or mortgage by him will not constitute a severance as against a purchaser at a foreclosure sale. The test is whether there is actual severance." There are many other cases which are opposed to the idea of constructive severance. In *Beckman vs. Sikes,* 35 Ka. 120, it was held that the lien of the mortgagee and the decree of foreclosure attached to growing crops as well as to the land, and that the purchaser of the land under the decree was entitled to growing crops as against the vendee of the mortgagee. In *Fruit Company v. Sherman Worrel Fruit Co.,* 142 Cal. 643; 76 Pac. 484, the court decided that a chattel mortgage cannot operate against a purchaser of a trust deed as a severance of the growing crop from the land. In *Riely v. Carter,* 75 Miss. 798; 23 S. W. 435, the court said in their opinion that the lien of the mortgagee attached to the growing crop until severed, as well as to the land. In a leading New York case, it is said that a prior mortgage takes precedence over a sale of the crop and thus takes precedence over the vendee's rights by purchase of the crop under execution levied on the crop, *Shephard v. Philbrick,* 2 Den. 174. The decision of the Supreme Court of Missouri when the Bradley case, supra, comes before it is a matter of conjecture. Should they decide as the Kansas City Court of Appeals did in saying that the execution of the chattel mortgage alone without any actual severance will not constitute such constructive severance as to entitle the holder of the chattel mortgage to the crop, they would seem to be supported by the weight of authority, but there is authority to the contrary. M. L. S.

Hardin v. Wolf et al., 148 N. E. 868. Supreme Court of Illinois, 1925.

JOINT TENANCY—DEED OF TRUST—SEVERANCE. A bill in equity for partition by Mark Hardin against Mary J. Wolff and others, in which William O'Brien intervened. Mark Hardin owned a lot improved by a brick building in the city of Chicago. The property was subject to two liens, one in favor of Mary J. Wolff, and the other in favor of a third party. Hardin conveyed the property to Mary J. Wolf, his daughter, who conveyed the property to a law clerk, who reconveyed the property to Mark Hardin and Mary J. Wolf to take and hold as joint tenants with a provision that on the death of one the survivor was to take all the residue of the property. It was the intention of the parties that the daughter was to take care of the father until his death, and that as payment she was to become owner of the prop-

erty at his death. To protect his interest in the property, the father directed his daughter to execute a note for the full value of her share in the property secured by a deed of trust on her undivided interest in the property in favor of O'Brien, the intervener, without consideration. Now Mark Hardin, the father, brought this bill for partition alleging that the execution of the note secured by the deed of trust severed the jointure, and that he is entitled to the note and deed of trust saying that the man O'Brien held the same in trust for him. The daughter, Mary J. Wolf, contends that the note and deed of trust were executed without consideration, therefore they are null and void, that the unity is not severed, and that she is still entitled to share the property. O'Brien filed a bill of interpleader. The master decided that the execution of the deed of trust severed the jointure. Held, that ordinarily the execution of a mortgage by one joint tenant severs the jointure but that in this case the note and deed were given without consideration and void, that the intention of the parties was to create a joint tenancy, and the joint tenancy was not severed.

At common law the execution of a mortgage by one joint tenant severed the tenancy, *York v. Stone*, 1 Salkk. 158, *in re Polland's Estate*, 3 DeGex, J., and Sm., 541, *Walkinson v. Hudson*, 4 L. J. Ch. O. S. 213, *Simpson's Lessee v. Ammons*, 1 Binney 175; 2 *Am. Dec.* 425. In *York v. Stone, supra*, the court decided a mortgage severs the joint tenancy, Chancellor Cowper saying "That a joint tenancy is an odious thing in equity, . . . that it is to the disadvantage of the mortgagor that the joint tenancy should continue, because if he happen to die first all his estate and interest goes from his representatives to the survivor, unless it be construed a severance." *In re Polland's Estate, supra,* it was held that a mortgage by one joint tenant severs the tenancy. In *Simpson's Lessee v. Ammons, supra,* Chief Justice Tilghman of the Pennsylvania court said: "The court are of the opinion that the mortgage severed the tenancy." Statements to the same effect are to be found in several textbooks. "A mortgage by a joint tenant of his share to a stranger would be effectual against survivorship, and may amount to a severance of the joint estate," 1 *Wash. Real Prop.* (4th Ed), 412. "Joint tenancy is severed by a mortgage, at any rate for the time being until paid or redeemed," *Thompson Real Prop.,* 1716. "In jurisdictions in which a mortgage ordinarily operates to transfer the legal title, a mortgage by a joint tenant, which involves such a transfer, will no doubt cause a severance of the joint tenancy," 1 *Tiffany Real Prop.,* 191. The clause in Tiffany's statement "ordinarily

operates to transfer the legal title" is a point to be considered. The cases referred to above were decided in jurisdictions where the common law doctrine that a mortgage is a transfer of a legal estate to the mortgagee was in force. Such is not the case in all jurisdictions today. In some twenty-six states today a mortgage is regarded as a mere lien, and no estate passes to the mortgagee, at least not till default and foreclosure; in seventeen states the common law rule that a legal estate passes to the mortgagee applies; while in three others, Missouri, Delaware and Mississippi, a mortgage is regarded as a mere lien till default when an estate and right of entry vest in the mortgagee, *Thompson Real Prop.* 4367. In Illinois, a legal estate vests in the mortgagee when the mortgage is executed, 4 *Scammon* 69, 69 Ill. 632, 124 Ill. 32, 186 Ill. 570. That Illinois rule is probably the underlying basis on which the court in *Hardin v. Wolf, supra,* stated that the execution of the mortgage severed the tenancy, and an influence which had bearing on the decision in *Lawler v. Byrne,* 252 Ill. 194, 96 N. E. 892, an earlier decision in which the Illinois court decided that a mortgage severed the jointure. What ruling the courts would make in states where the mortgage is regarded as a mere lien is somewhat a matter of conjecture. The modern aversion and statutes against joint tenancy and its incidents has caused a dearth of litigation on that question. However, it seems unreasonable to believe that in states where a mortgage is a mere lien that the execution of a mortgage could be a severance of the joint tenancy, at least before foreclosure.

M. L. S.

TORTS.

Davoren et al. v. Kansas City, 273 S. W. 401.

NEGLIGENCE—LIABILITY TO INFANTS—ATTRACTIVE NUISANCES. In the recent case of *Davoren et al. v. Kansas City,* 273 S. W. 401, we have again the question of liability for injury to an infant who is upon premises because he was attracted by a condition of the premises. The original suit was instituted in the Circuit Court of Jackson County by Davoren and his wife to recover damages for alleged negligence in the drowning of their minor son. The facts as developed at the trial were as follows: Some twenty years before the fatal drowning occurred, the city constructed a high fill or dam across a ravine for the purpose of building a street. The city did not build a culvert or any outlet for the release of surface water