seem to have devised what seems to be a workable solution to this artificiality by causing a presumption of ademption to arise in the case where the testator stands *in loco parentis* to the beneficiary; there is otherwise no ademption unless the testator *intends* that a gift made after the will should adeem the bequest.[26] Thus an American court's enquiry centres on ascertaining, quite apart from any presumptions in favor of ademption, what was the intention of the testator at the time of the subsequent gift. It is submitted that to adopt a similar approach in our own jurisdiction would do away with our unduly prolix and difficult enquiry into the following:

First, were both dispositions made for the same purpose? This prerequisite for the presumption to arise may be virtually unascertainable when the purpose for either or both dispositions is not apparent; and, second, Are there any factors serving to rebut the presumption of ademption once raised?

It is noteworthy that the desirable result reached by the Victorian Supreme Coure in *Re Sparrow* would similarly be obtained by the more realistic and logical enquiry as to the testator's intention at the time of the disposition *inter vivos*. The difference would be rather in the means than the end, but the American method is likely to produce greater consistency of decisions and is more flexible and readily comprehensible than our own.

For the present a lesson in drafting might be learned. The solicitor who draws up his client's will, and who later drafts an *inter vivos* settlement upon the same beneficiary should state expressly in the latter document whether the disposition is intended to adeem that contained in the will.

The problem of the man who writes his will and then neglects to alter it when circumstances change is not simply academic. The facts of *Re Sparrow* have arisen before,[27] and unless mankind becomes wiser, will no doubt arise in the future. It is for this reason that the true scope of the doctrine of ademption should be kept in mind.

DOROTHY KOVACS

LYONS v. LYONS[1]

Real property—Torrens system—Joint tenancy—Severance—Mortgage of interest by co-owner joint tenant.

The recent case of *Lyons v. Lyons* well illustrates the anomalous situation that may arise as a consequence of the acceptance of certain fundamental concepts in the law of property. More specifically, a mortgagee may find his security has vanished should a joint tenant mortgagor of land under the Transfer of Land Act predecease his co-owners.

In the case before the Supreme Court of Victoria the applicant's husband, holding as joint tenant with his wife, mortgaged his interest in the land. Prior to redemption of this mortgage he died and was survived by

26 Atkinson—Handbook of the Law of Wills (2nd Ed. 1953), 737-8.
27 E.g. *Re Horrocks* [1944] N.Z.L.R. 314.
1 (1967) V.R. 169, Supreme Court of Victoria; McInerney, A. J.

his wife who applied by summons for an order for the removal of a caveat lodged by the defendants. The defendants, as personal representatives of the deceased, claimed that by mortgaging, the husband had severed the joint tenancy and thereupon held an undivided half share as tenant in common.

The problem arises in this situation because of the anomalous nature of a joint tenancy and the peculiar effect of a mortgage under the Torrens system as distinct from that under the General Law. The notion of a joint tenancy is that it exists in the case of co-ownership where the co-owners, as against everyone else, stand in the position of together constituting a single owner, although as between themselves they have separate rights. Severance of such a relationship may be effected by alienation by a joint tenant of his aliquot share.

Considering the case of a mortgage by a joint tenant of land under the general law no problem arises. A mortgage in these circumstances is a conveyance by the mortgagor of his estate to the mortgagee, and there being no unity of title between the latter and the other joint tenants, a severance is effected.

Under the Torrens system the situation is quite different.[2] A mortgage has effect as a security only and does not effect a transfer of any estate in the land; the mortgagee merely gets an interest in the nature of a charge. Thus, if alienation is a prerequisite of severance, the logical and generally accepted legal opinion is that a mortgage by one joint tenant of land under the Transfer of Land Act does not sever the joint tenancy.

The consequences of reasoning along these lines, as the court did in this case, are to say the least, somewhat unusual. This is perhaps best illustrated by considering two possible situations.

Firstly, remembering that the right of survivorship is a feature of a joint tenancy, should it happen that the mortgagor joint tenant became the sole surviving co-owner, the mortgage would become a security against the whole estate .On the other hand if the mortgagor joint tenant predeceased the other co-owners the interest mortgage would cease to exist and the mortgagee would find himself without security.

One is tempted to argue that a more just result would be achieved if the surviving joint tenants were considered bound by the mortgage. Such was the decision in *Wilken v. Young*.[3] This conclusion was however strongly criticised in *People of California v. Nogarr*,[4] where it was held that as the mortgage lien attached only to such interest as the joint tenant had in the real property, when his interest ceased to exist, the lien of the mortgagee expired with it. That is to say, as the mortgage under the Torrens system effects no severance, the co-owners remain in the position of all together constituting a single own, and therefore to effectively encumber the land joint action by all co-owners would be necessary.

It was as a consequence of reasoning along these lines that McInerney, A.J. found for the applicant in this case. Accepting the traditional concept of a joint tenancy and the nature of Transfer of Land Act mortgages, one

2 See in particular section 74 T.L.A.
3 *Wilken v. Young* (1895) 41 N.E.68.
4 1958, 330 P (2nd) 858; 67 AM.L.R. (2nd) 992.

would suspect the decision reached in *Lyons v. Lyons* to be the only correct one in point of law and logic.

Even if this be a correct decision the resulting situation is not entirely satisfactory. It would appear that a person accepting a mortgage by a joint tenant of land under the Transfer of Land Act undertakes a considerable risk. While it is true his security may increase it is equally possible that his security may vanish. The mortgagee in such a case would still be able to enforce his debt against the deceased mortgagor's estate, but it may happen that the deceased's co-ownership in the land was his only tangible asset. In such a situation it is unwise for a prospective mortgagee to enter any transaction which results in the joint tenancy relationship remaining intact.

This is not to say that a joint tenant may not give a good security. Such a result could be achieved by avoiding the method of mortgaging provided by section 74 Transfer of Land Act and employing instead a method based on the principles of a General Law mortgage. This would involve a transfer by the mortgagor of his estate to the mortgagee, and an independent deed evidencing the right of redemption.[5] The mortgagor could protect his interest by lodging a caveat.

While this arrangement would seem to solve the problem of the uncertain security obtained by a mortgagee it is at the expense of severance of the original joint tenancy. This may be of significance in cases where it is in the interests of the co-owners that the joint tenancy continue. Such a situation would arise for example, where a husband and wife as joint tenants of the matrimonial home, would wish the relationship to continue so that they may benefit from the deduction for probate duty purposes provided by section 10 of the *Probate Duty Act 1962*. Here a mortgage by one joint tenant would be unsatisfactory to the mortgagee and therefore to the mortgagor, and it would seem necessary that both co-owners enter into the mortgage and thereby continue their relationship inter se. This of course assumes that the other joint tenant will be content to risk his interest in the land which may not always be the case.

In conclusion, although one may, at the outset, feel some concern for the unfortunate predicament of a mortgagee in such a case as this, it would seem that the decision here reached was the only one that could result if fundamental notions of real property are to remain intact. In future a prospective mortgagee, faced with these circumstances, must take care of the means employed to effect the proposed security.

HANI GOMBINSKI

[5] *Abigail v. Lapin* (1934) 51 C.L.R. 58.