DISMISSED AT DEATH: REASSESSING THE INTERSECTION OF JOINT TENANTS' RIGHTS OF SURVIVORSHIP AND PARTITION AT DEATH IN *BATTLE V. HOWARD*

Liam Edward Cronan[*]

I. INTRODUCTION

In 2022, the Massachusetts Supreme Judicial Court (SJC) issued the most recent decision in a series of cases addressing a seemingly simple property law question: what happens if a joint tenant sues for partition and then dies?[1] The joint tenancy, a common form of co-ownership, is unique for its "right of survivorship," which affords joint tenants the right to their co-owners' share of the property at death, preventing the property from transferring to heirs by will or intestacy.[2] Because relationships among joint

* Law Clerk, U.S. District Court for the District of Massachusetts. J.D., *summa cum laude*, Boston University School of Law; M.A. in History, *Phi Alpha Theta*, Boston University; B.A. in History, *summa cum laude*, *Phi Beta Kappa*, Tufts University. I am sincerely grateful to Prof. Gary Lawson, Prof. David Seipp, and Dr. Christian Samito, whose instruction in the law of property, trusts and estates, and legal history, respectively, inspired this Article.

1. Battle v. Howard, 185 N.E.3d 1, 4 (Mass. 2022).

2. *See* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES & POLICIES 596–601 (3d ed. 2017) (describing co-ownership of real property and creation of joint tenancies versus tenancies in common); *see also* Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent*

tenants can often sour, the law has also long afforded them a right to "partition," a remedy through which joint tenants can unilaterally sue to terminate a joint tenancy and prevent the right of survivorship from taking effect.[3] But partition, like any judicial remedy, takes time.[4] In cases when a joint tenant files for partition but dies before it is complete, the right of survivorship and the right to partition inherently conflict.[5] The fact the tenant died implies that their share of the property should pass to the other tenants, but the fact the tenant filed a partition implies that they wanted to terminate the right of survivorship in favor of some other heir; thus, their share of the property should not pass to the other joint tenants.[6]

For centuries, the law reached a consistent resolution to this inherent conflict.[7] In the past half century, however, courts have effectively ignored this conflict and reached vastly differing results.[8] The SJC's opinion in *Battle* was no different.[9] There, the SJC held that the partition must always be dismissed because the right of survivorship is triggered at the joint tenant's death.[10] A line of cases from other jurisdictions, beginning most notably with *Cobb v. Gilmer* from the D.C. Court of Appeals, largely support the conclusion that a joint tenant's death ends a partition.[11] These cases, however, rest their central premise on an incomplete, historically ungrounded view of the rights of survivorship and partition that are inherently at odds with centuries of legal history.[12]

The key flaw underlying *Battle* and analogous decisions from other jurisdictions is their failure to acknowledge statutory alterations to the

---

Ownership for Modern Relationships, 85 MARQ. L. REV. 423, 425 (2001) (citing 20 AM. JUR. 2D *Cotenancy and Joint Ownership* § 3 (1995)).

3. *See* MERRILL & SMITH, *supra* note 2, at 601 (quoting "[p]artition is the most important legal remedy available to concurrent owners. Any cotenants can sue for partition for any reason . . . . This in effect gives each cotenant an automatic right to terminate the cotenancy at any time.").

4. *Partitions, Buyouts & Forced Sales in Texas*, TEX. LANDOWNER L. FIRM, PLLC, https://texaslandownerfirm.com/practice-areas/partitions-buyouts-forced-sales/#:~:text=A%20partition%20action%20can%20take,are%20settled%20out%20of%20court (last visited Feb. 7, 2025) [https://perma.cc/6U52-PY5S].

5. Carrozzo, *supra* note 2, at 460.

6. *Id.* at 463.

7. *Id.* at 433.

8. *Id.* at 439.

9. Battle v. Howard, 185 N.E.3d 1, 3–4 (Mass. 2022).

10. *Id.*; *see* Eric T. Berkman, *Partition Action Dismissed After Death of Joint Tenant*, MASS. LAW. WKLY. (Apr. 22, 2022), https://masslawyersweekly.com/2022/04/22/partition-action-dismissed-after-death-of-joint-tenant/ (discussing key facts and holding of Battle) [https://perma.cc/2WCT-KE8Y].

11. Cobb v. Gilmer, 365 F.2d 931, 933 (D.C. Cir. 1966) ("[U]nless partition has been decreed before the death of the joint tenant, no interest in the property remains . . . which can support an action for partition."); Heintz v. Hudkins, 824 S.W.2d 139, 142 (Mo. Ct. App. 1992) ("[A] . . . partition . . . does not survive the death of . . . the tenants."); *see also*, *e.g.*, *Civil Practice–Death Of Plaintiff–Lack Of Substituted Party–Final Judgment*, MO. LAW. MEDIA (Jan. 1, 1991), https://molawyersmedia.com/1991/01/01/civil-practice-death-of-plaintiff-lack-of-substituted-party-final-judgment/ (describing result in *Heintz*, 824 S.W.2d at 142) [https://perma.cc/6UJZ-P7DF].

12. *Cobb*, F.2d at 932–33; *Heintz*, 824 S.W.2d at 140–46.

common law rule that a partition ends with a party's death.[13] As *Battle* recognized, a partition action effectively brings a joint tenancy and its right of survivorship to an end, but only when the partition is complete.[14] Because all actions at common law ended with the death of a party, a pending partition ended with the death of any party.[15] By statute, however, some jurisdictions allow partition suits to survive a joint tenant's death, effectively suspending the common law right of survivorship.[16] England first enacted such a statute in 1696, requiring that no partition "abate" (i.e., be dismissed) "by reason of the [d]eath of any [joint t]enant."[17] Many United Staes states followed suit and maintain similar statutory modifications.[18]

Despite *Battle*'s assertion to the contrary, Massachusetts is one such jurisdiction that has long since abrogated the common law rule that partitions abate upon the death of a joint tenant.[19] *Battle* recognized (but ultimately declined to apply) that such a statute exists in Massachusetts, Section 26, which provides that "[i]f a party named in the [partition] . . . dies during its pendency . . . the share . . . formerly belonging to him may be . . . disposed of as if the partition had been made prior to his decease . . . ."[20] Before the adoption of Section 26's predecessors, when "no such statute" prevented the abatement of a partition suit at a party's death, the SJC recognized the common law rule that parties seeking partition "cannot further prosecute" after "the death of one of the tenants."[21] But as of 1836, the legislature in Massachusetts adopted a statute, ostensibly modelled on the 1696 English statute, providing that, "[i]n the case of the death of any party in a partition,

13. *Battle*, 185 N.E.3d at 13.

14. *Id.* at 8 (citing Minnehan v. Minnehan, 147 N.E.2d 533, 535 (Mass. 1958) ("The mere institution . . . of partition proceedings does not work a severance of the tenancy.")).

15. *See* Eric W. Gunderson, *Personal Injury Damages Under the Maryland Survival Statute: Advocating Damage Recovery for a Decedent's Future Lost Earnings*, 29 U. BALT. L. REV. 97, 99 (1999) ("[A]t common law . . . all causes of action initiated by or on behalf of a party ended with the death of that party.") (footnote omitted).

16. *Id.*

17. Partition Act 1696, 8 & 9 Will. 3 c. 31 (Eng.) ("[N]o [p]lea in [a]batement shall be admitted in any [s]uit for [p]artition . . . by reason of the [d]eath of any [t]enant."); *see Plea in Abatement*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "plea in abatement" as plea to dismiss for failure to state claim).

18. *See, e.g.*, N.M. STAT. ANN. § 42-5-9 (2021) ("No suit for a partition shall abate by the death of any tenant . . . .").

19. MASS. GEN. LAWS ch. 241, § 26 (2024).

20. *Id.*; *see* Battle v. Howard, 185 N.E.3d 1, 13 (Mass. 2022) (rejecting the argument in which "Battle relies on [Section] 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.").

21. Thomas v. Staples, 2 Mass. 479, 480 (1807); *see* Mitchell v. Starbuck, 10 Mass. 5, 9 (1813) ("Upon a writ of partition at common law . . . the death of any one of the parties abates the writ."); see *Battle*, 185 N.E.3d, at 15 (showing that neither *Thomas* nor *Mitchell* are cited despite their nearly identical facts to those in *Battle*).

the suit shall not abate."[22] Later decisions by the SJC recognized that this statute afforded a joint tenant's heirs the right to continue a pending partition.[23] Massachusetts's legislature modified the statute only slightly in 1886 and again in 1921; thus, Section 26 traces an unbroken line back to the 1696 statute, mandating that the death of a joint tenant in *any* suit for partition cannot be grounds to dismiss the suit.[24] The convergence of a partition and death are precisely the facts that led to the decision in *Battle* and precisely why the SJC erred in ignoring Section 26.[25] Moreover, *Battle* is not alone in this error; cases from across jurisdictions since at least the 1950s, including *Cobb*, have failed to recognize statutory modifications to this rule.[26]

In the aftermath of the SJC's decision in *Battle*, attorneys for both sides recognized the convergence of partition and death as both a "thorny area of the law" and an issue that is "likely to occur again in the future."[27] Practitioners further predicted the *Battle* decision would result in a "slew of law review articles."[28] This Article is among the first.[29] Specifically, this Article aims to impart a historically informed understanding of the impact of a joint tenant's death on partition and offer a revived interpretation of the statutes that exist across jurisdictions, derived from a 1696 English antecedent, that expressly prevent a partition from ending at a party's death.[30] In so doing, this Article relies on centuries of Anglo-American law, from seminal sources of English law like Blackstone's *Commentaries* to early

---

22. *Compare* MASS. GEN. LAWS ch. 103, § 48 (1836) ("In the case of the death of any party in a partition, the suit shall not abate."), *with* Partition Act 1696, 8 & 9 Will. 3 c. 31 (Eng.) ("[N]o [p]lea in [a]batement shall be admitted in any [s]uit for [p]artition . . . by reason of the [d]eath of any [t]enant.").

23. *See* Brown v. Wells, 53 Mass. 501, 503 (1847) (recognizing Section 48 but holding that the wife of the deceased joint tenant could not continue partition because, at common law, a man's wife is not his heir).

24. *See* MASS. GEN. LAWS ch. 178, § 47 (1886); *see also id.* ch. 241, § 26.

25. Battle v. Howard, 185 N.E.3d 1, 3 (Mass. 2022); Berkman, *supra* note 10 ("[The Court] rejected the estate's argument that under . . . [S]ection 26 . . . because Dunn died during the pendency of the partition, his heirs inherited his interest in the property as though the partition had been completed before his death.").

26. *See, e.g.*, Sheridan v. Lucey, 149 A.2d 444, 445 (Pa. 1959); Cobb v. Gilmer, 365 F.2d 931, 932 (D.C. Cir. 1966); *see also, e.g.*, Heintz v. Hudkins, 824 S.W.2d 139, 142 (S.D. Mo. Ct. App. 1992).

27. *See* Morth v. Morth, No. 21-P-630, 2022 WL 3640323, at *2 (Mass. App. Ct. Aug. 24, 2022) (citing *Battle* regarding right to partition at common law); *see also* Furnas v. Cirone, 221 N.E.3d 772, 776–81 (Mass. 2024) (citing *Battle* to define right of survivorship for joint tenants); Pillai v. Scalia, No. 23-P-138, 2024 WL 482172, at *4–7 (Mass. App. Ct. Feb. 8, 2024) (similar); Lyman v. Lanser, 231 N.E.3d 358, 364 n.3 (Mass. App. Ct. 2024) (similar); Verdura v. DelGrosso, No. 22-P-780, 2023 WL 5570244, at *2 (Mass. App. Ct. Aug. 23, 2023) (similar); El Nar v. Salis, No. 21-P-760, 2022 WL 2674226, at *4 (Mass. App. Ct. July 12, 2022) (citing *Battle*'s interpretation of McCarthy v. Tobin, 706 N.E.2d 629, 629 (Mass. 1999) (regarding offers to purchase)); Fariello v. Zhao, 195 N.E.3d 425, 430 (Mass. App. Ct. 2022) (similar); Archer v. Grubhub, Inc., 190 N.E.3d 1024, 1029 (Mass. 2024) (citing *Battle* to define standard of review for denial of motions to compel and dismiss).

28. Berkman, *supra* note 10 (internal quotations omitted); *see also* Shelby D. Green, *Keeping Current: Property*, 36 PROBATE & PROP. 18, 20 (2022).

29. *See* discussion *infra* Parts I–IV.

30. *See* discussion *infra* Parts I–IV.

fourteenth-century case law, to deconstruct the historical intersection between the rights of survivorship and partition.[31]

This Article proceeds as follows.[32] Part II analyzes the scope of modern case law addressing the end of a partition upon death, including *Battle* and analogous cases from other jurisdictions.[33] Part III turns to the history of the common law right of survivorship, both its creation and severance, and the statutory right to partition, parsing how co-owners of real property have exercised that right, when that right is abated, and how statutory schemes affect that abatement.[34] Lastly, Part IV draws from this background to reconcile and reframe modern case law, in Massachusetts and elsewhere, with its historical antecedent.[35] Together, these sections reveal that a proper interpretation of Section 26 and statutes like it must prevent a partition ending with death.[36]

II. MODERN CASE LAW ON THE INTERSECTION OF SURVIVORSHIP AND PARTITION AT DEATH

Before turning to the historical antecedents of Section 26 and the broader development of law governing the rights of survivorship and partition, it is necessary first to survey the decision in *Battle* and the broader scope of similar cases from other jurisdictions.[37] Viewed together, this collection of modern case law including *Battle*, which address what happens to a joint tenancy when a joint tenant dies during the pendency of a partition, focuses only on the limited question of whether the of death a joint tenant severs a joint tenancy.[38] The holdings in these cases, and their overemphasis on survivorship, present a stark contrast to the history that precedes them.[39]

A. Battle v. Howard *in Massachusetts*

The most recent in this line of case law, and consequently the primary emphasis of this Article, is *Battle*.[40] There, Charles Dunn and Barbara Howard owned two adjacent plots of land in Dorchester, Massachusetts, as

31. Battle v. Howard, 185 N.E.3d 1, 3 (Mass. 2022); Berkman, *supra* note 10 (recognizing, implicitly, that courts have underread the tactic available when the common law rule applies: the death of *any* tenant, even if there are more than two tenants and the tenant who died did not file the partition, ends the suit).

32. *See* discussion *infra* Parts II–IV.

33. *See* discussion *infra* Part II.

34. *See* discussion *infra* Part III.

35. *See* discussion *infra* Part IV.

36. *See* discussion *infra* Parts II–IV.

37. Battle v. Howard, 185 N.E.3d 1, 3 (Mass. 2022).

38. *See* discussion *infra* Section II.A.

39. *See* discussion *infra* Section II.B.

40. *Battle*, 185 N.E.3d at 3.

joint tenants.[41] They owned the land together since 1993.[42] Decades later, in July 2020, Dunn (who was ninety-three by then) filed a petition to partition the property, seeking to sever the joint tenancy and, by extension, Howard's right of survivorship.[43] The parties went through several years of adjudication resulting in the acceptance of a proposed purchase and sale agreement and were set to appear in a final hearing scheduled before the Massachusetts Land Court on February 17, 2021.[44] One day before the hearing, however, Dunn died.[45] Howard then filed a motion to dismiss, claiming that his death imparted her with sole ownership of the former joint tenancy; and Freda Battle, Dunn's daughter, attempted to continue the partition action on behalf of her father by relying on Section 26, ostensibly giving her (as Dunn's heir) the right to continue the partition.[46] The Massachusetts Land Court denied Howard's motion, and Battle appealed to the SJC.[47]

In deciding Battle's appeal, the SJC held that Dunn's "partition action should have been dismissed after [he] died."[48] This holding rested on two central conclusions.[49] First, the court reasoned that Dunn's death did not sever his joint tenancy with Howard.[50] Here, the court restated that "[j]oint tenants hold a single estate in the property during their lifetimes . . . ." with a right of survivorship that exists based on four unities: (1) a unity of interest in the property; (2) a unity of title in the same deed or conveyance; (3) a unity of time when the joint tenants took ownership; and (4) a unity of possession so each has an undivided right to possess the estate.[51] If any one of the four unities is destroyed, the joint tenancy's right of survivorship severs.[52] Filing a partition, however, is not among the acts that cause a tenancy to sever.[53] Based on this background, the SJC noted (and neither party disputed) that

41. *Id.* at 4.
42. *Id.*; *see* Berkman, *supra* note 10; Green, *supra* note 28, at 20.
43. *Battle*, 185 N.E.3d at 4; Green, *supra* note 28, at 20.
44. *Battle*, 185 N.E.3d at 4.
45. *Id.*; *see* Berkman, *supra* note 10; Green, *supra* note 28, at 20.
46. *Battle*, 185 N.E.3d at 4.
47. *Id.* at 4–5; *see* Berkman, *supra* note 10.
48. Berkman, *supra* note 10.
49. *Battle*, 185 N.E.3d at 14.
50. *Id.* at 3.
51. *Id.* at 4–5; *see* Carrozzo, *supra* note 2, at 425 ("[T]he existence of a joint tenancy requires determining whether the four unities . . . are present. For the . . . unities to be present, it is necessary for the joint tenants' interests to accrue at the same moment (unity of time); by the same deed or conveyance (unity of title); each joint tenant must possess an equal undivided share of the estate (unity of possession); and their interests must be equal in length and quality (unity of interest)."); *see also* MERRILL & SMITH, PROP., *supra* note 2, at 597–99 (describing creation of joint tenancies); DUKEMINIER ET AL., PROPERTY 255-57 (Concise ed., 3d ed., 2021) (same).
52. *Battle*, 185 N.E.3d at 5 ("A joint tenancy is severed when any one of the four unities is destroyed . . . .").
53. Carrozzo, *supra* note 2, at 425–27.

Dunn's filed partition alone did not sever the joint tenancy; thus, Dunn and Howard remained joint tenants until Dunn died.[54]

Second, the court determined that Dunn's heirs had no statutory right to continue the partition after he died.[55] Battle claimed a right to stand in for Dunn under Section 26, which states that "[i]f a party named in [a partition] . . . dies during its pendency. . . . the share or portion formerly belonging to him may be . . . disposed of as if the partition had been made prior to his decease, and his heir . . . may recover the portion assigned to him . . . ."[56] Despite the seemingly clear applicability of Section 26 to the case, the court rejected Battle's argument, reasoning that Section 26 "was intended to apply to forms of joint ownership other than joint tenancies" because by their right of survivorship a joint tenancies ends when the last joint tenant dies, and holding otherwise would effectively "abolish" the right of survivorship.[57] Accordingly, the court held that because the joint tenancy remained intact and no statute dictated otherwise, Howard was sole owner of the property at Dunn's death.[58] Thus, the court concluded in *Battle* that between the rights of survivorship and partition, partition always loses.[59]

B. Case Law in Other Jurisdictions

Although *Battle* relied on few cases outside of Massachusetts law, it was hardly the first case to parse the ownership of a joint tenancy when partition and death coincide, as a limited number of secondary sources have recognized.[60] While death during a partition is certainly uncommon, it is not unheard of either.[61] The most noteworthy and perhaps the most highly cited case to face an issue analogous to the one in *Battle* is *Cobb v. Gilmer*, rendered by the D.C. Court of Appeals in 1960.[62] Its facts mirror *Battle*'s closely.[63] In *Cobb*, Pete Gilmer and Naomi Zachary held a tenancy by the

54. *Battle*, 185 N.E.3d at 7 ("On appeal, the parties also agree that Dunn's filing of the petition did not sever the joint tenancy.") (citing Minnehan v. Minnehan, 147 N. E. 2d 533, 535 (Mass. 1958)).

55. *Id*. at 12–13; *see* Berkman, *supra* note 10 ("[T]he SJC rejected the estate's argument that under . . . the Massachusetts partition statute, because Dunn died during the pendency of the partition, his heirs inherited his interest in the property as though the partition had been completed before his death.").

56. MASS. GEN. LAWS ch. 241, § 26 (024).

57. *Battle*, 185 N.E.3d at 12; Berkman, *supra* note 10.

58. *Battle*, 185 N.E.3d at 12–13; Berkman, *supra* note 10.

59. *Battle*, 185 N.E.3d at 14–15.

60. It did so despite the few Massachusetts cases on this issue. *Cf.* Bakwin v. Mardirosian, 6 N.E.3d 1078, 1085 (Mass. 2014) (recognizing that "where Massachusetts law is silent, it is appropriate to look to other jurisdictions' interpretations of analogous statutory provisions."); Purity Supreme Inc. v. Atty. Gen, 407 N.E.2d 297, 303 (Mass. 1980) (indicting that the court "must look to other sources of [s]tate law[]" when interpreting statutes if applicable precedent and legislative history do "not illuminate the issue before [the Court] . . . .").

61. Cobb v. Gilmer, 365 F.2d 931, 932 (D.C. Cir. 1966).

62. *Id.*

63. *Id.*

entirety, a form of co-ownership specific to spouses.[64] Zachary sought quiet title to the property but died before it was complete.[65] Zachary's daughter, Hazel Cobb, was substituted as plaintiff and continued the request for partition.[66] The court granted sole title to the property to Gilmer, and Cobb appealed, "challeng[ing] the trial court's conclusion that the partition action abated on the death of the original plaintiff."[67] Taking a decidedly broad-brush approach, the court declared that "apparently [a] universal rule in this country is that a pending suit for partition . . . does not survive the death of [a] joint tenant."[68] Based on this purportedly "universal" proposition, *Cobb* concluded that "unless partition has been decreed before the death of the joint tenant," no successor could continue the action.[69]

To reach this conclusion, *Cobb* relied on several earlier decisions that intimated a similar rule, emphasizing only the issue of survivorship.[70] One such case, identical the situation cited in *Battle*: *Minnehan v. Minnehan*, a Massachusetts decision from 1958 determining that "the mere institution . . . of partition proceedings does not work a severance of the tenancy."[71] *Cobb*, like *Minnehan*, also relied on *Dando v. Dando* from California and *Ellison v. Murphy* from New York.[72]

Like the others, *Ellison* concerned a plaintiff who sought partition but died before it was complete, and his heir sought to continue the suit.[73] The defendant countered that the executor had no right to continue the partition, and the court agreed.[74] The court stated only that "[it did] not think the commencement of this action [for partition] constituted a severance[,]" with no authority cited on that point.[75] Like *Ellison*, *Dando* involved a plaintiff who sued for partition and then died, an executor who attempted to continue

---

64. *Id.*; *see* MERRILL & SMITH, PROP., *supra* note 2, at 599–600 (describing creation and properties of tenancies by the entirety held by married partners).

65. *Cobb*, 365 F.2d at 932 (discussing that an action to quiet title is a suit intended to establish ownership over real property, thus "quieting" any contested claims); *see Quiet-Title Action*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining action to quiet title); *see also* Samuel L. Bray, *Preventative Adjudication*, 77 U. CHI. L. REV. 1275, 1283 nn. 31–32 (2010) (discussing "well established" purpose of actions to quiet title).

66. *Cobb*, 365 F.2d at 932.

67. *Id.*

68. *Id.* at 933.

69. *Id.*

70. *Id.*

71. Minnehan v. Minnehan, 147 N.E.2d 533, 535 (Mass. 1958); *see Cobb*, 365 F.2d at 933 (citing *Minnehan*, 147 N.E.2d at 535); *see also* Battle v. Howard, 185 N.E.3d 1, 8 (2022) (citing *Minnehan*, 147 N.E.2d at 535).

72. *See Minnehan*, 147 N.E.2d at 535 (citing Dando v. Dando, 99 P.2d 561, 561 (Cal. Ct. App. 1940)); Ellison v. Murphy, 219 N.Y.S. 667, 667 (N.Y. App. Div. 1927).

73. *See Ellison,* 219 N.Y.S. at 668 ("This action was brought originally by Robert J. Fuller seeking a partition . . . . After the commencement of the action plaintiff died, and his executor was substituted as plaintiff, and the action was thereupon continued by him.").

74. *See id*. ("The defendant [Ethel M.] Murphy . . . raises the question that plaintiff is not entitled to partition. In this contention I think she is correct.").

75. *Id*. at 667.

the partition, and a defendant who successfully convinced the court not to permit the partition action to continue.[76] On appeal, the court agreed with the trial court that the executor could not continue the partition action, holding that the right of survivorship had already vested in the other tenants and thus took precedence.[77]

One case that reached a more nuanced conclusion was *Sheridan v. Lucey*, a Pennsylvania case from 1956.[78] Like *Cobb*, the sole question in *Sheridan* was "whether [an] action for partition . . . by joint tenants with the right of survivorship abates upon the death" of a joint tenant.[79] Contrary to the case in *Cobb*, however, Pennsylvania maintained a statute stating that "[n]o plea in abatement [(i.e., dismissal of the suit)] shall be admitted . . . in any suit for partition . . . by reason of the death of any defendant," which Sheridan used in support of her right to continue the partition after the petitioner's death.[80] The court rejected this proposed reading of the statute.[81] The court held that, although the statute "provide[s] for survival of proceedings," it is "merely procedural and [does] not provide for a cause of action to survive where the right [of survivorship] is effectively extinguished by [the] death" of a joint tenant.[82]

Despite *Cobb* and *Sheridan*'s brief discussion of whether a partition action must always end upon death, later decisions and legal scholarship have widely and uncritically restated the rule they set forth.[83] Additional cases have added some nuance to the rule, broadly defining the right of survivorship to supersede any pending action for partition upon the death of

76. *See Dando,* 99 P.2d at 561 ("Susie May Dando filed a complaint in partition . . . . [Several weeks later,] the plaintiff Susie May Dando died . . . . Edmund Nichols, as executor of the estate of Susie May Dando, deceased, was substituted in [her] place . . . . The plaintiff [Nichols] contends the court erred . . . .").

77. *See id.* (holding that executor's claim to continue partition was "entirely without merit"). Technically, the court here rejected the heir's ability to maintain the partition action because the court determined that no such right existed, and neither common law and nor any statute in California dictated otherwise. In so doing, the court in *Dando* addressed the issue more adeptly than *Battle*, *Cobb*, or *Ellison*.; *see* discussion *infra* Section IV.A.

78. Sheridan v. Lucey, 149 A.2d 444, 445 (Pa. 1959).

79. *Id.*

80. *Id.* at 445 (quoting 12 PA. STAT. AND CONS. STAT. ANN. § 11 (1807)).

81. *Id.* at 446; *see* Patricia H. Jenkins, *Creation and Termination of Joint Tenancies in Pennsylvania*, 80 DICK. L. REV. 92, 104–05 (1975) (discussing holding in Sheridan and interpretation of state "statutes that provided for the survival of the proceedings" after "death of a joint tenant seeking partition."); *see also* William H. Dodd et al., *Pennsylvania Property Cases of 1959*, 64 DICK L. REV. 133, 145 (1960) (similar).

82. *Sheridan*, 149 A.2d at 446.

83. *See* discussion *infra* notes 84–85 and accompanying text.

a joint tenant.[84] However, these cases still accept that a partition action must end on the death of one of the joint tenants as a "universal" axiom.[85]

Legal scholarship addressing these cases has been limited, but the few sources that have surveyed this area of the law restate the rule as identified in *Cobb*.[86] One instance, Richard Helmholz's *Realism and Formalism in the Severance of Joint Tenancies*, accepts that "[w]here joint tenants petition for partition of the property . . . but one of them dies before the petition can be acted upon[,] . . . [t]he cases are virtually unanimous that there is no severance in this circumstance."[87] Similarly, John Orth's *The Perils of Joint Tenancies* relates that the "filing [of a partition] alone does not sever a joint estate" because "only a judgment of partition . . . has that effect . . . ."[88] Like Helmholz, however, Orth focuses solely (and briefly) on the limited question of whether the death of a joint tenant severs a joint tenancy and not the broader issue of whether death forces the partition suit to end.[89] It is the latter question, and the distinction between the severance of the right of survivorship at common law and the proper dismissal of partition by statute that commands the remainder of this Article.[90]

III. THE HISTORICAL INTERSECTION OF SURVIVORSHIP AND PARTITION AT DEATH

Many have described the common law right of survivorship as "[t]he distinguishing feature of joint tenancy" and the statutory right to partition as among "the most important legal remedy available" to joint tenants.[91] The

---

84. *See generally, e.g.*, Nichols v. Nichols, 168 N.W.2d 876 (Wis. 1969**)** (holding that death of joint tenant that occurs before sale is final triggers right of survivorship); *In re* Estate of Gordan, 842 A.2d 1270, 1275 (Me. 2004) (holding that death of joint tenant that occurs before divorce is final triggers right of survivorship).

85. *See, e.g.*, Heintz v. Hudkins*,* 824 S.W.2d 139, 142 (S.D. Mo. Ct. App. 1992) (citing Cobb v. Gilmer, 365 F.2d 931, 933 (D.C. Cir. 1966) ("[T]he universal rule . . . is that a pending suit for partition of a joint tenancy does not survive the death of one of the tenants.")); *see also*, *e.g.*, Mercurio v. Headrick, 983 So. 2d 773, 774 (Fla. Dist. Ct. App. 2008) ("[A] pending action to partition a joint tenancy with right of survivorship . . . does not survive the death of a joint tenant."); Jackson v. Estate of Green, 771 N.W.2d 675, 676 (Mich. 2009) ("[T]he mere filing of a partition action does not sever a joint tenancy.").

86. *See* discussion *infra* notes 87–89.

87. Richard H. Helmholz, *Realism and Formalism in the Severance of Joint Tenancies*, 77 NEB. L. REV. 1, 4–5, 30 (1998) (discussing distinctions between right of survivorship and right to partition).

88. John V. Orth, *The Perils of Joint Tenancies*, 44 REAL PROP., TR. & EST. L.J. 427, 439 (2009) [hereinafter Orth, *Perils*]; *see* H. E. Tully, *Joint Tenancy in Real Property—The Title Insurer's Viewpoint*, 37 WASH. L. REV. 7, 24 (1962) (briefly noting that death of joint tenant does not sever joint tenancy).

89. *See* Orth, *Peril*, *supra* note 88, at 439 (discussing whether death of joint tenant ends partition by severing right of survivorship); *cf.* Helmholz, *supra* note 87, at 30 (mentioning death of joint tenant does not sever right of survivorship).

90. *See* discussion *infra* Parts II–V.

91. MERRILL & SMITH, PROPERTY, *supra* note 2, at 597, 601; Anne L. Spitzer, *Joint Tenancy with Right of Survivorship: A Legacy from Thirteenth Century England*, 16 TEX. TECH L. REV. 629, 635 (1985); *see* Battle v. Howard, 185 N.E.3d 1, 5 (Mass. 2022) ("A joint tenancy is a form of

former, through which "a surviving tenant automatically acquires the interest of another joint tenant when the other tenant dies," arose at common law. [92] The latter, through which joint tenants have "an automatic right to terminate" the joint tenancy and its right of survivorship "at any time," arose by statute.[93] These rights, historical developments, and interactions form the backdrop against which cases such as *Battle*, *Cobb*, and *Lucey* crafted their holdings and determined whether a partition claim survives if a tenant dies.[94] Understanding how the statutory right to partition and the effect of a joint tenant's death on it, therefore, requires addressing the common law right of survivorship and its severance first.[95]

A. Common Law Right of Survivorship

The common law right of survivorship has existed in Anglo-American common law for more than eight centuries, and since has developed an intricate yet rigidly formalistic set of governing principles.[96] The right of survivorship exists whenever there is also a joint tenancy; therefore, the right

---

co-ownership . . . characterized by the right of survivorship."). Some have criticized the four unities needed to create joint tenancies as "needless and outmoded formalism" and call for a test based on the "the intent of the parties." For the extensive legal literature considering the severance of joint tenancies and its rigid formalism, most of which arose in the mid-twentieth century. *See* Robert W. Swenson & Ronan E. Degnan, *Severance of Joint Tenancies,* 38 MINN. L. REV. 466, 503 (1954); Edward H. Hoenicke, *Elimination of the Straw Man in the Creation of Joint Estates in Michigan,* 54 MICH. L. REV. 118, 120 (1955); Harold J. Romig, Jr. & John M. Shelton, *Severance of a Joint Tenancy in California,* 8 HASTING L.J. 290, 298 (1957); Londo H. Brown, *Some Aspects of Joint Owner- ship of Real Property in West Virginia,* 63 W. VA. L. REV. 207, 227 (1961); Elmer M. Million et al., *Real and Personal Property*, 36 N.Y.U. L. REV. 357, 381 (1961). Given this trend, some jurisdictions "replace[d] the rigid unities analysis with an examination of the parties' intent," though Massachusetts is not among them. Carrozzo, *supra* note 2, at 426.

92. The joint tenant thus removes the property subject to a right of survivorship from the typical probate process and grants ownership to the other tenant directly. MERRILL & SMITH, PROPERTY, *supra* note 2, at 598; *see* ROBERT H. SITKOFF & JESSIE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 41 (10th ed. 2017) ("Under the theory of joint tenancy, the decedent's interest vanishes at death . . . [t]he survivor need only file a death certificate with the local registrar of deeds."). Some have argued that this right has been misinterpreted and that, in theory, a joint tenant receives nothing on the death of another tenant. *See, e.g.*, John V. Orth, *The Paradoxes of Joint Tenancies*, 46 REAL PROP., TR. & EST. L.J. 483, 493 (2012) ("[A] joint tenant . . . gains nothing at the time of the death of the other joint tenant. The decedent's interest simply disappears, leaving the surviving joint tenant . . . now holding it alone as sole owner.").

93. *See generally* James Chen, *What Are Joint Tenants With Right of Survivorship (JTWROS)*, INVESTOPEDIA, https://www.investopedia.com/terms/j/jtwros.asp (Apr. 21, 2024) (explaining the general concept of joint tenant and their right to survivorship) [https://perma.cc/LJL6-YEF7].

94. Battle v. Howard, 185 N.E.3d 1, 3–4 (Mass. 2022); Cobb v. Gilmer, 365 F.2d 931, 932 (D.C. Cir. 1966); Sheridan v. Lucey, 149 A.2d 444, 445 (Pa. 1959).

95. *See generally What are the historical origins of joint-tenancies and tenancies-in-common?*, UNDERWOOD L. FIRM, P.C. (Sept. 16, 2022), https://www.underwood.law/blog/what-are-the-historical-origins-of-joint-tenancies-and-tenancies-in-common/ (discussing how the common law has stemmed from the seventeenth- and eighteenth-century England law) [https://perma.cc/HHC5-XYB2].

96. *See Right of survivorship*, CORNELL L. SCH., https://www.law.cornell.edu/wex/right_of_survivorship#:~:text=Under%20the%20right%20of%20survivorship,rights%20to%20the%20entire%20estate (last visited Feb. 25, 2025) [https://perma.cc/AD86-7WW6].

of survivorship exists so long as the four unities of time, interest, title, and possession are present.[97] It is destroyed, or severed, whenever one of the four unities cease to exist, rendering a joint tenancy a tenancy in common.[98] The importance of the four unities, in conjunction with the existence of the right of survivorship, can therefore be scarcely overstated: "[w]ithout the unities—all four simultaneously—there could be no joint tenancy" with an accompanying right of survivorship for the other tenants.[99] With a joint tenancy, survivorship is paramount.[100]

As the decision in *Battle* alluded, citing seminal works of Blackstone and others, the common law right of survivorship truly has ancient roots.[101] The concurrent ownership of property, of which the joint tenancy is an example and from which the right of survivorship arose at common law, was "recognized as early as the time of Henry de Bracton," the thirteenth-century English jurist who compiled the first treatise in Anglo-American law, *On the Laws and Customs of England*.[102] In his treatise, Bracton described co-owned property as being held "in common by common consent."[103] During Bracton's time, co-owners held such lands "*pur my et pur tout*" (by me and by all), meaning that each co-owner held the property with equal rights, from which the modern law derives the concept of each joint tenant having "a right to possess the whole."[104] Co-owners did not, however, possess anything recognizable as a right of survivorship.[105]

Joint tenancy was first described in a way recognizable today, with its distinct right of survivorship, no later than 1481 in Thomas Littleton's *Tenures*—the product of an English judge that is commonly regarded as the

---

97. *Battle*, 185 N.E.3d at 4–5; *see* Carrozzo, *supra* note 2, at 425.

98. *See Battle*, 185 N.E.3d at 4–5 ("A joint tenancy is severed when any one of the four unities is destroyed . . . ."); *accord* MERRILL & SMITH, *supra* note 2, at 598 ("Traditionally, if any of the unities is destroyed in a joint tenancy . . . [it] is severed and a tenancy in common is created.").

99. Orth, *Peril*, *supra* note 88, at 429 (citing Deslauriers v. Senesac, 163 N.E. 327, 329 (Ill. 1928); Stuehm v. Mikulski, 297 N.W. 595, 597 (Neb. 1941)); *see* Carrozzo, *supra* note 2, at 426 ("[S]everance . . . can be achieved simply by an act . . . that destroys any one of the four unities.").

100. *See* Chen, *supra* note 93.

101. *Battle*, 185 N.E.3d at 4–5.

102. Carrozzo, *supra* note 2, at 432 (citing AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES (A. James Casner et al. eds., 1952)); *accord* Helmholz, *supra* note 87, at 4 ("The common law joint tenancy . . . go[es] back at least to the thirteenth century.") (citing 3 BRACTON ON THE LAWS OF ENGLAND 271–72 (George Woodbine ed., Samuel E. Thorne trans. 1977)); THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 258–65 (1956) (showing how Bracton's work has been described as the "flower and crown of English jurisprudence" and is credited for its influence on the doctrine of stare decisis); *see Bracton Online*, HARV. L. SCH. LIB., https://amesfoundation.law.harvard.edu/Bracton/ (last visited May 28, 2024) (providing a general overview of Bracton and his work) [https://perma.cc/4J2U-EEKJ].

103. *Bracton Online*, *supra* note 102; *see* Carrozzo, *supra* note 2, at 432 ("Bracton . . . speaks of joint tenants who are seised 'pur my et pur tout.'").

104. MERRILL & SMITH, *supra* note 2, at 597.

105. *Id.*

first treatise on English property law.[106] Littleton, like Bracton before him, recognized forms of co-ownership that could exist whenever "two . . . or more . . . hold" an estate in common.[107] Littleton, however, for the first time, recognized joint tenancy as distinct among other forms of co-ownership.[108] "The nature of joint-tenancy," Littleton restates, "is[] that he which survive[s] shall have . . . the entire tenancy," acknowledging what is recognized today as the joint tenants' common law right of survivorship.[109]

Building upon Littleton's work, including his writings on joint tenancies, Edward Coke's *Commentary Upon Littleton* both affirmed the right of survivorship and distinguished it from tenancy in common in a way Littleton had not.[110] Coke, like Littleton before him, described that "[t]he nature of joint-tenancy . . . is that [the tenant] who survives shall have the entire tenancy," and thus, "he who survives . . . claims the land."[111] Unlike Littleton, however, Coke expressly distinguishes joint tenancy and its right of survivorship from tenancy in common—a distinction that mattered only once devising land by last will and testament had become possible under English law by statute as of 1540.[112] Only after that did joint tenancy and the tenancy in common require distinct nomenclature and separate recognition.[113]

While Bracton and Littleton both discuss early iterations of joint tenancies and their right of survivorship, they made no mention of the severance of joint tenancies.[114] Coke, by contrast, makes clear that important

---

106. Carrozzo, *supra* note 2, at 433; IAN WARD, ENGLISH LEGAL HISTORIES 177–78 (2019); *see also* John H. Baker, *Littleton [Lyttleton], Sir Thomas (d. 1481)*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (online ed., May 24, 2007), https://www.oxforddnb.com/display/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-16787 [https://perma.cc/7Q6M-9KMX].

107. THOMAS LITTLETON, TENURES 129–30 (Eugene Wambaugh ed., John Byrne & Co. 1903) (1481).

108. *Id.*

109. *Id.*; *cf.* MERRILL & SMITH, *supra* note 2, at 597 (defining joint tenancy under modern law).

110. VIRGINIA LAW BOOKS: ESSAYS AND BIBLIOGRAPHIES 322 (William Hamilton Bryson ed., 2000) (Edward Coke's treatise sought to "br[in]g up to date and enlarge" Littleton's work. Although Coke's treatise proved a meandering and unapproachable work, there is a near inexhaustive supply of case law, law review articles, books, and treatises that rely on his famed and oft-cited work.); *see* JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 167, 200 (2019) (indicating importance of Coke's work but describing his approach to writing it as "constantly wandering off at tangents . . . like a helpful old wizard, anxious to pass on all his wisdom before he died, but not quite sure where to begin or end," and providing an overview of his work and its influence on Anglo-American law); WARD, *supra* note 106, at 177–78 (providing an overview of Coke's work and its influence on Anglo-American law); *see generally* ALLEN D. BOYER, SIR EDWARD COKE AND THE ELIZABETH AGE (2003) (providing an overview of his legal and political career).

111. EDWARD COKE, A READABLE EDITION COKE UPON LITTLETON 341, 349 (Thomas Coventry ed., London, Saunders and Benning, Law Booksellers, Successors to J. Butterworth and Son 1830) (c. 1628).

112. *See* Statute of Wills 1540, 32 Hen. 8 c. 1 (Eng.) (permitting right to devise real property by last will); *see* LITTLETON, *supra* note 107, at 129–30; *see also* Spitzer, *supra* note 91, at 636 ("According to Littleton joint tenancy had necessarily to arise out of purchase: inheritance could not create a joint tenancy.").

113. *See* LITTLETON, *supra* note 107, at 129–30.

114. *Id.*

implications of a joint tenancy's unities for the continuation of its right of survivorship.[115] "There shall never be any survivorship," Coke relates in his *Commentary Upon Littleton*, "unless the [estate] be in jointure at the instant of the death of he who first dies."[116] If the estate had become a tenancy in common, the land went to the decedent's heirs.[117]

Referencing Coke on this point, William Blackstone's *Commentaries* from 1769 synthesizes Coke's writings into the modern law of unities.[118] He states that joint tenancies and their right of survivorship "are derived from its . . . unit[ies]" and "may be severed . . . by destroying *any* of its . . . unities," at which time "the jointure . . . is severed [and] the right of survivorship . . . ceases with it."[119] He justifies this strict requirement as necessary to maintain the core axiom, alive since Bracton, that joint tenants are "seised *per my et per tout*" with a right to possess the whole.[120] Blackstone claimed that if the tenants do not hold the land at different times, by different titles, or in different forms they cannot be said to truly possess an uninterrupted whole.[121]

Given the recognition since Blackstone's time that severance occurs only when a unity is destroyed, there is "virtually no dispute among courts regarding . . . severance," including that a joint tenancy is *not* severed when a joint tenant dies or files a suit for partition.[122] Consequently, courts agree that only a partition action that "is carried through to its conclusion" severs the joint tenancy into a tenancy in common and thus ends the right of survivorship.[123] Some have criticized this strict approach to severance for

115. COKE, *supra* note 111, at 341.

116. *Id.* at 346.

117. *Id.*

118. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *180, *180 n.1, *185–86 (1765).

119. *Id.*; *see* Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 4–19 (1996); *see also* DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW iii (1958) ("In the history of American institutions, no other book—except the Bible—has played so great a role . . . ."); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 23 (1991) (describing Blackstone's *Commentaries* as "*the* law book" of "esteem" in early America) (emphasis in original).

120. 2 BLACKSTONE, *supra* note 118, at *180.

121. *Id.*

122. Tully, *supra* note 91, at 20–21 (citing Scymczak v. Scymczak, 138 N.E. 218, 220 (Ill. 1923); Smith v. Smith, 287 N.W. 411, 415 (1939)). Indeed, the parties in *Battle* agreed, citing a previous Massachusetts decision, that neither the petitioner joint tenant's death nor filing of a partition action severed the joint tenancy at issue. *See also* Battle v. Howard, 185 N.E.3d 1, 7 (Mass. 2022) ("The mere institution . . . of partition proceedings does not work a severance . . . .") (citing Minnehan v. Minnehan, 147 N.E.2d 533, 535 (Mass. 1958)).

123. Helmholz, *supra* note 87, at 4, 30 ("Only a partition, accomplished by sale or physical division of the property, results in the parties holding separate interests in the property."); Spitzer, *supra* note 91, at 634 ("A joint tenancy can be partitioned only after judgment . . . ."); *see also* Helmholz, *supra* note 87, at 30 n.123 ("[T]he rule is necessary in order to safeguard the integrity of the underlying action for partition. Partition cannot be effective before it is obtained. One cannot secure the results of a judicial action simply by asking for it.") (citing *Minnehan*, 147 N.E.2d at 534).

failure to include the filing of partition.[124] To be sure, few actions by a joint tenant could "more objectively express the intention to sever a joint tenancy and eliminate the right of survivorship than the filing of a partition action."[125] Nevertheless, "[the] filing [of a partition] alone does not sever a joint estate; only a judgment of partition in kind or a judicial sale and division of the proceeds has that effect . . . ."[126]

In the absence of severance or partition, joint tenancy and its right of survivorship once served as a fashionable means of avoiding the "feudal incidents" accompanying tenures in land, the legal obligations in early modern England owed by tenants to landowners.[127] Joint tenancies were equally effective at frustrating a feudal landlord's right of escheat, under which ownership of land would revert to the landlord upon the death of a tenant.[128] Through the right of survivorship, parties could effectively prevent their land from ever reverting back to the landlord.[129]

These efforts led to a series of parliamentary reforms during the reign of Henry VIII in the early sixteenth century that continued into the seventeenth century.[130] Common law, therefore, is not the end of the matter.[131] That a partition action fails to sever a joint tenancy does not conclusively determine if the death of a joint tenant ends the partition actions.[132] The answer to that lies not in the common law of property but in a series of statutory changes.[133]

---

124. *See generally*, Helmholz, *supra* note 87, at 30 (describing that partition must be carried out to its conclusion for severance to occur, despite the parties' expressed intent to sever before one's tenant's death).

125. Orth, *Peril*, supra note 88, at 439.

126. *Id.* at 439; *see also* Orth, *supra* note 92, at 484 ("[B]ecause eliminating at least one of the required four unities effects the joint tenancy's severance, actions clearly intended to sever the estate and eliminate the associated right of survivorship—such as . . . filing a partition action—but that leave the unities intact will not be effective [to partition the property].") (footnote omitted).

127. *See* BAKER, *supra* note 110, at 272 (discussing after the Statute of Wills imparted English subjects with the right to devise land by last will and testament, parties could deprive the Crown and the aristocracy of feudal revenues using joint tenancies). Under medieval law, "the king owned the land and granted rights to others." STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS 4 (8th ed. 2013). Each form of tenure accompanied different rights and obligations. *See* LITTLETON, *supra* note 107, at 5–6; *see* Liam Edward Cronan, *Of Property and Pilgrims: The Myth of Communal Property and the Realities of Corporate Charters and Land Tenures in Plymouth Colony*, 55 ST. MARY'S L.J. (forthcoming 2024) (manuscript at 21, 27–28, 31, 33, 36) (describing various forms of tenures under English law).

128. *See* 1 FREDERICK POLLOCK AND FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD 355–66 (Cambridge Univ. Press 1968) (1895).

129. Carrozzo, *supra* note 2, at 433.

130. Spitzer, *supra* note 91, at 637 (quoting S. F. C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 211 (2d ed. 1981)). This desire for reforms led in part to the Statute of Uses, which paved the way for the advent of the modern trust. *See* Liam Edward Cronan, Note, *And the Heirs of His Trust Corpus: How the Fee Tail and Historical Limitations on Perpetuities Can Inform the Law of Perpetual Trusts*, 103 B.U. L. REV. 659, 673–74 n.57 (2023) (citing Statute of Uses 1535, 27 Hen. 8 c. 10 (Eng.)).

131. *See* discussion *infra* Section III.B.

132. *See* discussion *infra* Section III.B.

133. *See* discussion *infra* Section III.B.

B. Statutory Right to Partition

As *Battle* recognized, it is only by statute that joint tenants can partition their joint tenancy by means other than severance, which was derived from a statutory scheme first developed in sixteenth-century England and carried over into Colonial America.[134] At common law, there was no right to partition.[135] Recognizing this proposition, *Battle* relied on a seventeenth-century statute from Colonial Massachusetts and nineteenth-century case law on the matter, which affirms that partition "is impracticable . . . at common law . . . ."[136] The right to partition, instead, first arose as an outgrowth of a different, and long since extinct, form of co-ownership: the coparcenary.[137]

The coparcenary has ancient origins.[138] At the height of English feudal law in the thirteenth century, most co-ownership of real property that was not for a public venue, such as a stadium or a theatre, arose "with a [co]parcener."[139] Generally, the holders of a coparcenary, each called a "coparcener," were the daughters of a father who had died without male heirs and thus to whose lands "the laws of primogeniture," which granted ownership of lands to eldest sons, "did not apply."[140] Much like the modern joint tenant, coparceners held property jointly, possessed an undivided right to the whole estate, and presumptively had a right to claim the shares of a predeceased coparcener, just as a modern joint tenant takes through a right of survivorship.[141]

---

134. Battle v. Howard, 185 N.E.3d 1, 6 (Mass. 2022) ("[A] co-owner . . . has had, since colonial times, a statutory right to petition the courts to divide property that he . . . no longer wishes to own jointly . . . .").

135. *Id.* at 13–14.

136. *See id.* at 6 (citing Province L. 1693, c. 8, § 1; Cook v. Allen, 2 Mass. 462, 469 (1807)) (discussing the decision in *Battle* then moved on to its analysis of Section 26 "in its current form," making no further inquiry into the historical development of partition actions or their abatement upon the death of a joint tenant).

137. *See* 2 EDMUND HATCH BENNETT ET AL., MASSACHUSETTS DIGEST: A DIGEST OF THE REPORTED DECISIONS OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS FROM 1804 TO 1879, WITH REFERENCES TO EARLIER CASES 4033 (1881) (citing *Cook v. Allen* for proposition that right to partition did not exist at common law and arises only by statute).

138. BRACTON, *supra* note 102, at 130, 250.

139. *Id.*

140. Carrozzo, *supra* note 2, at 434; *see Coparcener*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "coparcener" as "[a] person [] to whom an estate descends jointly, and by whom it is held as an entire estate"). Only eldest male children inherited his father's estate under primogeniture, and thus coparcenary permitted property ownership to continue even where the decedent had only female children. *See* BAKER, *supra* note 110, at 228, 285, 287 (discussing adoption of primogeniture in Medieval England); *see also* ZOUHEIR JAMOUSSI, PRIMOGENITURE AND ENTAIL IN ENGLAND 9–17 (2011) (describing rules of primogeniture); BAKER, *supra* note 110, at 285 ("In certain parts of England," however, "coparcenary was also favored as the default form of inheritance between sons, in contrast to typical primogeniture inheritance . . . ."); *cf.* PRESSER & ZAINALDIN, *supra* note 127, at 700 (discussing absence of primogeniture in American law).

141. *See* BAKER, *supra* note 110, at 287–88 (noting that "parceners . . . held separate and undivided shares in the property" and right to other coparcener's shares at their death) (internal quotations omitted) (citing FRANK STENTON, THE FIRST CENTURY OF ENGLISH FEUDALISM 39–40 (2d ed. 1961))).

Although the coparcenary form of co-ownership has long fallen out of use, coinciding with the demise of primogeniture inheritance, its strictures gave rise to the right to partition property unilaterally, which had once been impossible for joint tenants.[142] As early as Bracton's time in the thirteenth century, English common law recognized that parties who held property as joint tenants could "*by common consent* choose to make [a] partition by writ of lands concerning which there was disagreement between them."[143] Otherwise put, co-owners could file an action to divide their property only by unanimous consent and not unilaterally.[144]

As Littleton restated two centuries later, "joint-tenants . . . [could] make partition between them, . . . but they [could] not be compelled to do [so] by the law."[145] Only the coparcenary could be unilaterally partitioned at common law.[146] A coparcener, unlike a joint tenant, could file "writ of *partitione facienda*" to "compel a fair division" of the property as determined by a court.[147] Literally translating to "let the division be done," the writ *partitione facienda* gave the partition suit its present name.[148]

Intent on extending the benefits of unilateral partition to joint tenants as well, Parliament enacted a statutory change to the common law.[149] It passed acts in 1539 and 1540 that extended the right of partition to all forms of co-ownership, including joint tenancy.[150] The 1539 Joint Tenants and Tenants in Common Act, within the Proclamation by the Crown Act, dictated that "all joint tenants and tenants in common . . . may be . . . compelled . . . to make [a] partition between them."[151] Making clear the connection between this statutory right and the common law right of coparceners, the 1539 statute expressly provided that a joint tenant's statutory right to a writ of partition was "in like manner and form as coparceners by the common law . . . are compellable to do. . . ."[152]

---

142. *Id.* at 228, 287 (describing end of primogeniture in England); PRESSER & ZAINALDIN, *supra* note 127, at 329 (describing how primogeniture in Colonial America "was replaced by a system of partible inheritance in New England and significantly diminished among southern colonies.").

143. BRACTON, *supra* note 102, at 210–11 (emphasis added).

144. *Id.*

145. LITTLETON, *supra* note 107, at 135.

146. *Id.*

147. *Id.* at 114–15; BAKER, *supra* note 110, at 288.

148. LITTLETON, *supra* note 107, at 115 (concluding that it is from their ability to partition their land that coparceners derived their name); *see* Carrozzo, *supra* note 2, at 434 ("[T]he origin of the name 'parceny' appears to stem from this right.") (citing WILLIAM F. WALSH, A HISTORY OF ANGLO-AMERICAN LAW § 115, at 215 (2d ed. 1932)).

149. Proclamation by the Crown Act 1539, 31 Hen. VIII c. 1 (Eng.).

150. *Id.*

151. *Id.*; *see* Spitzer, *supra* note 91, at 636 ("In Littleton's time, a joint tenancy was subject to partition by the consent of all tenants, but partition could not be forced on an unwilling joint tenant. Such compulsion was not available until provided by statute in 1539.") (footnote omitted) (citing Proclamation by the Crown Act 1539, 31 Hen. VIII c.1 (Eng.)).

152. Proclamation by the Crown Act 1539, 31 Hen. VIII c. 1 (Eng.) (cleaned up).

The following year, the Partition Act of 1540 clarified that a partition of a joint tenancy could be achieved by the same means as a coparcener could at common law: the "[w]rit of [p]artition."[153] A century later, Coke relied on these statutes to reiterate, contrary to Littleton, that "joint-tenants . . . are compellable to make partition by . . . statute."[154] Likewise, Blackstone, writing in the eighteenth century, cited these statutes to explain that the partition is impossible at common law, but that by statute, "[j]oint-tenants . . . are compellable by writ of partition."[155]

Recognizing this English antecedent, American colonies enacted their own versions of the 1539 statute, extending the statutory right to partition when it otherwise had not existed.[156] Massachusetts, for example, was early among them.[157] In 1693, the General Court enacted a statute providing that "all persons having . . . [l]ands . . . as [c]oparceners, joint-[t]enants, or [t]enants in [c]ommon, may be compelled by writ of [p]artition at the common [l]aw to divide the same[,] where the parties cannot agree to make [p]artition thereof by themselves."[158] In essence, this statute effectively codified England's 1539 Joint Tenants and Tenants in Common Act and 1540 Partition Act in Massachusetts.[159]

Half a century later, the colony reinvigorated its law on partition with the Act for the More Easy Partition of Lands in 1748.[160] This Act both reaffirmed the statutory right to partition of all lands held by co-owners, whether a joint tenancy or otherwise, and expanded the right by allowing partitions to be made not only by a co-owner but also by an agent, attorney, or guardian.[161] Through statutes such as these, the right to partition became part of early American law when it would otherwise not have existed at common law.[162]

---

153. Partition Act 1540, 32 Hen. 8 c. 32 (Eng.).

154. COKE, *supra* note 111, at 290 (citing Proclamation by the Crown Act 1539, 31 Hen. VIII. c. 1 (Eng.)).

155. 2 BLACKSTONE, *supra* note 118, at *185 (citing Proclamation by the Crown Act 1593, 31 Hen. VIII. c. 1 (Eng.)); *see* BAKER, *supra* note 110, at 313 (discussing that, by Blackstone's time, joint tenancies served as an integral part of "strict settlements," complex legal arrangements used to keep land in the hands of a single family).

156. 1 WILLIAM BLACKSTONE, COMMENTARIES *105 (discussing that, under prevailing legal theory at the time, laws in force in England were not automatically enforced in overseas colonies. Instead, as Blackstone states, the American colonies were "subject . . . to the control of . . . [P]arliament," but were "distinct . . . dominions," and thus English law "ha[d] no . . . authority there" until a colony expressly chose to enact it.").

157. *Id.*

158. *See* MASS. GEN. LAWS ch. 103, § 1 (1836).

159. *See id.*

160. *See* THE CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 568 (T. B. Wait and Co., Boston, 1814) ("Be it enacted . . . that . . . any person or persons interested with any others in any lot or grant of land, making application, either by themselves or their lawful agents, attorneys or guardians, to the superior [sic] court of judicature, the said court [is] . . . authorized . . . to cause partition to be made of such lands. . . .").

161. *See id.*

162. *See id.*

C. Common Law and Statutory Abatement of Partition

With the advent of a statutory right of partition for joint tenants, an inherent conflict with the common law right of survivorship arose whenever a party died during a partition.[163] When such a death occurs, as it did in *Battle* and many other cases before it, the surviving joint tenants may attempt to end the partition by moving to dismiss the suit.[164] The common law right of survivorship appears to trump partition and grant the surviving tenants the right to the property.[165] But whether a court ought to grant such dismissal depended on yet another parliamentary enactment.[166]

At common law, the rule was simple: a party's death ended the partition.[167] Indeed, all actions at common law ended, or abated, "with the death of that party" bringing the action.[168] This rule was applied as early as 1313 in *Broomfield v. Broomfield*.[169] There, a coparcener filed a writ of *partitione facienda* before the English Court of Common Pleas but died before the partition was complete, at a time when such a right held was only by coparceners.[170] The court determined that the coparcener's siblings continued to hold the land jointly after his death because the partition had not been completed when he died.[171] Nearly three centuries later, the Court of Common Pleas in *Lord Barkley v. Countess of Warwick* similarly reiterated that "the death after the first judgment shall not abate [the will]" and, therefore, ordered a partition action dismissed after one of the joint tenants died before the partition was complete.[172]

---

163. *See generally* Battle v. Howard, 185 N.E.3d 1, 3 (2022) (discussing whether a party's death vests full title in a joint tenant).

164. *See id.* at 3; *see also* Cobb v. Gilmer, 365 F.2d 931, 932 (D.C. Cir. 1966).

165. *See Battle*, 185 N.E.3d at 3.

166. *See* Partition Act 1696, 8 & 9 Will. 3, c. 31, § 3 (Eng.).

167. Gunderson, *supra* note 15, at 100.

168. *See* Gunderson, *supra* note 15, at 100 n.24 ("[The] common-law doctrine is *actio personalis moritur cum persona*. In English this translates to 'a personal right of action dies with the person.'") (quoting Doggett v. Boiler Eng'g & Supply Co., 477 P.2d 511, 512 (Idaho 1970)).

169. Broomfield v. Broomfield, Y.B. 6 Edw. 2, 87 (1313–14) (Eng.) (reprinted in 8 SELDEN SOC'Y, YEAR BOOKS OF EDWARD II, at 87 (1913)).

170. *Id.* (originally published in Law French, the language of English law at the time and until approximately the seventeenth century).

171. *Id.* (presenting a rare, though possible, instance of a coparcenary held by brothers); *see* Jamoussi, *supra* note 140 (noting the possibility of coparcenary held between male children in some parts of England).

172. Lord Barkley v. Countess of Warwick, 40 and 41 Eliz. I, pl. 32 (1598-99), in 1 GEORGE CROKE & THOMAS LEACH, REPORTS OF SIR GEORGE CROKE, KNIGHT, OF SELECT CASES ADJUDGED IN THE REIGN OF QUEEN ELIZABETH, KING JAMES, AND KING CHARLES I IN THREE VOLUMES 635–36 (1790); *see* Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 545 n.28 (1932) (referencing *Lord Barkley v. Countess of Warwick* in history of appeals as final judgments in partition actions); *see also* LEICESTER'S COMMONWEALTH: THE COPY OF A LETTER WRITTEN BY A MASTER OF ART OF CAMBRIDGE 159 (Dwight C. Peck ed., Ohio Univ. Press 1985) (1584) (discussing ongoing land feud between Berkeley and Warwick).

The common law rule ending any suit for partition when a co-owner died, however, eventually proved cumbersome and was therefore amended by statute—a statute that once proved dominant in the law of partition but has since been all but forgotten.[173] In 1696, Parliament enacted the Partition Act, whose main thrust was to amend the procedures for bringing partition actions and impose time limits on which such a claim could be brought, effectively serving as an addendum to the 1539 and 1540 statutes.[174] A later part of the 1696 statute, however, adds that "[n]o [p]lea in [a]batement shall be admitted in any [s]uit for [p]artition . . . by reason of the [d]eath of any [t]enant."[175]

A now-defunct procedural plea, the "plea in abatement" was akin to the modern motion to dismiss.[176] Pleas in abatement did not challenge the facts of the opposing party's complaint; instead, they objected to mode of the proceedings, such as a challenge to jurisdiction.[177] Thus, the 1696 Act changed the common law rule.[178] Before this Act, a joint tenant could have used a plea in abatement to successfully have the writ of partition dismissed after the death of any other tenant, arguing in essence that the court no longer had jurisdiction over the case, given that all actions at common law ended with a party's death by *actio personalis moritur cum persona*.[179] By stating that no partition could "abate by reason of the death of" any co-tenant, the Act expressly forbade such a procedural tactic.[180]

By the eighteenth century, legal treatises including Blackstone's *Commentaries* interpreted the 1696 statute to mean what it said, that "[no] plea in abatement [could] be admitted in any suit for partition . . . by reason of the death of any tenant."[181] Instead, "where the plaintiff died after the . . . writ [was filed]," the other joint tenants could continue the suit, and

---

173. *See* Partition Act 1696, 8 & 9 Will. 3, c. 31, § 3 (Eng.).

174. *Id.*

175. *Id.*

176. See *Plea in Abatement*, BLACK'S LAW DICTIONARY (12th ed. 2024); *see Pleas in Abatement*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/plea_in_abatement (last updated July 2020) ("A plea in abatement is a procedural device and type of demurrer used to challenge a complaint.") [https://perma.cc/H8GT-J9V9]; *see Demurrer*, BLACK'S LAW DICTIONARY (12th ed. 2024); *cf.* FED. R. CIV. P. 12(b)(1)–(6) (allowing challenge to sufficiency of a party's complaint).

177. *See Plea in Abatement*, *supra*, note 176.

178. *See* Partition Act 1696, 8 & 9 Will. 3, c. 31, § 3 (Eng.).

179. *See* Gunderson, *supra* note 15, at 100, n.24 (explaining rule of *actio personalis moritur cum persona*).

180. *Id.*; *see also* THE PRACTICE PART OF THE LAW: SHEWING THE OFFICE OF AN ATTORNEY, AND A GUIDE FOR SOLICITORS 219 (1711) (recognizing that under the 1696 Partition Act, "no [p]lea in [a]batement" could be granted for any partition action where one of the cotenants died before the action was complete).

181. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *302 (1768); *see also* ABRAHAM CLARK FREEMAN, COTENANCY AND PARTITION: A TREATISE ON THE LAW OF CO-OWNERSHIP AS IT EXISTS INDEPENDENT OF PARTNERSHIP RELATIONS BETWEEN THE CO-OWNERS 609 (1874) ("The statute 8 and 9 Wm. III., for the easier obtaining partitions of lands, enacted 'that no plea in abatement shall be admitted or received in any suit for partition [of lands], nor shall the same be abated by reason of the death of any tenant.'"); Partition Act 1696, 8 & 9 Will. 3, c. 31, § 3 (Eng.).

if no other tenant existed, the deceased tenant's heir or heirs "had a *scire facias* upon [the partition action]."[182] A writ of *scire facias*, literally meaning "you make known," was a writ at common law used to revive a judgment that had previously ended for some reason.[183] Although unmentioned in the statutory text itself, it thus became accepted practice under English law that, through a *scire facias*, the deceased joint tenant's heir had a right to revive the partition action that would have otherwise, under the common law rule, ended upon the joint tenant's death.[184]

The statute allowing partition actions to be revived remained in force under English law until Statute Law Revision Act in 1867 formally repealed it.[185] In the interim between 1696 and 1867, however, the spirit of the initial Partition Act and its halt on the abatement of partition spread with the British Empire, both through Parliament and by the consent of the colonies themselves.[186] For example, in 1767, Parliament promulgated the Act for Partition of Land in Coparcenary, Joint Tenancy, and Tenancy in Common in the Colony of Nova Scotia, mirroring the 1696 Partition Act, dictating that under the laws of Nova Scotia "no [p]lea in [a]batement [shall] be admitted or received in any suit for partition, nor [s]hall the [s]ame be abated by [r]eason of the [d]eath of any [t]enant."[187] In similar fashion, Virginia's colonial legislature enacted A Bill concerning Partitions and Joint

182. 1 CROKE & LEACH, *supra* note 172, at 636 (citing Partition Act 1696, 8 & 9 Will. 3 c. 31 (Eng.)).

183. *See* C. Sidney Carlton, *Scire Facias and Executions*, 24 MISS. L.J. 124, 124 (1952) ("Originally, th[e] writ [of scire facias] was used at common law only to revive judgments in real actions."); *Revival of Judgments by Scire Facias*, 28 DICK. L. REV. 206, 209 (1924) (describing the writ of scire facias and its requirements; the writ was since abolished under federal law and has also been abolished in many states); *see* FED. R. CIV. P. 81(b) ("The writ[] of scire facias . . . [is] abolished."); *see, e.g.*, WIS. STAT. § 784.01 (West 2024) (indicating that remedies previously obtainable by writs of scire facias and quo warranto are now accessible through civil actions); CAL. CIV. PROC. CODE § 802 (West 2024) (abolishing the writ of scire facias).

184. *See* Carlton, *supra* note 183, at 124 ("Originally, th[e] writ [of *scire facias*] was used at common law only to revive judgments in real actions."); *Revival of Judgments by Scire Facias*, *supra* note 183, at 209 (describing requirements for *scire facias*).

185. Statute Law Revision Act 1867, 30 & 31 Vic. c. 59 (Eng.) ("repealing certain [e]nactments which have ceased to be in force or have become unnecessary," including the Partition Act 1696, 8 & 9 Will. 3, c. 31. No reason was given for its repeal. By the 1860s, it is likely that the 1696 statute's purpose had long been eroded by the declining use of the writ of partition, which was abolished in 1833); *see* Halton v. Earl of Thanet (1777) 96 Eng. Rep. 669, 670 (C.P.) (noting that "the writ of partition at common law is now fallen into disuse; the usual proceeding being by a bill in equity . . . ."); *see also* ROBERT CAMPBELL, PRINCIPLES OF ENGLISH LAW FOUNDED ON BLACKSTONE'S COMMENTARIES 171 (1907) ("[T]he procedure by writ of partition fell into disuse and . . . was finally abolished by the Real Property Limitation Act . . . .") (citing Real Property Limitation Act 1833, 3 & 4 Wm. IV, c. 27, § 36).

186. *See* An Act for Partition of Land in Coparcenary, Jointenancy, and Tenancy in Common, and Thereby for the More Effectual Collecting of Majesty's Quit Rents in the Colony of Nova Scotia, (1797) 7 Geo. 3, c. 2 (Eng.).

187. *Id.*

Rights and Obligations in 1779, providing: "[n]o . . . suit for partition . . . shall . . . abate by the death of any tenant."[188]

After the American Revolution, other jurisdictions followed suit; for example, like Maryland which adopted a statute in 1785 stating that "[n]o action of . . . partition . . . shall abate by the death of . . . any of the parties."[189] Many others did the same.[190] Given the breadth and widespread nature of these statutory enactments, it therefore became the "general rule" in American law that a suit for partition "does *not* abate on the death of any of the parties;" instead, partition actions ending with the death of one of the joint tenants only occurred in jurisdictions where "the [1696] statute of 8 and 9 Wm. III., or some similar statute, has not been adopted."[191]

IV. RECONCILING MODERN CASE LAW WITH ITS HISTORICAL ORIGINS

For nearly a half-century, the once general rule that a partition action does not abate because of the death of any of the parties has been nearly forgotten and entirely misapplied by courts facing such an issue.[192] Instead, these courts have almost uniformly held that the right of survivorship is triggered by the joint tenant's death and therefore order the pending partition dismissed upon their death.[193] When guided by the above history, however, it becomes clear that the proper approach to this issue is not reached by overemphasizing a joint tenancy's right of survivorship and its severance at a joint tenant's death—as many cases have, it is reached by looking to whether statutory enactments impact the common law abatement of partition upon a joint tenant's death.[194] *Cobb*, *Battle*, and others well illustrate this flaw and its potential for revision.[195]

A. Revisiting Cobb *and Other Jurisdictions*

Cases like *Cobb* and those that follow it wrongly conclude that the "universal rule in this country is that a pending suit for a partition of a joint tenancy does not survive the death of one of the tenants."[196] This "universal

188. *106. A Bill Concerning Partitions and Joint Rights and Obligations June 18, 1779*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0106 (last visited Feb. 9, 2025) [https://perma.cc/LJC6-E5NK].

189. Gunderson, *supra* note 15, at 101 n.34 and accompanying text (citations omitted).

190. *See, e.g.*, GA. CODE ANN. § 9-2-40 (West 2024) ("No action shall abate by the death of either party . . . .").

191. FREEMAN, *supra* note 18181, at 609 n.2 (emphasis added).

192. *E.g.*, Cobb v. Gilmer, 365 F.2d 931, 933 (D.C. Cir. 1966).

193. *Id.*

194. Author's original thought.

195. *Id.*

196. *Cobb*, 365 F.2d at 933; *see also* Heintz v. Hudkins, 824 S.W.2d 139, 142 (Mo. Ct. App. 1992) ("[T]he universal rule in the United States is that a pending suit for partition of a joint tenancy does not survive the death of one of the tenants.") (citing *Cobb*, 365 F.2d at 933).

rule" could not be a farther cry from the general rule, restated in the nineteenth century: a partition "does not abate on the death of any of the parties" unless a statute dictates otherwise.[197] *Cobb*'s error likely stems from an overreading of the cases it cites.[198] Indeed, one case cited in *Cobb* expresses somewhat greater nuance in addressing the death of a joint tenant during partition.[199] In California, *Dando v. Dando* recognized "the common law rule" that a partition action could not continue after the death of a joint tenancy "*except as modified by statute*."[200] Because California "ha[d] no statute declaring that the mere fact one joint tenant files an action in partition works [as] a severance of the tenancy," the court ruled in favor of the defendants.[201] Thus, while *Dando* still primarily focused on severance, it still recognized the common law and statutory distinction, which *Cobb* did not.[202]

Other jurisdictions had previously expressed the issue raised in *Dando* with even greater clarity.[203] As early as 1854, the Maine Supreme Judicial Court in *Dwinal v. Holmes* determined that "the death of a party, either petitioner or respondent, in [an action] for partition, abates the petition" unless there is "*any statut[ory] provision to the contrary*."[204] Because Maine—like California—had no such provision, the court held that the party's death ended the partition.[205]

The Supreme Court of Illinois applied the same rule to an opposite result in *Monroe v. Millizen*.[206] In Illinois, a statute required that "[n]o plea in abatement shall be received in any suit for partition . . . by the death of any tenant," which led the court to hold that the surviving joint tenant's "plea in abatement . . . was improperly filed . . . in th[at] case," and thus the partition suit could continue.[207] More recently in Arkansas, *Woolfolk v. Davis* recognized the potential applicability of a statute's ability to suspend the abatement of partition actions upon death, though the statute ultimately did not apply on its facts.[208] This line of case law from *Dwinal* to *Woolfolk* reveals

197. FREEMAN, *supra* note 181, at 609 § 496.
198. Author's original thought.
199. *Id.*
200. Dando v. Dando, 99 P.2d 561, 562 (Cal. Dist. Ct. App. 1940) (emphasis added).
201. *Id.*
202. *Compare id.*, *with* Cobb v. Gilmer, 365 F.2d 931, 933 (D.C. Cir. 1966).
203. Dwinal v. Holmes, 37 Me. 97, 98 (1854) (emphasis added).
204. *Id.*
205. *Id.* at 99–100.
206. Monroe v. Millizen, 113 Ill. App. 157, 158 (Ill. App Ct. 1904).
207. *Id.*; *see* Kellner v. Finkl, 123 N.E. 522, 523 (1919) ("Section 21 of the Abatement Act provides that no plea in abatement shall be received in any suit for partition, nor shall such suit abate by the death of any tenant.").
208. Uniquely, this case is among the few to recognize, as English law did, the writ of *scire facias* as a method of reviving the partition on a decedent's behalf. *See* Woolfolk v. Davis, 285 S.W.2d 321, 323–24 (Ark. 1955) ("Davis died intestate . . . while his suit for . . . partition of the property was still pending in the court below. When . . . Davis died the suit abated, subject to the right of his heirs to have the action revived within one year from the next session of court after his death. They failed to have the cause

that the true question in any case facing the effects of a joint tenant's death on a pending partition is not, as *Cobb* thought, solely whether the right of survivorship was severed.[209] The question is also whether the jurisdiction maintains a statute providing that a partition action does not "abate" upon death.[210]

To answer this question, courts are left to decide whether any applicable statute allows a partition to continue and, if so, whether the statute's language is specific enough to permit that result.[211] As some early cases recognized, the history of partition squarely aids in interpreting this question.[212] It is only when a statute affecting a similar outcome to its 1696 English ancestor, does a partition not abate on a tenant's death.[213] For example, the Pennsylvania Supreme Court in *Frohock v. Gustine* recognized that an abatement statute was "like the English statute of 8 & 9 W. 3, c. 31, that no plea in abatement shall be admitted or received in any suit for partition," and therefore interpreted it as applicable when a joint tenant died.[214] Similarly, the court in *Kellner v. Finkl* recognized that an Illinois statute was "almost a literal copy of section 3 of chapter 31 of 8 and 9 William III"; the abatement statute that was once in force under English law after 1696, which interpreted the statute to apply when a joint tenant had died.[215] Courts appeared to agree, however, that only a statute applying to partition actions suffices.[216]

This problem arose recently in *Rusnak v. Phebus* in Tennessee, which has a general statute providing that "actions do not abate by the death," but no statute precisely stating that partition actions could continue after death.[217] Because this statute related only to suits in general, and not to partition specifically, the court rejected a party's attempt to continue a partition action under this statute.[218] The Michigan Supreme Court in *Jackson v. Estate of Green* reached a nearly identical conclusion, holding that a statute generally allowing actions to survive did not include partitions.[219]

---

revived within the time and manner provided by [the statute]."); *cf.* 1 CROKE & LEACH, *supra* note 172, at 636 (noting that heirs of deceased joint tenant could continue partition action via writ of *scire facias*).

209. Author's original thought.

210. *Id.*; *accord* Dando v. Dando, 99 P.2d 561, 562 (Cal. Dist. Ct. App. 1940) (recognizing common law and statutory distinction in partitions).

211. Author's original thought.

212. *See Dando*, 99 P.2d at 561.

213. *See* N.M. STAT. ANN. § 42-5-9 (West 2021).

214. Frohock v. Gustine, 8 Watts 121, 123 (Pa. 1839).

215. Kellner v. Finkl, 123 N.E. 522, 522 (1919).

216. *Compare Frohock*, 8 Watts at 123, *with Kellner, 123 N.E. at 522*.

217. Rusnak v. Phebus, No. M2007-01692-COA-R9-CV, 2008 WL 2229514, at *13–14 (Tenn. Ct. App. May 29, 2008) (internal quotation omitted) ("[A]ctions do not abate by the death, or other disability of either party, or by the transfer of any interest therein, if the cause of action survives or continues.").

218. *Id.*

219. Jackson v. Estate of Green, 771 N.W.2d 675, 677–78 (Mich. 2009) ("[T]he filing of the partition action did not sever the joint tenancy because an order effectuating a partition had not entered at the time of defendant's death.") (citing MICH. COMP. L. ANN. § 600.2921 (West 1961) ("All actions and claims survive death.")).

Even among jurisdictions whose statutory language prevents the end of a partition action on a joint tenant's death, unmoored from their historical origins, the more recent cases still wrongly read these statutes and—in essence—read them out of existence.[220] Pennsylvania presents a prime example.[221] As early as 1809, the Pennsylvania Supreme Court had recognized statutory language providing "that no plea in abatement shall be received in any suit for partition," preventing the abatement of a partition after the death of the plaintiffs.[222] Three decades later, the court applied the same statute to the same effect, noting that its language "is like the English statute of 8 & 9 W. 3, c. 31."[223]

A century later, however, this line of reasoning was all but forgotten.[224] *Sheridan v. Lucey* in 1959 presented almost identical facts (the death of a joint tenant during the pendency of partition) and the same statutory text, providing that "abated by reason of the death of any defendant."[225] The court, however, applied common law rules of severance to, in effect, repeal this statutory mandate.[226] Because the death of a joint tenancy accrues the right of survivorship to the other joint tenant or tenants, the court held that there is nothing left to partition "when the party to the action dies."[227] Accordingly, it classified this statute as "merely procedural" and thus, the statute "do[es] not provide for a cause of action to survive where the right is effectively extinguished by death."[228]

By dismissing the statute as merely procedural, the Pennsylvania court reached a result contrary to the way similar statutes had previously been enforced in England and elsewhere.[229] As *Frohock* recognized over a century prior, the Pennsylvania statute maps almost identically onto the English 1696 statute, which was no mere matter of procedure.[230] Instead, that statute did what it said: it prevented a partition, once filed, from being dismissed solely

220. *Compare* McKee v. Straub, 2 Binn. 1, 1–3 (Pa. 1809), *with Frohock*, 8 Watts at 123 *and* Sheridan v. Lucey, 149 A.2d 444, 445 (Pa. 1959).

221. *Compare McKee*, 2 Binn. at 1–3, *with Frohock*, 8 Watts at 123 *and Sheridan*, 149 A.2d at 445.

222. *McKee*, 2 Binn. at 1–3.

223. *Frohock*, 8 Watts at 123.

224. *Sheridan*, 149 A.2d at 445.

225. *See id.* ("The sole question on this appeal is whether the action for partition of real estate held by joint tenants with the right of survivorship abates upon the death of the complainant . . . . [A Pennsylvania statute] provides that 'No plea in abatement shall be admitted or received in any suit for partition, nor shall the same be abated by reason of the death of any defendant.'").

226. *Id.*

227. *Id.* at 445–46.

228. *Id.* at 446.

229. *Id.*

230. *See, e.g.*, Birth Ctr. v. St. Paul Cos., 787 A.2d 376, 387 (Pa. 2001) ("In enacting a statute, the legislature is presumed to have been familiar with the law, as it then existed . . . ."); *see also*, *e.g.*, Reginelli v. Boggs, 181 A.3d 293, 304 (Pa. 2018) ("[S]urplusage . . . is not permissible under basic statutory construction principles."); *accord* Briscoe v. LaHue, 460 U.S. 325, 330 (1983) (recognizing that courts should interpret statutes by assuming legislatures were aware of then-existing common-law principles); Yates v. United States, 574 U.S. 528, 543 (2015) (recognizing that courts should not read statutes as containing superfluous language).

because a joint tenant died and, in turn, granted the joint tenant's heirs a right by writ of *scire facias* to continue the lawsuit.[231] Even if one were in fact to classify this statute as mere procedure, it bears no repetition that procedural rules impact a parties' substantive rights.[232] Fewer readings of this statute could thus be more ungrounded from its historical origin.[233]

Sheridan's inapt holding also touches upon the limits of judicial authority when applying statutes such as the one at issue.[234] It is not for the court to decide that a statute preventing a partition suit from ending with a joint tenant's death ought to be ignored.[235] If a legislature feels that such a statute, by effectively placing a stay on the right of survivorship during the pendency of a partition, is unfair, then it is certainly free to repeal the statute at any time—just as Britain did to the 1696 Partition Act in 1867.[236] But so long as such a statute remains in force, courts cannot simply choose to ignore its clear historical meaning or creatively read them out of existence.[237] Statutes modeled in the image of the 1696 statute prevent the end of a partition suit when a joint tenant dies unless and until the applicable legislature decides otherwise.[238]

B. Reviving Battle *in Massachusetts*

Having analyzed the various approaches courts have taken to this issue, and how many of those approaches disregard the historical origins of partition's abatement under the 1696 statute, it remains only to discern where *Battle v. Howard* fits within this line of cases and, importantly, how *Battle*'s ahistorical approach can be remedied.[239] *Battle*'s principle flaw is that it follows the common law rule, affirming the partition's dismissal upon

---

231. *See* 1 CROKE & LEACH, *supra* note 172, at 636 (citing Partition Act 1696, 8 & 9 Will. 3 c. 31 (Eng.)).

232. *See, e.g.*, Hanna v. Plumer 380 U.S. 460, 465 (1965) (recognizing even mere procedural rules can "and often do affect the rights of litigants") (quoting Miss. Pub. Corp. v. Murphee, 326 U.S. 438, 445 (1946)).

233. *Id.*

234. Sheridan v. Lucey, 149 A.2d 444, 445 (Pa. 1959).

235. *Id.*

236. *See, e.g.*, Commonwealth v. Newman, 633 A.2d 1069, 1071 (1993) ("[T]he legislature is always free to change the rules [set forth in statutes]."); Jubelirer v. Rendell, 953 A.2d 514, 529 (2008) ("The legislative power is the power 'to make, alter, and repeal laws.'") (quoting Blackwell v. State Ethics Comm'n, 567 A.2d 630, 636 (1989)); *accord* Massachusetts v. Missouri, 308 U.S. 1, 17 (1939) ("Each [s]tate has the unfettered right at any time to repeal its legislation.").

237. *See* James J. Gory Mech. Contracting, Inc. v. Pa. Hous. Auth., 855 A.2d 669, 680 (Penn. 2004) (Eakin, J., dissenting) ("[A c]ourt has no authority to ignore the plain meaning of a statute . . . ."); Seiu Healthcare Pa. v. Commonwealth, 104 A.3d 495, 502 (Penn. 2014) ("[T]he letter of the statute cannot be disregarded under the pretext of pursuing its spirit."); *accord* Cent. Intel. Agency v. Sims, 471 U.S. 159, 170 (1985) ("[P]lain statutory language is not to be ignored.") (citing United States v. Weber Aircraft Corp., 465 U.S. 792, 798 (1984)).

238. Author's original thought.

239. *See* discussion *supra* Section III.B.

Dunn's death.[240] Massachusetts, however, maintains a statute modifying that common law rule.[241] In *Battle*, the appellee cited and relied on Section 26 to argue that because Dunn, the other joint tenant, "died during the pendency of the petition . . . the share formerly belonging to him may be set off 'as if the partition had been made prior to his decease.'"[242] Even the opposing counsel later "conceded that language in Section 26 appeared . . . to give a decedent's heirs the right to step into his shoes."[243] The court disagreed.[244] But under a proper historical understanding of Section 26, Battle was right.[245]

The court's misinterpretation of Section 26 stems from its incomplete consideration of the common law on the issue of abatement and Section 26's effective alteration of that underlying common law rule.[246] *Battle* had claimed it was important to read Section 26 "with due regard for the . . . common law," yet called the interpretation of Section 26 "an issue of first impression."[247] It is not.[248] There is a steady trail of precedent behind Section 26 predating its current statutory enactment, beginning with *Thomas v. Smith* in 1807.[249]

There, like in *Battle,* a joint tenant died and another party attempted to step into his place.[250] The Court recognized that "[b]y the English statute of 8 and 9 Will. 3, c. 31," the 1696 abatement statute, "the death of one of the tenants shall not abate a writ of partition" and instead the suit may continue.[251] However, the court noted Massachusetts "ha[d] no such statute" and dismissed the petition.[252] Three years later, in *Mitchell v. Starbuck*, the court reiterated that "at common law . . . the death of any one of the parties abates" a partition, absent a statutory change to that rule.[253]

---

240. *See* Battle v. Howard, 185 N.E.3d 1, 11 (Mass. 2022).

241. *See* discussion *infra* Section III.B.

242. *Battle*, 185 N.E.3d at 10 ("If a party named in the petition. . . dies during its pendency . . . . the share . . . formerly belonging to him may be . . . disposed of *as if the partition had been made prior to his decease*.") (quoting MASS. GEN. LAWS ch. 241, § 26 (2024)) (emphasis added).

243. Berkman, *supra* note 10.

244. *Battle*, 185 N.E.3d at 11.

245. *See* discussion *supra* Section III.B.

246. *See* discussion *supra* Section III.B.

247. *Battle,* 185 N.E.3d at 10.

248. *See* discussion *supra* Section III.B.

249. *See* discussion *supra* Section III.B.

250. Thomas v. Smith, 2 Mass. 479, 480 (1807); *see also* Cook v. Allen, 2 Mass. 462, 468 (1807).

251. *Thomas,* 2 Mass. 479 at 480.

252. *Id.*

253. Mitchell v. Starbuck, 10 Mass. 5, 9 (1813); *see* 1 THERON METCALF & JONATHAN C. PERKINS, DIGEST OF THE DECISIONS OF THE COURTS OF COMMON LAW AND ADMIRALTY IN THE UNITED STATES 9 (1860) (citing *Thomas v. Smith* for the proposition that "[d]eath of respondent abates petition for partition"); 3 EDMUND H. BENNETT & FRANKLIN F. HEARD, THE MASSACHUSETTS DIGEST: BEING A DIGEST OF THE DECISIONS OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, FROM THE YEAR 1804 TO THE YEAR 1857 3 (1862) (citing *Thomas v. Smith* for the proposition that "[t]he death of one co-respondent in a petition for partition . . . abate[s it]").

A statutory amendment to the common law rule came to Massachusetts by 1836 in an enactment that is the direct ancestor of Section 26.[254] In relevant part, Massachusetts law on partitions by that time provided "[i]n the case of the death of any party in a partition no plea in abatement shall be received and . . . *the suit shall not abate by the death of any of the tenants*."[255] By its very language, this statute was a near carbon copy of the 1696 English statute.[256] The English statute began "[n]o [p]lea in [a]batement shall be admitted," and the Massachusetts one began "no plea in abatement shall be received."[257] The English statute applies to "any [s]uit for [p]artition," and the Massachusetts one applies to "any party in a partition."[258] The English statute is triggered "by reason of the [d]eath of any [t]enant," and the Massachusetts one is triggered "by the death of any of the tenants."[259] In its effect, the Massachusetts statute therefore abrogated the common law rule that an action for partition could be dismissed because a joint tenant died.[260]

In the decades that followed, the SJC affirmed this statute's prohibition on abatement and the right it afforded a joint tenant's heirs.[261] *Brown v. Wells* addressed the issue squarely.[262] That case followed the familiar fact pattern: a party filed a petition for partition, the petitioner died, and another person (the decedent's spouse in that case) sought to step into the petitioner's place.[263] The issue before the court, therefore, was "whether the right to prosecute the petition survives" by statute and, more specifically, whether the decedent's spouse was an "heir" with a right to continue the partition.[264] The court ruled against the spouse, holding that she could not continue the partition, but it did so solely because of a technical definition of heir at the time.[265] The court determined that heir then had a precise meaning at common law, which included only one's descendants and not spouses.[266] The court did

254. *See* MASS. GEN. LAWS ch. 103, § 48 (1836).

255. *Id.* (emphasis added).

256. *See* discussion *infra* Section III.B.

257. *See* MASS. GEN. LAWS ch. 103, § 48 (1836); *see* Partition Act 1696, 8 & 9 Will. 3 c. 31 (Eng.)

258. *See* MASS. GEN. LAWS ch. 103, § 48 (1836); *see* Partition Act 1696, 8 & 9 Will. 3 c. 31 (Eng.)

259. *See* MASS. GEN. LAWS ch. 103, § 48 (1836); *see* Partition Act 1696, 8 & 9 Will. 3 c. 31 (Eng.)

260. *See* discussion *infra* Section III.B.

261. Brown v. Wells, 53 Mass. (12 Met.) 501, 501 (1847).

262. *Id.*

263. *See id.* ("[A] petition for partition . . . was entered . . . [in] June . . . 1846 . . . . Between the [filing of partition and hearing], the petitioner died . . . . [T]he petition was continued to the next June term, 'for the heirs or devisees of the said [petitioner], deceased . . . .").

264. *Id.* at 502.

265. *See id.* (holding that "right to prosecute this petition" did not "survive[] to [his spouse]" upon death).

266. *Id.*; The technicality in *Brown* requires an understanding of a spouses' right to her husband's estate at common law. At common law, one's spouse was not his "heir" because only lawfully begotten children could accurately be called his "heirs." *See* GEORGE WASHINGTON THOMPSON, A PRACTICAL TREATISE ON TITLE TO REAL PROPERTY, INCLUDING THE COMPILATION AND EXAMINATIONS OF ABSTRACTS, WITH FORMS 734, 945 (1919) (noting for that reason spouses did not receive a share of a

not, however, question that the statute gave those who were heirs a right to carry on a partition action.[267]

Following *Brown*, the Massachusetts General Court amended the statute to remove the term "abate" in 1886, but left the language of the statute intact to carry out the same effect: "[w]hen a party dies during the pendency of the petition [for partition], the share . . . belonging to him may be assigned in his name to his estate, to be held and disposed of in the same manner as if the partition had been made prior to his death."[268] In effect, this modification did not change the thrust of the statute; it merely modernized its language and added a provision that one's estate could carry on the partition if there were no joint tenants left, which English common law already recognized in applying their own statute.[269] Then, in 1921, Section 26 received its modern name and had its wording only marginally modified since the 1886 version, with minor modernizing edits like changing "when" to "if" and "held and disposed" to "assigned or set off."[270] That version of the statute has remained in force, unchanged ever since and, until *Battle* in 2022, had been left uncited since *Brown* in 1847.[271]

Despite the wealth of history preceding Section 26, the court in *Battle* attempted to avoid Section 26's application by three principal means.[272] The court first claimed Section 26 could not be read to apply to joint tenancies because joint tenancies, via their right of survivorship, end as soon as the penultimate joint tenant dies.[273] Here, the court makes the same error as *Cobb* in presuming universal abatement at the death of a joint tenant.[274] In Massachusetts, this rule derives from *Minnehan v. Minnehan*, which in turn

---

deceased spouse's estate directly. Instead, a decedent's surviving spouse received a right of "dower" for wives or "curtesy" for husband, usually amounting to one-third of the deceased spouse's estate); *see also* 2 BLACKSTONE, *supra* note 118, at *180 (defining dower and curtesy); COKE, *supra* note 111111, at 290 (same); *accord* J. Cliff McKinney, *With All My Worldly Goods I Thee Endow: The Law and Statistics of Dower and Curtesy in Arkansas*, 38 U. ARK. LITTLE ROCK L. REV. 353, 356–57 (2016) (describing application of dower and curtesy and its history in early English common law); EILEEN SPRING, LAW, LAND, AND FAMILY: ARISTOCRATIC INHERITANCE IN ENGLAND, 1300 TO 1800 40–49, 59–60 (1993).

267. *Brown*, 53 Mass. (12 Met.) at 501–02.

268. MASS. GEN. LAWS ch. 178, § 47 (1886).

269. *See* 1 CROKE & LEACH, *supra* note 172, at 636 (noting that heirs of deceased joint tenant could continue partition action via writ of *scire facias* under the Partition Act 1696, 8 & 9 Will. 3 c. 31 (Eng.)). *Scire facias* existed in Massachusetts at the time but has since been abolished. *See Domestic Relations Procedure Rule 81: Applicability of rules*, MASS. Rules OF DOMESTIC RELS. PROC., https://www.mass.gov/rules-of-domestic-relations-procedure/domestic-relations-procedure-rule81-applicability-of-rules (Feb. 11, 2025) ("The following writs are abolished: audita querela; certiorari; entry; error; mandamus; prohibition; quo warranto; review; and *scire facias*.") (emphasis added) [https://perma.cc/L4AN-UMG2].

270. MASS. GEN. LAWS ch. 241, § 26 (1921).

271. *See* ch. 241, § 26 (1932) ("If a party named in the partition has died . . . during its pendency . . . [and] his death is made known to the court during the proceedings, the share . . . 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.").

272. Battle v. Howard, 185 N.E.3d 1, 12 (Mass. 2022).

273. *Id.*

274. Cobb v. Gilmer, 365 F.2d 931, 933 (D.C. Cir. 1966).

rests on shaky precedential grounds.[275] *Minnehan* supported its claim that "[t]he mere institution . . . of partition proceedings does not work a severance of the tenancy" by citing two familiar cases: *Ellison* from New York and *Dando* from California.[276] The court in *Battle* expressly distinguished reliance on *Ellison* as "misplaced," weakening *Minnehan*'s support for this claim.[277] *Minnehan*'s broad claim is further weakened by wrongly supposing *Dando* stood broadly for the proposition that partition actions end with the death of a joint tenant.[278] In reality, *Dando* recognized only that partitions ended with a joint tenant's death *unless* an applicable statute—such as Section 26—mandated otherwise.[279]

The court further claimed that reading Section 26 to stay the partition action after a joint tenant's death would result in "the abolition of the right of survivorship."[280] Like in *Sheridan*, the court here failed to distinguish the right of survivorship, a common law rule, from the non-abatement of partitions, a statutory mandate.[281] The prevention of a partition from ending on death, like the right to partition itself, is statutory.[282] The right of survivorship, by contrast, is rooted only in the common law.[283] And as with any aspect of the common law, it can be added on to, suspended, or abrogated altogether where a statute dictates otherwise.[284] By enacting a statute, such as Section 26 and its predecessors, the legislature chose to temporarily suspend

---

275. Minnehan v. Minnehan, 147 N.E.2d 533, 536 (Mass. 1958); *see Battle,* 185 N.E.3d at 7 (Mass. 2022) ("[The] filing of [a] petition [for partition] d[oes] not sever [a] joint tenancy.") (citing *Minnehan*, 147 N.E.2d at 536); *see also* Helmholz, *supra* note 87, at 30.

276. *Minnehan*, 147 N.E.2d at 536 (citing Ellison v. Murphy*,* 219 N.Y.S. 667, 667 (N.Y. App. Div. 1927) and Dando v. Dando*,* 99 P.2d 561, 561 (Cal. Ct. App. 1940)).

277. *Compare Battle*, 185 N.E.3d at 7 (citing *Minnehan*, 147 N.E.2d at 536), *and Minnehan*, 147 N.E.2d at 536 (citing *Ellison*, 219 N.Y.S. at 668), *with Battle*, 185 N.E.3d at 10 n.11 ("Battle cites a New York trial court decision, *Ellison* v. *Murphy* . . . . Battle's reliance on it is entirely misplaced."). Otherwise put, the court in *Battle* declined to rely on *Ellison* in one breath and implicitly relied on it in another by citing *Minnehan*. The rule in *Ellison* continues to be enforced in New York. *See* Orlando v. DePrima, 22 Misc. 3d 987, 989 (N.Y. Sup. Ct. 2008) ("[T]he commencement of the action amounted to no more than a request by the plaintiff that the court order the property to be sold, and that no severance would occur until the granting of a judgment in the action decreeing a partition and sale." (quoting O'Brien v. O'Brien, 89 Misc 2d 433, 434 (1976)).

278. *Dando*, 99 P.2d at 561.

279. *See id.* (holding that partition actions end with joint tenant's death "except as modified by statute.").

280. *Battle,* 185 N.E.3d at 7.

281. *Id.*; *see* Sheridan v. Lucey, 149 A.2d 444, 445 (Pa. 1959).

282. *See* discussion *supra* notes 136–148 (describing how partition of joint tenant was not practicable at common law).

283. *See* discussion *supra* notes 102–112 (describing how right of survivorship derives from English common law).

284. *See* Ames v. Chandler, 164 N.E. 616, 617 (Mass. 1929); Crawford-Plummer Co. v. McCarthy, 116 N.E. 575, 575 (Mass. 1917); *accord* discussion *supra* note 236 (listing cases recognizing legislature's power to amend or abrogate common law as axiomatic).

the right of survivorship in favor of allowing partition actions to continue, even after a joint tenant's death, at the behest of the deceased tenant's heirs.[285]

That is precisely what a proper application of Section 26 does.[286] It does not "abolish" the right of survivorship; rather, it overrides the common law, as statutes do, and suspends the right of survivorship from taking effect when a joint tenant files for partition but then dies before the partition is complete.[287] If that result seems unfair or unworkable, then it is well within the legislature's province to amend Section 26 or repeal it altogether.[288] But until such time, it is not for a court to effectively repeal it by refusing to apply it to the very circumstance its drafters intended it to.[289] That is precisely the error the Pennsylvania court made in *Sheridan*, and it was no less of an error in *Battle*.[290]

Uniquely, the SJC focused on Section 26's language regarding the "*share* or portion formerly belonging to a decedent" as a "signal[] that [Section 26] is not meant to apply to joint tenants, as joint tenants own not 'shares' in the subject property. . . ."[291] On this point, *Battle* stands alone among other jurisdictions and within Massachusetts law.[292] In previous cases addressing Section 26's predecessor, there was not a moment of doubt that its prevention of abatement applied to "any" suit for partition.[293] Before that, English law presumed that its statute, which also applied to any suit for partition, prevented abatement with equal force in cases involving joint

285. *See* MASS. GEN. LAWS ch. 241, § 26 (2024) ("If a party named in the partition has died . . . during its pendency . . . the share . . . 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* . . . .") (emphasis added).

286. *Id.*

287. *See* Battle v. Howard, 185 N.E.3d 7, 13 (Mass. 2022) ("If we were to read this language as applying to all forms of co ownership, the result would be the *abolition* of the right of survivorship.") (emphasis added).

288. *See* Mason v. Gen. Motors Corp., 490 N.E.2d 437, 442 (Mass. 1986) ("The Legislature is free to change the law in that regard if it chooses to do so."); *see also* Answer of the Justices to the Senate, 547 N.E.2d 17, 22 (Mass. 1989) (reiterating the legislature's power to amend legislation so long as it would not violate the Constitution).

289. *See* Commonwealth v. Richards, 690 N.E.2d 419, 421 (Mass. 1998) ("Any change in the statute is for the Legislature, not the courts."); *see also* Abraham v. Woburn, 421 N.E.2d 1206, 1211 (Mass. 1981) ("It is not for the judiciary to override legislative policy because the policy is unappealing . . . .").

290. *See* Sheridan v. Lucey, 149 A.2d 444, 445 (Pa. 1959) (declining to apply Pennsylvania abatement of partition statute in a case with the death of joint tenant); *see also* discussion *supra* notes 229–232 and accompanying text (describing how *Lucey*'s decision not to apply abatement statute conflicts with its precedential obligations as a constitutional court).

291. *See Battle*, 185 N.E.3d at 13 (Mass. 2022) (emphasis added).

292. *Id.*

293. *See* MASS. GEN. LAWS ch. 103, § 48 (1836) (expressly stating its prevention of abatement is to apply to "*any* suit for partition.") (emphasis added); *see also* MASS. GEN. LAWS ch. 178, § 47 (1886) (stating prevention of abatement applied to "the partition" without specifying it as applying only to some forms of co-ownership); MASS. GEN. LAWS ch. 241, § 26 (2024); *cf.* Brown v. Wells, 53 Mass. 501, 501 (1847) (holding that statute preventing the end of partition on death did not apply solely because the decedent's spouse was not his heir, not because the statute did not apply to joint tenancies).

tenancies or other forms of co-ownership.[294] Even the courts that have disregarded abatement statutes, such as *Sheridan*, never denied that they apply to joint tenancies and other forms of co-ownership.[295] More to the point, the term "share" has been used across jurisdictions to describe a joint tenant's ownership interest in owning the property jointly while having a right to possess the whole.[296] Therefore, the court in *Battle* crafted an argument to avoid Section 26's ostensibly clear language that, while creative, is wholly inapt.[297]

Given the court's refusal to recognize Section 26 for what it is, an applicable statute that prevents a partition from being dismissed upon a joint tenant's death, the criticism of *Battle* that followed on issuance is well founded.[298] Some rightly claim that the court in *Battle* "ignored very clear language in Section 26 to reach a result it wanted to get to on the facts of this case."[299] The court, in so doing, "[e]ffectively . . . rewr[o]t[e the] statute by declaring that 'a party named in the petition' [for partition] does not include one who owns a property as a joint tenant with right of survivorship."[300] The better answer than *Battle*'s, which effectively adopted the same misgivings as both *Cobb* and *Sheridan*, is found as early as the mid-nineteenth century with *Cook* and *Mitchell* and is reflected in cases such as *Dwinal* and *Monroe*.[301]

Together, those cases stand for a proposition that *Battle,* and others, did not.[302] When a jurisdiction maintains no statute providing to the contrary, the

---

294. *See* Partition Act 1696, 8 & 9 Will. 3 c. 31 (Eng.) (expressly stating its prevention of abatement is to apply to *any* suit for partition); *see also* 3 BLACKSTONE, *supra* note 181, at *302 (affirming that English abatement statute applied to *any* suit for partition of lands); *see also* FREEMAN, *supra* note 181, 609; 1 CROKE & LEACH, *supra* note 172, at 636.

295. *See, e.g.*, Sheridan v. Lucey, 149 A.2d 444, 445 (Pa. 1959) (rejecting the applicability of statute that abated partitions on death based on the right of survivorship but never questioned it could apply to joint tenancies).

296. *See, e.g.*, Green v. Skinner, 185 Cal. 435, 438 (1921) ("It is the law that a joint tenancy may be severed and ended by a conveyance by one of the tenants of his *share*.") (emphasis added); Duncan v. Suhy, 378 Ill. 104, 110 (1941) ("One of the essential characteristics of a joint tenancy is unity of interest which requires that the *shares* of the joint tenants be equal") (emphasis added); Porter v. Porter, 472 So. 2d 630, 634 (Ala. 1985) ("In a joint tenancy each tenant is seized of some equal *share* while at the same time each owns the whole." (emphasis added)); Downing v. Downing, 326 Md. 468, 474 (1992) ("Joint tenancy means that each joint tenant owns an undivided *share* in the whole estate . . . .") (emphasis added); *In re* Estate of Thomann, 649 N.W.2d 1, 7 (Iowa 2002) (describing party's *share* of the joint tenancy); *see also*, *e.g.*, *In re* Benner, 253 B.R. 719, 722 (Bankr. W.D. Va. 2000) (describing party's *share* of joint tenancy in federal bankruptcy matter).

297. *Battle*, 185 N.E.3d at 13.

298. Berkman, *supra* note 10.

299. *Id.*

300. *Id.*

301. *See* Cobb v. Gilmer, 365 F.2d 931, 932 (D.C. Cir. 1966) (declining to recognize abatement of partition based entirely on common law right of survivorship); *see also* Sheridan v. Lucey, 149 A. 2d 444, 445 (Pa. 1959) (declining to recognize abatement of partition, despite relevant statute expressly providing to contrary).

302. *See Cobb*, 365 F.2d at 932; *see also Sheridan*, 149 A.2d at 445.

death of a joint tenant ends the partition action and warrants its dismissal.[303] When, however, a jurisdiction has a statute expressly providing that a partition does not end, or abate, with the death of any of the parties to the suit, then the statute must be applied to do what it says, and no motion to dismiss can be granted based solely on a party's death.[304] The party's heirs may instead continue the suit, which has been true for over three centuries.[305]

V. CONCLUSION

When the disputes in cases like *Battle*, and those like it from other jurisdictions, are read in light of the historical development of joint tenancies and partitions, the cases' fundamental flaws are revealed.[306] The history of joint tenancies, and most notably the development of the common law right of survivorship and severance, is a long one, beginning with the earliest formulations of English in the ages of Bracton and Coke.[307] This foundation reveals the rule that at the death of a joint tenant, the remaining rights in the property pass to the surviving tenants.[308] Partition, in turn, creates the right to disentangle a joint tenancy.[309] Unlike the common law right of survivorship, the right to partition has existed since the fifteenth century only as a statute.[310] Since the seventeenth century, the effect of a joint tenant's death on partition action also rests on statutory grounds such that a partition could continue after death if a statute so dictated.[311] English law was the first to recognize such a statutory enactment in 1696.[312] Although repealed now,

303. *See* Cook v. Allen, 2 Mass. 462, 468 (1807); *see also* Mitchell v. Starbuck, 10 Mass. 5, 9 (1813); *see also* Dwinal v. Holmes, 37 Me. 97, 97 (1854); Dando v. Dando, 99 P.2d 561, 561 (Cal. Ct. App. 1940); *accord* 1 CROKE & LEACH, *supra* note 17272, at 636; Gunderson, *supra* note 15, at 101 & nn. 32–33.

304. *See, e.g.*, Monroe v. Millizen, 113 Ill. App. 157, 158 (1904); Kellner v. Finkl, 288 Ill. 451, 452–53 (1919); Woolfolk v. Davis, 225 Ark. 722, 726–27 (1955); *accord* Partition Act 1696, 8 & 9 Will. 3 c. 31 (Eng.) (It is not enough, however, to have a statute merely stating that actions survive death; the statute must embrace partitions); *See also* Rusnak v. Phebus, No.M2007-01692-COA-R9-CV, 2008 WL 2229514, at *13–14 (Tenn. Ct. App. May 29, 2008); Jackson v. Estate of Green, 771 N.W.2d 675, 677–78 (Mich. 2009).

305. *See* MASS. GEN. LAWS ch. 241, § 26 (2024); *accord* 1 CROKE & LEACH, *supra* note 172, at 636.

306. *Id.*

307. James M. Walker, *The Theory of Common Law,* FAM. GUARDIAN FELLOWSHIP, https://famguardian.org/Publications/TheoryOfCommonLaw/TheoryOfCommonLaw.htm (last visited Mar. 14, 2024) [https://perma.cc/7PFN-C48A].

308. *Id.*

309. *See* Joe Hawbaker, *Partition*, HAWBAKER L. OFF. 1, 3, https://www.cfr.org/sites/default/files/PDFResources/Farm%20Resource%20pages/partition-2014.pdf (last visited Feb. 11, 2025) [https://perma.cc/5TUS-LNTN].

310. *Restoring Hope for Heirs Property Owners: The Uniform Partition of Heirs Property Act*, AM. BAR ASS'N. (Oct. 1, 2016), https://www.americanbar.org/groups/state_local_government/publications/state_local_law_news/2016-17/fall/restoring_hope_heirs_property_owners_uniform_partition_heirs-property_act/ [https://perma.cc/77EN-AGMG].

311. Spitzer, *supra* note 91, at 637 (quoting S. F. C. MILSON HISTORICAL FOUNDATIONS OF THE COMMON LAW 211 (2d ed. 1981)).

312. Partition Act 1696, 8 & 9 Will. 3 c. 31 (Eng.).

the 1696 Act deeply influenced Anglo-American law on partition, leaving antecedents across jurisdictions—including Massachusetts—where the law recognizes by statute that a partition suit will not abate because of the death of any joint tenant.[313]

Partition and its abatement in the law of joint tenancies is very important.[314] Yet *Battle* and other cases have declined to rely on statutes that, in many jurisdictions, expressly allow heirs to continue a partition after the death of any joint tenant.[315] Instead, these cases have overemphasized the common law rules governing a joint tenant's right of survivorship, understated the statutory development of partition, and rejected the applicability of statutes allowing a partition's abatement by contorted and misguided constructions.[316] A proper application of the rule dictates the opposite conclusion.[317] Where a statute, often derived from the 1696 antecedent under English law, mandates that a partition not abate "by reason of the death" of any joint tenant, while the common law rule granting survivorship to other joint tenants gives way in favor of the deceased tenant's heirs.[318] Until the statute is repealed or revised, and thus the jurisdiction returns to the common law rule, ending a partition at the death of any joint tenant the statutory change to the common law must be applied as written.[319] Only then will courts allow tenant's heirs their longstanding statutory right to continue partition suits.[320]

313. *See, e.g.*, MASS. GEN. LAWS ch. 241, § 26 (2024).

314. *See* MERRILL & SMITH, PROPERTY, *supra* note 2, at 601 (recognizing joint tenants' statutory right to partition as among "the most important legal remedy available" to joint tenants).

315. Battle v. Howard, 185 N.E.3d 7, 12 (Mass. 2022).

316. Author's original thought.

317. *Id.*

318. *See* Partition Act 1696, 8 & 9 Will. 3 c. 31 (Eng.).

319. Author's original thought.

320. *See* Collins v. O'Laverty, 136 Cal. 31, 35 (1902) ("To deny the remedy would be to deny the right . . . and thus to nullify the statute.") (citation omitted); *see also* Rhodes v. Miller, 189 La. 288, 295 (1938) (similar); Lummus Co. v. Commonwealth Oil Refining Co., 195 F. Supp. 47, 53 (S.D.N.Y. 1961) (similar); Smith v. State, 93 Idaho 795, 808 (1970) (similar); Crouse v. Creanza, 658 F. Supp. 1522, 1526 (W.D. Wis. 1987); *accord* Poindexter v. Greenhow, 114 U.S. 270, 303 (1885) ("To take away all remedy for the enforcement of a right is to take away the right itself.").