this will, which has been proved as her last will and testament, are enough to show that the deceased had conceptualized her interest as separate from

that of the defendant. The fact that she had made the will does nothing to show that she did anything that would be indicative of a contrary intention to sever the joint tenancy. There is thus no evidence that she had gone back on her original intention to purchase the defendant's share. Neither is there anything to show a change in her intention to treat their interests in the property as if severed and constituting a tenancy in common.

65. The defendant himself has not given evidence of any communication between himself and the deceased that could point to any act or conduct on the part of the deceased that would show a reversion in her original position to acquire his share. In his witness statement, he said that when Mrs. Coleman started divorce proceedings he had asked her *"how we would deal with the property and her reply was she had no intention to move from where she was and that she did not tell me to leave the house."* He has not indicated when such a conversation took place as to whether it was before the negotiation had commenced or after. In any event, I find it to be of no moment as showing an alteration in any prior decision of the parties to deal with the joint tenancy. It is not sufficient to indicate a revocation of the deceased's intention or of his intention as demonstrated in written documents exchanged between them.

66. He has also not given any evidence to show a reversion of his own position. The evidence has shown nothing from which it could be found that the parties had reserved the right to alter their position to sever the joint tenancy in light of any future development. For all practical purposes, the defendant's intention and agreement to enter into the contract of sale of his share to the deceased remained unchanged up to the date of the death of the deceased. I am left to conclude that the agreement between them to sever the joint tenancy was settled and was at an acceptable degree of finality.

67. That agreement to sever is separate and distinct from the contract of sale that would eventually be executed between them in order to effect the necessary transfer. I do not believe that Page Wood, V-C's agreement in the second rule means a

contract in the legal and formal sense of the word. I believe that any consensus formed and expressed between the parties that the joint tenancy be severed is ample to come within the rule. I, therefore, find a mutual agreement to sever the joint tenancy, as deduced from the written words and the conduct of the parties, thereby bringing the case within the second rule in **Williams v Hensman**.

Is there mutual conduct severing the joint tenancy?

68. In the event I am considered wrong on finding severance on the basis of a mutual agreement within the second rule of **Williams v Hensman**, I have also considered the circumstances within the context of the third rule to whether there is mutual conduct severing the joint tenancy. In the words of Sir Page-Wood, V.C., for there to be severance on this ground, there must be *'any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.'*

69. Gray and Francis Gray (page 867) noted that in spite of the close conceptual similarity between this rule and the 'mutual agreement' rule, *'the balance of judicial opinion is now to the effect that the third category of severing circumstance is not a mere subheading of rule 2 of Page Wood V-C's categories.'* They stated:

> " 'Mutual conduct' has been taken to comprise any conduct of the joint tenants which falls short of evidencing an express or implied *agreement* to sever but which nevertheless indicates an unambiguous common intention that the joint tenancy should be severed." (See **Abela v Public Trustee** [1983] 1 NSWLR 308 at 315G.)

70. It is established on good authority that an expressed or implied agreement need not be reached for the third method to operate; it is sufficient if the acts and dealing with the property by the parties indicate an intention by them that they should hold in common: **Wilson v Bell** 1845 5 IR EQR, 501. The examples of the course of dealing required to establish severance are said to be manifold and depend on the individual facts of each case. It has been suggested that a common intention to sever may be more readily inferred from a course of conduct where the joint tenants are married to each other: **Harris v Goddard** (supra) at 1208F or where the personal relationship of the joint tenants has broken down: see **In the Marriage of**

Badcock and Badcock (1979) FLC 90 -723, 898; **Re Walters and Walters** (1978) 79 DLR (3d) 122 at 127.

71. It is recognized, however, that the most difficult relate to the circumstances prevailing in this case where there has been inconclusive negotiations between joint tenants in relation to their respective 'shares'. Whilst it has been said that negotiation does not amount to a course of dealing, it has, however, been noted and I am so guided that courts in other jurisdictions have occasionally been more prepared to uphold severance resulting from abortive or inconclusive negotiations between the joint tenants with respect to their individual shares. This is reported to be particularly so where the negotiations have been incorporated in correspondence between the parties: **Ginn v Armstrong (**1969) 3 DLR 3(d) 285 at 288; or have been mediated through their respective legal advisers: **Re Walters and Walters** (1978) 79 DLR or where the parties have plainly begun to conceptualize their entitlements in terms of individualized shareholding: **Slater v Slater** (1987) 4 BPR 9431 at 9435 (See: Gray and Francis Gray (supra), page 870).

72. In this case, the parties were married and the relationship had broken down leading to a long period of separation and the initiation of divorce proceedings. These are factors that, on the strength of the authorities, would readily lend themselves to an inference of a common intention between the parties to cease joint ownership in the property. In addition, the negotiations between the parties have been incorporated in correspondence between them thereby providing us with evidence of expressed manifestations of their intentions. The correspondence between them was also mediated through their respective legal advisers. This points, strongly, to an inference that the parties acted with proper legal advice and with full knowledge and understanding of the legal effect of the course of dealing they had embarked on. This is not a case of layman dealing with layman without legal advice. The correspondence and consequent actions of the parties also lead to a finding that both had begun to conceptualize their entitlements in terms of separate and distinct holding.

73. In **McDowell v Hirchfield Lipson & Rumney** [1992] 2 FLR 126, It was held, *inter alia*, that in the absence of an express act of severance of a joint tenancy, a party had to prove a course of dealing in which both parties had evinced an intention to sever the tenancy. In that case, the court found that there was no evidence of such intention in the parties' discussions about the divorce and the sale of the property.

74. This case at bar can be readily distinguished from **McDowell v Hirchfield** for there is clear indication in both parties correspondence that the agreement to negotiate for the sale was acceded to by both parties. This was done through their respective legal advisers. I see nothing to indicate that both parties, at the time of entering into negotiations, were not committed to accepting a tenancy in common and thereby accepting to preclude the operation of the *jus accrescendi* principle.

75. Is there a course of dealing between the parties evincing a common intention to sever and to mutually treat the tenancy as a tenancy in common? In **Gore and Snell** (supra), the learned judge stated that *"a course of dealing is where over the years the parties have dealt with their interests in the property on the footing that they are interests in common and are not joint"*(emphasis mine.) I do not accept that a course of dealing from which a common intention may be inferred should necessarily relate in all cases to the conduct of the party over years. This interpretation would preclude severance on this limb when the tenants have not enjoyed ownership for years. I do not think it necessary for the duration to necessarily determine if there is a course of dealing evidencing a common intention. What should be looked for is whether there is evidence of dealing between the parties in relation to their shares that sufficiently shows a mutual treatment of the common property as constituting a tenancy in common. Sir Page Wood, V-C said, *"severance may be effected by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common."*(Emphasis added.)

76. Sir Page Wood, V-C made no reference to a 'long' course of dealing but rather 'any' course of dealing that is enough to indicate the requisite common

intention to sever. It is thus the nature and substance of the dealing that should be material and not so much the duration of it. So, once a common intention has been sufficiently intimated by the interested parties during the course of this dealing and there is no evidence of non-committal, then that ought to be largely determinative of the issue rather than the length of time the parties have been dealing. Of course, the longer the period of dealing, the stronger may be the inference of a common intention in relation to the property but it should not mean that a course of dealing of a short duration should automatically be disqualified as being insufficient. It must depend on the circumstances of the particular case and whether a settled common intention has been intimated.

77. I would, therefore, posit the view that a long period of dealing between the parties on the assumption that each owns a severed share as if they hold the property as tenants in common is but one example of mutual conduct from which a common intention to sever may be found. The categories of circumstances of mutual conduct, from which a common intention to sever may be found, should not be regarded as closed.

78. I am reminded of the dictum of Sir John Pennycuick in **Burgess v Rawnsley** and I share his view when he stated:

> "I do not doubt myself that where one tenant negotiates with another for some rearrangement of interests, it may be possible to infer from the particular facts of a common intention to sever, even though the negotiations break down. Whether such an inference can be drawn, must I think depend upon the particular facts..."

In **Greenfield v Greenfield** (1979) 38 P& C.R. (Ch. D.), it was re-asserted that the joint tenants must make clear a common intention of ending the joint tenancy.

79. It is the existence of that clear and unambiguous common intention to treat the interest as severed that is the crux of the matter on the third limb and not so much whether an expressed or implied agreement is reached. Where there is an agreement, it is of course a clear intention to sever. It is the parties who have the right to sever their interest and to oust the operation of the rule of survivorship as

they see fit or as they please. If they both chose to do so, why should the court not give effect to their intention?

80. In **Williams v Hensman,** Sir Page Wood V-C, in speaking of the deed of indemnity in that case said (at page 560): *"But I think the deed of May 1835 was a dealing which cannot be reconciled with any view, except that of the parties to it thenceforth holding their interests as tenants in common."* In copying this view, I would say that the written communication between the deceased and the defendant and their subsequent conduct based on such communication point to them embarking on a course of dealing which cannot be reconciled with any view except that they were mutually treating their interests as severed and as being that of tenants in common with the defendant's 'share' capable of being the subject matter of a sale agreement between them. 'It is not material whether that was or was not done in ignorance of the existence of a joint tenancy': ***Jackson v Jackson*** as cited in **Williams v Hensman**.

81. I find, therefore, that by the time of the death of the deceased both parties had evinced a common intention, communicated between them, that the joint tenancy be treated as severed or that they treat with their interests in the property in a manner that must involve severance.

82. In **Robertso v Fraser** 1871 6 Ch. App. 696 at 699, Lord Hatherly LC (formerly Page Wood, V-C) stated:

> "Anything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint tenancy and to create a tenancy in common."

I find on the evidence that there is enough to indicate much more than a slightest degree of intention to divide the property. There was mutual intention to divide it. This must be held to abrogate the idea of a joint tenancy and to create a tenancy in common. Again, Sir Page Wood, V-C said in **Williams v Hensman:**

> "In *Jackson v Jackson* it is laid down, that, where you find in point of fact that a dealing as tenants in common, it is not material whether that was or was not done in ignorance of the existence of a joint- tenancy. And there is good reason for this, for it

must be borne in mind that a joint-tenancy is a right which any one of the joint-tenants may determine when he pleases; and, if all continue to deal on the footing of their interests not being joint, it would be most inequitable to treat it as a joint-tenancy when all the parties, whether in ignorance or not, have dealt with their interests as several." (Emphasis added.)

83. I find that there was mutual conduct evincing a common intention that the tenancy be severed in satisfaction of the third limb of **Williams v Hensman.** In such circumstances, I conclude that there has been a severance of the equitable joint tenancy during the lifetime of the deceased. Accordingly, the defendant would hold the legal estate as trustee on trust for the benefit of himself and the estate of the deceased in equal shares.

84. ORDER

1. The beneficial joint tenancy ownership by Lucille Adela Coleman and Linford Coleman of all that parcel of land being part of Garden Hill in the parish of Saint Catherine was severed during the lifetime of the deceased LUCILLE ADELA COLEMAN.

2. The defendant holds the legal estate on trust for the benefit of himself and the estate of the deceased in equal shares.

3. The property is to be sold by private treaty and failing that by public auction and the proceeds be shared equally between the defendant and the deceased's estate.

4. The property is to be valued by a valuator agreed on by both parties within 30 days of the order hereof. If the parties failed to agree such valuator, the Registrar of the Supreme Court is empowered to appoint an approved valuator and the cost of valuation to be borne equally between the parties.

5. The Registrar of the Supreme Court is empowered to sign all documents to give effect to the order made herein if either party is unwilling or unable to sign.

6. Costs to the claimant to be agreed or taxed.

7. Liberty to apply.