SJC-13177

FREDA BATTLE, personal representative,[1] vs. BARBARA A. HOWARD.

Suffolk. January 10, 2022. - April 7, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Real Property, Partition, Joint tenancy. Joint Tenants. Death. Jurisdiction, Land Court. Land Court, Jurisdiction. Practice, Civil, Death of party, Motion to dismiss, Standing.

Petition for partition filed in the Land Court Department on July 29, 2020.

A motion to dismiss was heard by Robert B. Foster, J.

A proceeding for interlocutory review was heard in the Appeals Court by William J. Meade, J., and the appeal was reported by him to a panel of that court. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Daniel B. Walsh for the respondent.
Denzil D. McKenzie (Colin Creager also present) for the petitioner.

[1] Of the estate of Charles R. Dunn.

CYPHER, J. Charles R. Dunn and Barbara A. Howard owned two adjacent parcels of land (property) in the Dorchester section of Boston as joint tenants with a right of survivorship. During the course of proceedings to partition the property, Dunn passed away. Thereafter, Howard filed a motion to dismiss the petition for lack of subject matter jurisdiction, claiming that the decedent's death vested full title in her as the surviving joint tenant. The judge denied the motion, and this appeal followed.

This case presents the question whether the partition proceedings up to the point of the decedent's death, including the acceptance of a buyer's offer to purchase the property, severed the joint tenancy and terminated Howard's right of survivorship. In addition, we are asked to determine whether G. L. c. 241, § 26 (§ 26), permits Dunn's heirs to maintain the action for partition and whether G. L. c. 241, § 25 (§ 25), grants the Land Court jurisdiction to continue to hear the case. We conclude that the proceedings and the acceptance of the offer did not sever the joint tenancy. We further conclude that § 26 does not confer standing on the heirs of a joint tenant to continue a partition action. Finally, § 25 provides only that the Land Court has supplemental jurisdiction over matters related to an otherwise valid petition for partition. Where, as here, a party lacks standing under G. L. c. 241, § 1 (§ 1), § 25 does not permit the Land Court to retain jurisdiction over the

defective suit. For these reasons, Howard's motion to dismiss should have been granted. We therefore reverse the order denying the motion.

Background. 1. Facts. The facts are undisputed. On February 23, 1993, Dunn and Howard took title to the property as joint tenants by a deed from the prior owner, recorded with the Suffolk registry of deeds. On July 29, 2020, when he was approximately ninety-three years old, Dunn filed the petition, seeking a partition by sale. At a case management conference on September 4, 2020, the judge found, based on the parties' stipulation, that Dunn and Howard held the property as joint tenants and that the property could not be advantageously divided, see G. L. c. 241, § 14. The parties informed the judge that they were engaged in settlement discussions and would continue to pursue alternative dispute resolution. Nevertheless, Dunn also made an oral motion for appointment of a commissioner. The judge allowed the motion. On September 14, 2020, the judge issued an interim order (interim order) setting forth his findings and appointing a commissioner. Neither party appealed from the interim order.

After the commissioner filed a report on the value of the property, the judge held another hearing on December 11, 2020, and issued a warrant for sale of the property, which was later amended to correct certain scrivener's errors (amended warrant).

The amended warrant authorized the commissioner to market and sell the property, but provided that "[t]he purchase and sale agreement shall provide that the price and other terms of the sale shall be subject to review and approval by the court . . . [and] the sale shall not be consummated unless and until approved by this court on application of the Commissioner, subject to the rights of the parties to object." The amended warrant further stated that "[t]he Commissioner shall solicit offers but shall not enter into an agreement with a buyer for the purchase and sale of the [property] . . . until further order of [the] court." The amended warrant allowed either party, prior to the judge's authorizing the commissioner to enter into a purchase and sale agreement, to match any offer accepted by the commissioner or to extend their own offer. After approval by the judge, the warrant provided that the commissioner could proceed to execute a purchase and sale agreement, subject to the parties' further right to object to the commissioner's report of the terms of the sale and the judge's power to "act on" those objections, including by "disapprov[ing] the price and terms of sale." After this final approval by the judge of the price and terms of the sale, the amended warrant authorized the commissioner "to consummate the sale [and] to convey title by commissioner's deed." Finally, the amended warrant provided that the parties were free to reach

a consensual resolution of the case at any time, and that the commissioner was to cease work upon receipt of notice of settlement by the parties.

On January 30, 2021, the commissioner accepted an offer to purchase the property. The commissioner's report and motion for authority to enter into a purchase and sale agreement, which was filed with the court on February 1, 2021, stated that the offer "ha[d] been accepted by the [commissioner] subject to approval by this Court." The judge requested that the commissioner file a proposed purchase and sale agreement and scheduled a hearing to take place on February 17.

Dunn passed away on February 16, 2021. His attorney filed a notice of death with the court the following day. On February 19, Howard filed a motion to stay proceedings. At a hearing on the commissioner's motion for authority, the judge asked the parties to submit briefing regarding the effect of Dunn's death on the case. Approximately one week later, Howard filed a motion to dismiss.[2] She argued that the mere filing of the petition for partition did not operate to sever the joint tenancy, and therefore, on Dunn's death his interest in the property vested solely with her as the surviving joint tenant.

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[2] Howard styled the motion as a motion to dismiss for lack of subject matter jurisdiction. As we explain infra, the petition should have been dismissed on the grounds that Dunn's heirs lack standing to continue the action.

Dunn's attorney opposed the motion to stay and the motion to dismiss, purportedly on behalf of Dunn, as it appears that no personal representative had yet been appointed.

On March 4, 2021, the judge denied Howard's motion to stay and her motion to dismiss, approved the proposed purchase and sale agreement, and allowed the commissioner's motion for authority to enter into the agreement. However, the judge stayed execution of the purchase and sale agreement to allow Howard to seek a stay or other relief from the Appeals Court. On Howard's application pursuant to G. L. c. 231, § 118, a single justice of the Appeals Court issued an order staying proceedings in the Land Court to allow Howard to pursue an interlocutory appeal from the order denying her motion to dismiss.[3] We then transferred the matter to this court on our own motion. Dunn's daughter, Freda Battle, was appointed personal representative on October 8, 2021, and continues the action on behalf of Dunn's estate.[4]

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[3] Howard also requested that the single justice of the Appeals Court enter an order dismissing the petition, but the single justice concluded that he lacked the power to review a dispositive order. See Commonwealth v. Owens-Corning Fiberglas Corp., 38 Mass. App. Ct. 600, 601 n.3 (1995); Pemberton v. Pemberton, 9 Mass. App. Ct. 809, 809 (1980).

[4] The single justice noted that, as of the date of his order, April 2, 2021, it was unclear whether a personal representative had been appointed. Battle filed a motion with this court on November 11, 2021, to substitute herself in place

2. Joint tenancy at common law. A joint tenancy is a form of coownership arising under the common law and characterized by the right of survivorship. See Weaver v. New Bedford, 335 Mass. 644, 646 (1957) ("A joint tenancy is created by the common law[,] and the incident of survivorship grows out of the application of common law principles wholly independent of statute"); Attorney Gen. v. Clark, 222 Mass. 291, 295 (1915). Joint tenants hold a single estate in the property during their lifetimes. See 2 H.T. Tiffany, Real Property § 418, at 196 (1939) (Tiffany); 2 W. Blackstone, Commentaries *180. Upon the death of one joint tenant, sole ownership of the property automatically vests in the surviving tenant. See Weaver, supra ("In the absence of a severance of the jointure by the transfer or conveyance in his lifetime of the deceased joint tenant's interest the entire title vested in [the surviving joint tenant]"); Clark, supra. The vesting of a joint interest in a surviving joint tenant is not considered to be a transfer or inheritance, but an interest that came into being at the time the joint estate was created. See Weaver, supra ("The plaintiff's seisin was derived from the instrument establishing the joint tenancy and not by descent"); Clark, supra at 293-295.

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of Dunn pursuant to Mass. R. A. P. 30, as appearing in 481 Mass. 1661 (2019).

A joint tenancy is created under the instrument of purchase or devise under which the joint tenants take title. See Weaver, 335 Mass. at 646; Clark, 222 Mass. at 295; Knapp v. Windsor, 6 Cush. 156, 160 (1850). The creation and maintenance of a joint tenancy depends on the existence of four "unities": the unity of interest, the unity of title, the unity of time, and the unity of possession. See Knapp, supra at 160-161, citing 2 W. Blackstone, Commentaries *180. In sum, a joint tenancy exists so long as the coowners "have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession." Tiffany, supra at § 418, at 196.

A joint tenancy is severed when any one of the four unities is destroyed, including due to a unilateral act of one of the parties. See Weaver, 335 Mass. at 646. See also Tiffany, supra at § 425, at 208-209. Generally, acts that will sever one or more of the four unities and terminate a joint tenancy include alienation of the land by conveyance, including some forms of granting a mortgage by one or more joint owners, and severance by partition. See West v. First Agric. Bank, 382 Mass. 534, 536 n.4 (1981), superseded by statute on other grounds ("joint tenancy is destroyed if [a joint tenant] aliens his interest, or creditors levy on his interest, or he partitions under G. L. c. 241, § 1"); Weaver, supra; Clark, supra; Tiffany, supra.

Because joint tenancy and the right of survivorship operate to the disadvantage of heirs, Cross v. Cross, 324 Mass. 186, 188 (1949); Stimpson v. Batterman, 5 Cush. 153, 153-155 (1849), joint tenancies have been disfavored under the law, and unless the intent to create a joint tenancy is clearly expressed, a deed or devise will be treated as creating a tenancy in common, see Cross, supra; G. L. c. 184, § 7 ("A conveyance or devise of land to two or more persons . . . shall create an estate in common and not in joint tenancy, unless it is expressed in such conveyance or devise that the grantees or devisees shall take jointly, or as joint tenants . . ."). [5] Nevertheless, if the intent to create a joint tenancy is clear, it will be enforced by the courts. See Cross, supra.

3. Statutory scheme for partition of property. Alongside the common law, a coowner of property has had, since colonial times, a statutory right to petition the courts to divide property that he or she no longer wishes to own jointly with another. See Cook v. Allen, 2 Mass. 462, 469 (1807) (referring to writs of partition under English common law prior to

[5] By the mid-Twentieth Century, most other States had adopted statutes limiting or abolishing joint tenancy as a form of coownership. See Holohan v. Melville, 41 Wash. 2d 380, 388 (1952) ("in the late 1700's and early 1800's most states enacted statutes limiting or abrogating [joint tenancy]"). See, e.g., Erickson v. Erickson, 167 Or. 1, 19 (1941) (abolished in Oregon).

enactment of statute by Parliament); Province Laws 1693, c. 8, § 1 (predecessor to G. L. c. 241). See also Hershman-Tcherepnin v. Tcherepnin, 452 Mass. 77, 92 (2008), quoting S.M. Dunphy, Probate Law and Practice § 16.3, at 247 (2d ed. 1997) ("Partition is a matter of absolute right, it is not dependent on the consent of any of the co-tenants or the discretion of the court").

In its current form, § 1 allows "[a]ny person, except a tenant by the entirety,[6] owning a present undivided legal estate in land, not subject to redemption, . . . to have partition." See Bernat v. Kivior, 22 Mass. App. Ct. 957, 958-959 (1986) (holders of remainder interest were not entitled to partition during lifetime of life tenant because "[t]he right to partition presupposes a present, possessory interest in land"). Thus, standing to bring an action for partition of land is conditioned on the petitioner's owning a present undivided legal estate in the land. See Devine v. Deckrow, 299 Mass. 28, 33 (1937) ("the petitioner was not, as provided in G. L. [Ter. Ed.] c. 241, § 1, the owner of a present undivided legal estate in

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[6] Tenancy by the entirety is a form of joint ownership available to married couples which, though similar to a joint tenancy, differs in that it is not subject to the statute on petitions for partition, see G. L. c. 241, § 1, and, under the common law, cannot be severed by a unilateral act of one of the spouses, see Hoag v. Hoag, 213 Mass. 50, 53-54 (1912).

the land in question and therefore had no standing to bring the petition for partition"); Bernat, supra.

"Division in kind is the primary and favored method of partition." Delta Materials Corp. v. Bagdon, 33 Mass. App. Ct. 333, 337 (1992). "If division in kind cannot be accomplished advantageously and 'without great inconvenience to the owners,'" all or part of the property may be sold. Id. at 338, quoting G. L. c. 241, § 14. See Batchelder v. Munroe, 335 Mass. 216, 217-218 (1957). Such a sale may involve one owner buying out the others or a new owner purchasing the entire property, with the proceeds of the sale being divided among the former owners. See G. L. c. 241, § 14; Delta Materials Corp., supra.

Under G. L. c. 241, a joint owner desiring partition commences proceedings by filing a petition with either the Probate and Family Court or the Land Court. See G. L. c. 241, § 2 (§ 2) (referring to Probate and Family Court by its former name, Probate Court). The court hearing the petition also has full jurisdiction in equity in all matters relating to the partition, including, in cases of partition by sale, the distribution of the proceeds. G. L. c. 241, § 25. See part 2.d, infra. On filing the petition, the petitioner also must file a notice with the appropriate registry of deeds describing the land to be partitioned and naming the parties to the action. G. L. c. 241, § 7. If "at any time" the land or parties

involved in the action change, the notice must be updated. Id. In addition, at any time, the judge may order an examination of title, and if "at any stage of the proceedings" it appears that the land has been described inaccurately, the judge may order the petitioner to amend the petition to correct the description. G. L. c. 241, § 17. The petitioner also must cause notice to be given by citation to all respondents named in the action. G. L. c. 241, § 8. If the judge determines that the petitioner is entitled to partition, the judge enters an "interlocutory decree that partition be made" (interlocutory decree)[7] that specifies the parties and proportions in which the partition shall be made. G. L. c. 241, § 10 (§ 10). The judge then appoints a commissioner and issues a warrant authorizing the commissioner to carry out the partition. See G. L. c. 241, § 12 (§ 12).

If partition is to be by sale, the judge may set terms and conditions for the sale and for the commissioner's conduct of the sale. See G. L. c. 241, § 31. If the sale is private, as opposed to by auction, the sale is subject to the judge's finding that the interests of the parties will be promoted or to the parties' assent. See id.

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[7] The interim order in this case was such an interlocutory decree. For the sake of clarity, when we discuss the order that the judge entered, we shall use the term "interim order" as defined supra. When we discuss, more generally, the function and effect of an interlocutory decree entered pursuant to § 10, we shall use the term "interlocutory decree."

The commissioner is required to make a report to the judge regarding the actions taken to effect the partition and to give the parties "seven days' notice of the time and place appointed for making the partition." G. L. c. 241, § 12. The commissioner's report or "return" is subject to approval by the judge; the judge may accept the return, amend it and confirm it as amended, or set the return aside and order the commissioner to undertake new efforts at partitioning the property. G. L. c. 241, § 16 (§ 16). Section 16 provides that "[a]fter the return of the commissioner[] has been accepted and confirmed, the court shall thereupon enter a decree that the partition be firm and effectual forever." Section 18 describes the final effect of partition by division and partition by sale: "The partition by division, when confirmed and established by a final decree under [§ 16], or the sale if partition is made by sale, shall be conclusive upon all persons named in the petition." G. L. c. 241, § 18 (§ 18). As discussed infra, § 26 specifically addresses certain consequences of a party's death during partition proceedings. See G. L. c. 241, § 26; part 2.c, infra.

Discussion. "We review the denial of a motion to dismiss de novo." Sudbury v. Massachusetts Bay Transp. Auth., 485 Mass. 774, 778 (2020), quoting Edwards v. Commonwealth, 477 Mass. 254, 260 (2017), S.C., 488 Mass. 555 (2021).

1. The effect of Dunn's death. In this case, the parties agree that Dunn and Howard held the property as joint tenants, and the judge ruled accordingly in the interim order. On appeal, the parties also agree that Dunn's filing of the petition did not sever the joint tenancy. See Minnehan v. Minnehan, 336 Mass. 668, 671 (1958) ("The mere institution by a joint tenant of partition proceedings does not work a severance of the tenancy"). The questions presented are when in partition proceedings one of the four unities is disrupted so that the parties' joint tenancy is severed, see Tiffany, supra at §§ 418, 425, and whether that point was reached and such a severance worked in this case. Howard argues that, with respect to a partition by sale, the operative act that upsets the four unities and severs a joint tenancy is the commissioner's conveyance of the property by deed to a buyer. We agree.

Section 18 provides that, in a partition by sale, the sale of the land is binding on the parties and others interested in the land. G. L. c. 241, § 18 ("The partition by division, when confirmed and established by a final decree under [§ 16], or the sale if partition is made by sale, shall be conclusive upon all persons named in the petition . . ." [emphasis added]). In Buron v. Brown, 336 Mass. 734, 734-735 (1958), the plaintiff had purchased land from a commissioner appointed in an action for partition by sale and sought to evict the defendant, one of the

prior joint owners. Interpreting § 18, we rejected the argument that the defendant's ownership of the land had not ended because no final decree had been entered in the case. See id. at 735. We concluded that "[t]he statute plainly does not condition the finality of the sale on confirmation of proceedings under § 16 or any other provision." Id. Thus, Buron established that, in an action for partition, a coowner's interest in land terminates no later than the conveyance to a buyer by the commissioner's deed.

The following year, in Cowden v. Cutting, 339 Mass. 164, 169 (1959), we considered the effect of a partition in which a certain locus was omitted from the commissioner's deed conveying the property, despite the commissioner's having included the locus in his report to the judge and the judge's entering a decree based on the description in the report. In holding that the partition had been ineffective as to the omitted locus, we observed that "[t]he operative instrument in a partition by sale [is] . . . the deed of the commissioner."[8] Id. at 169-170, citing Buron, 336 Mass. at 735, and G. L. c. 241, § 18. As to the locus left out of the deed, we stated that the parties had the option of directing the commissioner to convey the locus or

[8] We based our conclusion in part on a predecessor to § 18, which stated: "The conveyance shall be conclusive against all parties to the proceedings for partition and those claiming under them." R. L. 1902, c. 184, § 47.

of initiating new partition proceedings as to the locus. Id. at 170. Thus, unless land, or a portion of it, is conveyed by the commissioner's deed, the interests of the coowners in an action for partition by sale remain unchanged.

This conclusion is consistent with other sections of G. L. c. 241, which allow the judge and the parties to alter the course of proceedings up to the point at which the partition becomes effective. See Boss v. Leverett, 484 Mass. 553, 557 (2020) ("We look at the statute in its entirety when determining how a single section should be construed"). For example, the proceedings may be amended at any time to add parties, include more land, or correct the description of the land, as contemplated by §§ 7 and 17. In addition, the judge may set terms and conditions for a partition by sale in the interlocutory decree, and the commissioner is required to make a report to the judge which is subject to court approval or amendment. See G. L. c. 241, §§ 12, 16, 31. Where the sale is to be private, a specific finding must be made, after a hearing or assent of the parties, that the interests of the parties will be promoted by the proposed sale. G. L. c. 241, § 31. In addition, the commissioner must give the parties seven days' notice of when the partition is to take place, implying that the actual, effective partition is an event that takes place after the judge's approval of the commissioner's report, the remaining

event being the conveyance itself. See G. L. c. 241, § 12. All of these provisions support the conclusion that the status quo of the joint tenancy is maintained while all necessary determinations are made and conditions satisfied and that, up until the point of the conveyance, the parties may terminate the proceedings, including by settlement or voluntary dismissal.[9]

Thus, until Dunn's death, the parties remained joint tenants with a right of survivorship. When Dunn died, Howard became the sole owner of the property. At that time, neither Dunn nor his heirs held "a present undivided legal estate in" the property entitling them to maintain an action for partition. See G. L. c. 241, § 1. Howard's motion to dismiss therefore should have been allowed on the grounds that Dunn's heirs lacked

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[9] The parties dispute the relevance of a recent Land Court decision, Sze vs. Sze, Mass. Land Ct., No. 16 MISC 000723, 26 LCR 646 (Dec. 19, 2018). In that case, the decedent passed away two weeks before the interlocutory decree issued, but the decree nevertheless identified him and two others as joint tenants. Id. at 647. The decree was not appealed and became binding. Id. Thus, notwithstanding the decedent's death prior to the entry of the interlocutory decree, the case is similar to this one, where a party whose rights were determined in the interlocutory decree died before the consummation of the sale or conclusion of the action. The judge correctly concluded that the joint tenancy had not been severed, and that the remaining joint tenants held the property to the exclusion of the decedent's heirs. Id. In this respect, the case aligns with our conclusion here and supports Howard's argument. In reaching this conclusion, the judge aptly explained the difference between the interlocutory decree and the final judgment in a partition proceeding. Id. at 646 n.6, citing Brown v. Bulkley, 11 Cush. 168, 169-170 (1853).

standing. Battle's arguments to the contrary are unavailing. We address each in turn.

2. Battle's arguments. a. The effect of the interim order and the warrant. Battle argues that the issuance of the interim order and the amended warrant severed the joint tenancy.[10] First, as described above, this argument fails based on the plain language of the statute, because neither an interlocutory decree nor a warrant brings about the partition. Rather, § 10 states that "[i]f it is found that the petitioner is entitled to have partition . . . , the court shall make the interlocutory decree that partition be made" (emphasis added). Thus, § 10 contemplates that partition is an event that occurs sometime after the entry of the interlocutory decree but not as a result of the entry of interlocutory decree itself.[11]

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[10] Battle's argument is unclear in that she appears to conflate the interim order and the amended warrant, or to construe the interim order as part of the amended warrant. In partition proceedings, an interlocutory decree, in this case the interim order, see note 7, supra, is issued pursuant to § 10 and constitutes the court's determination of the parties' rights in the property at the time of the petition and their rights upon partition, when it occurs. The warrant is issued under § 12, after the commissioner is appointed, and authorizes the commissioner to carry out the partition, setting out the requirements for their doing so.

[11] In support of the argument that the interlocutory decree severed the joint tenancy prior to Dunn's death, Battle cites a New York trial court decision, Ellison v. Murphy, 128 Misc. 471 (N.Y. Sup. Ct. 1927). The decision is meaningful only as persuasive authority and is not binding on us. Nevertheless, Battle's reliance on it is entirely misplaced, as the decision

Similarly, § 12 states that "[i]f the court determines the petitioner is entitled to partition, it shall thereupon appoint one or more disinterested commissioners and issue a warrant to them to make partition" (emphasis added). As with the interlocutory decree under § 10, the warrant issued pursuant to § 12 does not itself effect the partition but instead authorizes the commissioner to make the partition at some future time, through subsequent, additional acts. As discussed above, § 12 also requires the commissioner to "give at least seven days' notice of the time and place appointed for making the partition," further supporting the conclusion that the issuance of the warrant is not the event that brings about the partition. Thus, despite Battle's attempt to characterize the interim order as "an order making partition," the description is inaccurate.

Second, the function of an interlocutory decree under § 10 is to determine the rights of the parties in the property at the time the partition proceedings were commenced and, thus, the rights and shares to which they are entitled upon the eventual

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comes to the opposite conclusion. The judge in Ellison concluded, "If the plaintiff had seen fit to discontinue the action at any time before judgment, the parties would still have remained joint tenants, with the right of survivorship. . . . [C]ommencement of the action amounted to no more than a request by the plaintiff that the court order the property to be sold, and . . . no severance would occur until the granting of a judgment in the action decreeing a partition and sale" [emphases added]. Id. at 472.

partition. See G. L. c. 241, § 10 (interlocutory decree "determine[s] the persons to whom and the proportions in which the shares shall be set off"). It is in this context, as Howard points out, that we have stated that an interlocutory decree "is a conclusive determination of the rights of all parties to the proceedings under the petition, and no question any longer remains open concerning either ownership or title, or their individual shares and interest." Brown v. Bulkley, 11 Cush. 168, 169-170 (1853) (after interlocutory decree entered in accordance with parties' agreement that their shares in land should be partitioned, one party could not later contest other's title as question thereafter was "not open or debatable"). For this reason, an interlocutory decree is immediately appealable. See Morgan v. Jozus, 67 Mass. App. Ct. 17, 20 (2006).

To the extent that we have also stated that, after the entry of the interlocutory decree, "[n]othing, then, remains to be done but to carry it into effect; and this is accomplished by commissioners . . . who have no other duty to perform or authority to act, than to divide the estate according to the directions contained in the warrant," Brown, 11 Cush. at 169-170, the statement is consistent with the principle that the commissioner is to carry out the partition, but that the partition has not yet occurred. Indeed, in Brown, which involved a partition by division, we referred to the partition's

becoming final upon acceptance by the judge and the entry of final judgment in the case, not upon the entry of the interlocutory decree or the warrant. See id. at 170. See also G. L. c. 241, § 18.

Third, in this case, the amended warrant demonstrates that the partition by sale was not to be final until the conveyance. The amended warrant explicitly stated that any purchase and sale agreement would be subject to approval by the judge and to the parties' rights to object to its terms. The warrant specified that the commissioner was authorized "to consummate the sale[and] to convey title by commissioner's deed" only after final approval by the judge. Most tellingly, the amended warrant expressly provided that the parties were free to settle the matter consensually, including, presumably, by terminating the action for partition and maintaining the status quo, that is, their joint tenancy.

Finally, a conclusion that the interim order or the amended warrant severed the joint tenancy would lead to an absurd result. See Ciani v. MacGrath, 481 Mass. 174, 178 (2019). If either did so, the parties would be deprived of the ability to maintain their joint tenancy until the completion of the partition or to remain joint tenants, if they agreed to dismissal of the petition. Instead, they would be forced to

continue as tenants in common or to undertake further steps to reestablish their ownership as joint tenants.

b. The commissioner's acceptance of a buyer's offer. Battle next argues that, even if the interim order and the warrant did not sever the joint tenancy, Dunn and Howard's unity of interest was destroyed when the commissioner accepted the buyer's offer. Battle contends that the commissioner's written acceptance of the offer created in the buyer an equitable right to possess the property that destroyed the unity of interest because a seller is bound by an accepted offer, such that further steps like the signing of the purchase and sale agreement and deed are merely ministerial.

Battle's reliance on our decision in McCarthy v. Tobin, 429 Mass. 84 (1999), for this argument is misplaced for a number of reasons. In McCarthy, we held that, where all material terms had been agreed to, an offer to purchase was a firm offer such that the seller's acceptance created a binding contract to sell the subject property that entitled the buyer to specific performance.[12] See id. at 87-89. The case did not present the

[12] We did not hold, as Battle asserts, that in all cases the accepted offer to purchase and not the purchase and sale agreement constitutes the contract for sale that is enforceable in equity by specific performance. See McCarthy v. Tobin, 429 Mass. 84, 87-89 (1999). Our holding was limited to cases in which all material terms are agreed to and contained in the offer to purchase. Id.

question whether the acceptance of the offer severed a joint tenancy.

First, our conclusion in McCarthy was based on the parties' manifest intent to be bound by the terms of the unconsummated agreement. See id. at 87 ("The controlling fact is the intention of the parties"). Here, the terms of any agreement between the buyer and the commissioner would have been subject to approval by the judge and the parties' right to object under the amended warrant. In addition, prior to the judge's authorizing the commissioner to enter into a purchase and sale agreement, either party, under the amended warrant, had a right to prevent the sale by matching the buyer's offer or making an offer of their own. Furthermore, the amended warrant provided that the commissioner "shall solicit offers but shall not enter into an agreement with a buyer for the purchase and sale of the [property] . . . until further order of [the] court." While the warrant was silent on the commissioner's authority to accept an offer prior to seeking approval of a purchase and sale agreement, we construe this language to mean that the commissioner was not authorized to bind Dunn and Howard to sell the property by accepting a firm offer as the sellers did in McCarthy. Accordingly, the commissioner reported that he had accepted the offer "subject to approval by this Court." In the context of this case, the commissioner's acceptance of the

buyer's offer did not evidence the same definite intent to be bound as the acceptance of the firm offer in McCarthy.

Second, it was implicit in our holding in McCarthy that, while the seller was bound to enter into a purchase and sale agreement and to convey the property, the acceptance of the offer did not bring about the conveyance itself. See id. at 87-88. Battle acknowledges as much by citing the principle that, in the Commonwealth, "the rights of the purchaser are contract rights rather than rights of ownership of real property." Laurin v. DeCarolis Constr. Co., 372 Mass. 688, 691 (1977) (after signing of purchase and sale agreement, sellers had "an equitable obligation to convey [the property] to the purchaser on payment of purchase money" but retained "the exclusive right to possession of the property" [quotations and citations omitted]).[13] Thus, the acceptance of the offer did not alter Dunn's and Howard's property rights.

For these reasons, Battle's argument that the accepted offer to purchase terminated the joint tenancy by severing Dunn and Howard's unity of interest fails.

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[13] The decision in Laurin v. DeCarolis Constr. Co., 372 Mass. 688, 691 (1977), which Battel cites, therefore is directly contrary to Battle's contention in her brief that "the buyer . . . gained an equitable right to possession of and title to the Property."

c. General Laws c. 241, § 26. Battle relies on § 26 to argue that, because Dunn died while the petition was pending, his heirs inherited his interest in the property as if the partition had been completed before his death. The construction of this statute is an issue of first impression. Section 26 states:

> "If a party named in the petition has died prior to the filing thereof, or dies during its pendency, and such fact did not appear during the proceedings, his heir or devisee shall be entitled to the share of land set off to him or his share of the proceeds of a sale. If his death is made known to the court during the proceedings, the share or portion formerly belonging to him may be assigned or set off in his name to be held and disposed of as if the partition had been made prior to his decease, and his heir or devisee may recover the portion assigned to him, or his share of the proceeds, by appropriate action. The court may, however, in any case arising hereunder, if there has been a sale, order his share of the proceeds to be paid to his personal representatives pending settlement of his estate, or deposited under section thirty-four to await their appointment."

According to Battle, because Dunn died during the pendency of the petition and his death was made known to the court, the share formerly belonging to him may be set off "as if the partition had been made prior to his decease." While there is some superficial appeal in this reading of § 26, we must read the section and the statute as a whole, Boss, 484 Mass. at 557, and with due regard for the established principles of the common law discussed supra. See Weaver, 335 Mass. at 646 (declining to construe statute creating lien on property as abrogating right

of survivorship absent transfer or conveyance of interest by joint tenant during lifetime where "[n]othing in [statute] suggests an intention of the Legislature to change the established common law rule"). See also Brear v. Fagan, 447 Mass. 68, 72 (2006) (statute is not to be interpreted "as effecting a material change in or a repeal of the common law unless the intent to do so is clearly expressed" [citation omitted]).

The introductory language of the first sentence of § 26, "If a party named in the petition has died prior to the filing thereof, or dies during its pendency . . . his heir . . ." (emphasis added), suggests that this section was intended to apply to forms of joint ownership other than joint tenancies. If a joint tenant dies prior to the filing of a petition for partition, sole ownership of the property vests in the surviving joint tenant, and no partition is to be had. See Weaver, 335 Mass. at 646; Clark, 222 Mass. at 295. There are no heirs with respect to the relevant property, and any heirs of the decedent have no "present undivided legal estate in" the land sufficient to sustain an action for petition. See G. L. c. 241, § 1; part 1, supra.

If we were to read this language as applying to all forms of coownership, the result would be the abolition of the right of survivorship. A joint tenant who did not initiate partition

proceedings during their lifetime always would die "prior to the filing" of a petition by their heirs. The heirs, in turn, always would be able to file such a petition to claim a share of the property held in joint tenancy, and to prevent the surviving joint tenant from assuming sole ownership. There is no evidence before us of any legislative intent to work such a fundamental change to the common law of joint tenancy, and we therefore decline to adopt such a reading of § 26. See Brear, 447 Mass. at 72; Weaver, 335 Mass. at 646. Instead, we understand that "a party named in the petition" does not include one who owns property as a joint tenant with a right of survivorship.

As the phrase "a party named in the petition" is the subject of both verbs in the subordinate clause in the first sentence beginning with "If," we must read it consistently as to each. Thus, the language "If a party named in the petition . . . dies during its pendency" also does not apply to a deceased joint tenant. Battle's argument that this language creates a right in the heirs of a joint tenant to maintain an action for partition after his death therefore fails.

Our reading of § 26 as applying to forms of coownership other than joint tenancy[14] is supported by the reference in the

[14] And of course, other than tenancy by the entirety, which is explicitly excluded from the scope of G. L. c. 241 and actions for partition by § 1.

second sentence to the "share or portion formerly belonging to" a decedent. This language signals that the section is not meant to apply to joint tenants, as joint tenants own not "shares" in the subject property, but a single estate which they hold jointly. See Tiffany, supra at § 418; 2 W. Blackstone, Commentaries *180. Thus, rather than creating in the heirs of a joint tenant the right to bring an action for partition, a right that they do not have at common law, § 26 merely sets out the procedure that heirs must follow to secure partition of the otherwise heritable shares of a decedent who was not a joint tenant.

d. Equity jurisdiction. Battle argues that G. L. c. 241 as a whole and § 25 specifically imbue the Land Court with broad jurisdiction over the petition notwithstanding Dunn's death. First, Battle contends that the common law right of survivorship cannot have operated to deprive the Land Court of jurisdiction because G. L. c. 241 is a comprehensive scheme that displaced the common law as to joint tenancies and the right of survivorship. The argument depends on a misreading of our holding in O'Connor v. Boyden, 268 Mass. 111, 114-115 (1929). In stating that "[t]he sweep and nature of [G. L.] c. 241" called for application of the "principle that, when a statute has been enacted apparently designed to embrace the whole subject to which it relates, all previous provisions of the

common or statutory law are no longer operative with respect to that subject," we plainly were referring to the fact that "[G. L.] c. 241 deals comprehensively with the whole field of petitions for partition of land." Id. Thus, O'Connor stands for the proposition that G. L. c. 241 displaced the common law regarding the process and rules of partition, not that it abrogated the entire common law of joint ownership of real property including joint tenancies and the right of survivorship. See Clough v. Cromwell, 254 Mass. 132, 134 (1925) ("R. L. c. 184, § 1 [precursor to G. L. c. 241], abolished the writ of partition at common law" and established jurisdiction of Superior Court and Probate Court over petitions for partition). See also Corcoran v. S. S. Kresge Co., 313 Mass. 299, 303 (1943) ("statutes . . . made in derogation of the common law are to be construed strictly"). As discussed supra, joint tenancies and the right of survivorship have always been creatures of common law,[15] and they have existed alongside the statutory scheme for partition articulated by the provisions of G. L. c. 241, including after our decision in O'Connor. See Weaver, 335 Mass. at 646.

[15] Joint tenancy and the right of survivorship briefly were abolished by statute, St. 1783, c. 52, which subsequently was repealed, St. 1785, c. 62, restoring the prior common law regime, see Hoag, 213 Mass. at 51.

Second, Battle argues, again based on her misreading of O'Connor, that § 25 confers on the Land Court jurisdiction to hear the petition "despite any common law or prior statutory authority to the contrary." This is not so. Section 25 states, in relevant part:

> "The court in which a petition has been brought under this chapter shall have jurisdiction in equity over all matters relating to the partition, and, in case of sale, over the distribution of the proceeds thereof."

As an initial matter, § 25, by its terms, does not address the trial courts' jurisdiction over a petition for partition. That is the function of § 2 ("Probate courts and the land court shall have concurrent jurisdiction of all petitions for partition"). Instead, § 25 establishes that a court having jurisdiction over a petition for partition also has supplemental jurisdiction "in equity over all matters relating to the partition." See Asker v. Asker, 8 Mass. App. Ct. 634, 640 (1979) (jurisdiction under § 25 is limited to "matters 'in reference to the common land'" and did not extend to issues relating to personal property that defendant had removed from premises and converted).

The court's decision in O'Connor, 268 Mass. at 114-115, properly understood, illustrates this point. In that case, the plaintiffs commenced an action in the Superior Court alleging a breach of fiduciary duty by the defendants in a parallel action for partition in the probate court and sought a constructive

trust compelling defendants to reconvey their interests in the subject property to the plaintiff. See id. at 114. This court concluded that the action in the Superior Court was a collateral attack on the proceedings in the probate court and that, because the issues were "intimately interwoven with the petition for partition," exclusive jurisdiction over the plaintiff's claims rested with the probate court under § 25. Id. at 114-115. Thus, the exercise of supplemental jurisdiction under § 25 is conditioned on a court's having jurisdiction over the relevant petition. There is no authority for Battle's assertion that § 25, in effect, creates jurisdiction over a petition where none would exist under § 2.[16]

As Howard argues and as we observed supra, because Dunn died prior to the severance of the joint tenancy and because sole ownership of the property vested in Howard, Dunn's heirs have no standing to maintain the action for partition under § 1 that Dunn initiated. Section 25 does not alter this conclusion.

Conclusion. For the reasons stated, Howard's motion to dismiss the petition should have been allowed on the grounds that Battle lacks standing to continue the action for partition.

Order denying motion to dismiss reversed.

[16] The judge in this case purported to exercise equitable powers under § 25 to find that the accepted offer to purchase was the equivalent of a conveyance of the property and destroyed the joint tenancy. This was error.