http://www.law.harvard.edu/faculty/cdonahue/courses/prop/lec/outcl20_19S_classtest.html

Co-tenancies are of great practical importance today.

CO-TENANCIES, I.E., CONCURRENT INTERESTS

1. O —> A, B, and C
   a. At common law
   b. In modern law
   c. A —> X
   d. C dies; what is the state of the title?
   e. O —> A as a tenant in common of 1/3, with B as a tenant in common of 1/3, with C&D as joint tenants of 1/3
   f. What if C&D are both killed in a car accident? (This question applies to any situation where title to property is dependent on one person surviving another.)
2. What was (and is) the NH statute all about? (p. S273):

"Every conveyance or devise of real estate made to two or more persons shall be construed to create an estate in common and not in joint tenancy, unless it shall be expressed therein that the estate is to be holden by the grantees or devisees as joint tenatnts, or to them and the survivor of them, or unless other words are used clearly expressing an intention to create a joint tenancy."

   a. An attempt to implement intent?
   b. The probate court clerks' protective act?
   c. *Gagnon*: "to Jules L. and Georgina T. and to the survivors of them." Habendum and warranty: "to the granteees, their heirs and assigns." Held: tenants in common. Case illustrates potential conflict between granting and habendum clauses. Note how changing "survivor" to "survivors" produces strikingly different results.
   d. So how do we do it right? "To A & B as joint tenants with right of survivorship and not as tenants in common." In Michigan there is authority that suggests that mention of a right of survivorship is likely to produce concurrent life estates with alternative contingent remainders in A & B. This does not give you the severability feature of the joint tenancy. Michigan, so far as I am aware, is the only state that does this, but in Michigan one would be advised to omit any reference to a right of survivorship.
3. O —> A

   A —>A and B as joint tenants, or

   A —>X —>A and B
   a. At common law
   b. Modern law
4. O —> A and B as joint tenants

   A —> A (i.e., A conveys to himself, attempting to create a tenancy in common between himself and B)
5. Wisconsin statutes—the problem of retroactivity. Note: Tenancy by the entirety is generally thought not to exist in Wisconsin, at least since a court decision of 1925 That case may the reason why Wisc. amended the stat. in 1933.

a. Wisc. 1848:

§ 44. All grants and devises of lands, made to two or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy.

§ 45. The preceding section shall not apply to mortgages, nor to devises or grants made in trust, or made to executors, or to husband and wife.

These provisions were carried forward as worded into the compiled statutes of 1925 being renumbered as §§230.44 and 230.45.

b. Wisc. 1933 amended § 230.45 to add two new subsections:

(2) Any deed from husband to wife or from wife to husband which conveys an interest in the grantor's lands and by its terms evinces an intent on the part of the grantor to create a joint tenancy, and any husband and wife who are grantor and grantee in any such deed heretofore given shall hold the premises described in such deed as joint tenants.

(3) Any deed to two or more grantees which, by the method of describing such grantees or by the language of the granting or habendum clause therein evinces an intent to create a joint tenancy in grantees shall be held and construed to create such joint tenancy.

c. In a deed dated in 1944, "Bertha Hass —> Bertha Hass and Herbert W. Hass of Marathon County, mother and son, a life estate as joint tenants during their joint lives and an absolute fee forever in the remainder—> the survivor of them in his or her own right." After the description of the property, the indenture noted: "The purpose of this conveyance is to vest the title to the above described property in the grantees herein named as joint tenants and none other." *Hass v. Hass* (1946) holds that that creates a life estate as tenants in common during their joint lives with a remainder in fee simple in the survivor.

d. Wisc. 1950 amended 230.45(2) to read:

(2) Any deed to two or more grantees, including any deed in which the grantor is also one of the grantees, which, by the method of describing such grantees or by the language of the granting or habendum clause therein evinces an intent to create a joint tenancy in grantees shall be held and construed to create such joint tenancy.

e. In a deed dated in 1940, "Emil Moe —> Emil Moe and Emma Moe [his sister], joint tenants". *Moe v. Krupke* (1949) holds that this creates a tenancy in common.

f. Wisc. 1969 rewrote the whole statute and renumbered it § 700.19.

Today it reads in relevant part (with some additions that we'll get to tomorrow):

(1) The creation a joint tenancy is determined by the intent expressed in the document of title, instrument of transfer or bill of sale. Any of the following constitute an expression of intent to create a joint tenancy: "as joint tenants," "as joint owners", "jointly", "or the survivor", "with right of survivorship" or any similar phrase.

(2) If persons named as owners in a document of title, transferees in an instrument of transfer or buyers in a bill of sale are described in the document, instrument or bill of sale as husband and wife, or are in fact husband and wife, they are joint tenants, unless the intent to create a tenancy in common is expressed in the document, instrument or bill of sale. . . .

(5) The common law requirements of unity of title and time for creation of a joint tenancy are abolished.

What question does this statute not answer? (Note: Wisconsin has a Marketable Title Act, with a 30-year limitation. § 893.33. This will probably, over time, solve the problem.)

6. *Holbrook*

   a. O –> A and B, husband and wife

      What does this create at common law?

      What happens if one of them dies?

      What happens if they get a divorce?

      (We will deal with the modern law of tenancies by the entirety tomorrow, including what happens if one of them conveys his/her interest, but we need this much to explain the *Holbrook* case.)

   b. Kenneth J. O'Connell, J.

   c. Who's Eleanor L. Anderson?

   d. What was the purpose of the conveyance?

      "It is further agreed that the said joint tenancy shall be accomplished by the parties executing a deed to their entire present estates in said property to Eleanor L. Anderson with instructions that she convey the same to the parties herein as joint tenants and not as tenants in common or as tenants by the entirety, but with right of survivorship between them, which right of survivorship shall continue without regard to whether or not a divorce shall be granted to one or the other of the parties.

      "It is further understood and agreed that during the lifetime of the husband, he shall be entitled to have and receive all rents, issues and profits of the property above described in this paragraph with the duty to maintain the same and to pay all lawful taxes, liens and other charges and assessments on the same which shall accrue during his lifetime.

      "At anytime during his lifetime the husband shall have the right to make a bona fide sale of the property at a reasonable price to any third person or party, and in event of such sale the wife shall join with him in such conveyance and shall be entitled to receive as her own property, one-half of the net principal and interest, if any, to be received from such sale."

   e. What does the court hold?

   f. A side note on the statute and on policy. (OR. REV. STAT. § 93.180 as it existed in 1965):

Every conveyance or devise of lands, or interest therein, made to two or more persons, other than to executors or trustees, as such, creates a tenancy in common unless it is expressly declared in the conveyance or devise that the grantee or devisees take the lands as joint tenants. [Derived from a statute adopted in 1854.] Joint tenancy is abolished and all persons having an undivided interest in the property are deemed and considered tenants in common. [Derived from a statute adopted in 1862.]

   g. OR. REV. STAT. § 93.180 as it was amended in 1983 and as it exists in Oregon today (p. S94).

Every conveyance or devise of lands, or interest therein, made to two or more persons, other than to a husband and wife, as such, or to executors or trustees, as such, creates a tenancy in common unless it is in some manner clearly and expressly declared in the conveyance or devise that the grantees or devisees take the lands with right of survivorship. Such a declaration of a right to survivorship shall create a tenancy in common in the life estate with cross-contingent remainders in the fee simple. Joint tenancy is abolished and the use in a conveyance or devise of the words "joint tenants" or similar words without any other indication of an intent to create a right of survivorship shall create a tenancy in common.

7. General remarks about the economic relation among co-tenants.

   a. Ouster. Possessory action plus mesne profits.

b. Statuory action for accounting for profits.

c. In general, no accounting where one co-tenant simply occupies the whole, but the occupying co-tenant must pay the ordinary expenses.

d. Contribution in actions for partition. Distinction between ordinary expenses and improvements. Possibility of imposing a fiduciary duty on co-tenants.

8. For tomorrow try to get the basic points out of a long assignment. The basic points are, as a general matter, how do we treat today with marital unit in the context of (a) death, (b) divorce, (c) debt, (d) taxes, and (e) pensions, both public and private. I gave you the Uniform Acts in a number of places, not because every jd has them, but because I think that for the most part that is where we are heading. We will spend some time on the two principal cases *Beal* and *Ciani*, and *Jezo* (pp. S286, S294–95). One way to come grips with all those details is to ask yourself the question what would have happened in those three cases if the relevant Uniform Acts had been in effect?