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PARTIAL ALIENATION BY ONE CO-OWNER OF LAND

Despite the fact that co-ownership is a very popular form of landholding in Singapore, many aspects of the law relating to it remain unsettled. This article explores the question whether the granting of a mortgage or a lease by one joint tenant severs the joint tenancy. It is argued that in deciding this matter the courts should have regard to the fact that modern law provides a simple and effective means of severance. The courts should not therefore be astute to discover new methods of severance and in particular should avoid legitimising any forms of severance which can be effected by one party without the knowledge of the other joint tenants.

I. INTRODUCTION

CO-OWNERSHIP is one of the most common forms of land holding in Singapore and indeed in most common law countries. It has formed part of the legal system since the earliest times. One might therefore be forgiven for assuming that legal problems relating to the nature and effect of co-ownership had been worked out long ago. In fact, this is far from the case and what might appear to be quite basic problems relating to co-ownership remain unresolved. This article looks at one of these areas – that of partial alienation by one co-owner. Although the state of the law is such that it is possible to reach only tentative conclusions as to what should be the legal result in any given case, it is hoped that a study of the problems created by partial alienation may serve perhaps to shed some light on the nature of co-ownership as a whole.

The essential problem is the extent to which partial alienation by one joint tenant can sever a joint tenancy, although a consideration of this issue will necessitate some discussion of a number of related areas. Joint tenancy is based on the theory that each co-owner owns the whole of the property rather than merely a part. As Bracton put it, each joint tenant *totum tenet et nihil tenet*[1] – each holds everything yet holds nothing. It is precisely because neither tenant holds a separate interest that the doctrine of sur-

[1] Bracton, *De legibus et consuetudinibus Angliae*, fo 430 (Woodbine's ed), vol 4, 336.

vivorship applies. When one joint tenant dies, nothing passes to his fellow joint tenant, it is simply that the survivor now holds the interest alone.

Joint tenancy can be converted into a tenancy in common by an act of severance, and traditionally the usual method of severance at common law is where one joint tenant alienates his interest in the land.[2] If A and B are joint tenants of Blackacre and A conveys his interest to C, B and C become tenants in common of Blackacre in equal shares. There is no unity of title as between B and C because they do not derive title to the land from the same act or document. The fact that a joint tenancy can be severed by alienation presents considerable logical difficulties. Neither joint tenant owns a separate interest in the land. Each joint tenant holds everything yet holds nothing. If so, what property does he have to alienate to a third party? One might have thought, therefore, that the only way in which severance could take place would be by some form of agreement between all the joint tenants. In fact, however, severance is effected by the unilateral act of alienation by one of the joint tenants. What appears to happen is that the alienor disposes of an interest that he does not actually have and this "transfer" creates the very interest, which was supposedly the subject matter of the transfer in the first place.

It is possible to dismiss the logical difficulties involved in understanding how a joint tenancy can be severed by alienation as mere academic quibbling. There is a rule of law that a joint tenancy is severed by alienation. This rule has been accepted for centuries and that is all that matters for practical purposes. However, problems arise when one is faced with a novel situation. Suppose a question arises as to whether or not a certain act amounts to a form of alienation sufficient to sever a joint tenancy. If this precise point is not covered by case law, the normal course of action of a lawyer would be to try to draw a logical deduction from those rules of law which have been clearly established by the courts. It is difficult to do this, however, if those rules themselves are based on a what is actually a logical fallacy. Where logical deduction is impossible, it is tempting instead to appeal to authority. This may perhaps explain a notable feature of the twentieth century cases on common law severance, which is the extent to which so many of these modern judgments are embellished with quotations from Coke upon Littleton.

[2] In addition to the case of alienation, a joint tenancy at common law is severed where one of the tenants subsequently acquires a further interest in the same land. See Megarry and Wade, *The Law of Real Property*, (5th ed, 1984), at 433. Obviously this is a very uncommon form of severance. Modern statute law has added an additional method of severing a common law joint tenancy by way of deed of declaration: Conveyancing and Law of Property Act, Cap 61, 1994 Rev Ed, s 66A.

Littleton's treatise on English law was written in or about 1481 and the first volume of Coke's Institutes, known as Coke upon Littleton, was published in 1628. While these works are undoubtedly deserving of the highest respect, there is a difficulty in accepting without question the views they express on severance. The common law traditionally preferred joint tenancy over tenancy in common. There are certain reasons for this peculiarly connected with the feudal system,[3] but in addition conveyancers preferred joint tenancy because joint tenants held by a single title, whereas in the case of tenancy in common the title of each tenant had to be examined separately. By way of contrast equity favoured tenancy in common as being certain and equal and avoiding the chance element inherent in the doctrine of survivorship. In considering novel issues in severance today, the policy considerations are different. Feudal considerations are obviously irrelevant and under modern conveyancing practice – particularly with the introduction of registration of title – land held by way of tenancy in common is no more difficult to deal with than land held under a joint tenancy. It might be argued therefore that in deciding doubtful cases the common law should now follow equity and prefer tenancy in common. However, modern law provides a simple method of severing a joint tenancy by means of a deed of declaration.[4] There is much to be said for encouraging parties to use this method rather than the alternatives, as the deed of declaration is a totally transparent way of dealing with the joint tenancy. It requires all the relevant parties to be notified and removes any doubts as to their legal position. It may well be that the courts of equity were liberal in the past in construing certain cases as effecting a severance of the joint tenancy precisely because there was at the time no simple method of severance such as the modern deed of declaration. Be that as it may, in considering whether novel fact situations give rise to severance, perhaps the most important policy consideration today is that the law should strive to avoid any situation which might allow one joint tenant to sever the joint tenancy without the knowledge of the other joint tenants.

It should be borne in mind that acts which may be insufficient to sever a joint tenancy at common law may nevertheless do so in equity. Page Wood V-C stated in *Williams* v *Hensman*,[5]

[3] See Megarry and Wade, *supra*, note 2, at 424.
[4] Conveyancing and Law of Property Act, *supra*, note 2.
[5] (1861) 1 John & H 547, at 557-8.

> A joint tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share ... Secondly, a joint-tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.

The only head of severance in equity of relevance to the subject of this article is the first head – an act of any one of the parties operating on his own share. Clearly what the common law would consider to be severance by alienation would be included under this head, but the phrase "act ... operating upon his own share" seems wider than alienation. It may well include acts of partial alienation that would not effect severance at common law.

It is clear that where one joint tenant alienates his share totally, the joint tenancy will be severed. Where A and B are joint tenants of the fee simple or a lease of Blackacre and A conveys his interest to C, B and C will become tenants in common of the fee simple or the lease of Blackacre. Where, however, A only alienates his interest partially, the law is not so clear. Partial alienation will occur where A mortgages his interest to C and where A leases his interest to C.[6] It is worth noting that the word "partial" is used here in two senses. The alienation is partial in the first place because A still retains an interest in Blackacre. But it is also partial in a temporal sense because it appears that at some stage in the future the *status quo ante* will be restored. This is clearly the case where A has leased his interest to C. After the lease comes to an end, A and B will be in exactly the same position as before the lease was created. Where A has mortgaged his interest to C, the parties will be restored to their previous positions once A has paid off the mortgage. In this case, however, there is the risk that A will

[6] It may also occur where A makes a declaration of trust in favour of C. In theory there is an additional case where A grants a life interest to C. Not surprisingly this possibility does not seem to have been considered often in the modern case law. It would seem to raise the same policy considerations as the granting of a lease and it is therefore submitted that it should be governed by the same rules. However, Megarry and Wade, *supra*, note 2, at 431, express the view in reliance on Littleton (Litt 302 and Coke's comment) that the grant of a life interest by one joint tenant is an act of severance.

never redeem the mortgage and C will exercise his rights as mortgagee, in which case the *status quo ante* will never be restored.[7]

II. MORTGAGES

At common law a mortgage takes the form of a conveyance of the legal estate from the borrower to the lender with a proviso for reconveyance on redemption of the mortgage. As such it amounts to a total alienation of the borrower's legal interest in the land. The result therefore is that where a joint tenant mortgages his interest at common law, the joint tenancy is severed.[8]

There is a clear contrast between the common law mortgage and the registered mortgage under the Land Titles Act.[9] This takes the form of a charge on the land and there is no transfer of any interest from the borrower to the lender. Section 68(3) provides as follows:

> A mortgage shall not operate as a transfer of the land mortgaged, but shall have effect as a security only.

As there is no alienation as such by the borrower, it would appear that the grant of a registered mortgage by one joint tenant does not sever the joint tenancy at common law. This is the view adopted in the Australian case of *Lyons* v *Lyons*.[10] There is no difficulty in understanding why a registered mortgage should not sever at common law. Just as in the case of the rentcharge, there is no transfer but only a charge over the land and it is clearly established that the grant of a rentcharge does not sever at common law.[11] It is less clear, however, why the grant of a registered mortgage does not sever in equity under the first head of *Williams* v *Hensman*[12] as the act of a party "operating upon his own share". This point was not clearly discussed in *Lyons* v *Lyons*, although since *Williams* v *Hensman* was considered, the possibility of severance in equity was canvassed, and the decision stands

7 For the sake of completeness, it should be noted that there are acts which A may do in relation to Blackacre which do not even amount to partial alienation and which therefore will clearly not lead to severance. Examples are the grant of a rentcharge, easement or a profit. For a full discussion see *Hedley* v *Roberts* [1977] VR 282.

8 *York* v *Stone* (1709) 1 Salk 158; *Re Pollard's Estate* (1863) 3 De GJ & S 541, at 558.

9 Cap 157, 1994 Rev Ed.

10 [1967] VR 169. See also *Re Shannon's Transfer* [1967] Tas SR 245.

11 See *Hedley* v *Roberts*, *supra*, note 7, at 286. See also Challis, *The Law of Real Property* (3rd ed, 1911) at 367 (note).

12 *Supra,* note 5.

as authority for the proposition that the grant of a registered mortgage by one joint tenant does not sever either at common law or in equity.

The words "an act of any one of the persons interested operating upon his own share", if taken literally, seem wide enough to encompass the grant of a registered mortgage or, indeed, an equitable mortgage. The two types of mortgage are functionally equivalent for present purposes. Neither amounts to a transfer of an interest in the land. Both take the form of a charge. The key to the decision in *Lyons* v *Lyons* seems, however, to be in the restricted view sometimes placed upon the words "act ... operating upon his own share". The phrase is not interpreted literally but is rather understood as meaning "alienation in equity". McInerney AJ quoted[13] with approval a passage from *Re Wilks*[14] where Stirling J mentions only two modes of severance of a joint tenancy:

> (1) by a disposition made by one of the joint owners amounting at law or in equity to an assignment of the share of that owner, or
>
> (2) by mutual agreement between the joint owners.

Most of the illustrations usually given for severance under the first head of *Williams* v *Hensman* are of forms of alienation.[15] Indeed the one case which is often cited as going beyond what would amount to severance at common law is where one of the joint tenants concludes a specifically enforceable contract to transfer his interest to a third party. Clearly this would not sever at common law, but on the principle that equity looks on as done that which ought to be done, the contract has the effect of transferring the vendor's equitable interest to the purchaser under the doctrine in *Walsh* v *Lonsdale*.[16] Such an act will clearly sever the joint tenancy in equity.[17] It can obviously be characterised as a form of alienation in equity.

In England there is authority[18] for the view that the commencement of litigation relating to the "share" of the joint tenant severs the joint tenancy

[13] *Supra*, note 10, at 172.

[14] [1891] 3 Ch 59, 61-2.

[15] See *eg* Gray, *Elements of Land Law* (2nd ed, 1993), at 489-497; Megarry and Wade, *The Law of Real Property* (6th ed, 2000), at 9-038 *et seq*. There is, however, Canadian authority for the view that a declaration of trust can sever the joint tenancy. This is considered further below in Section III.

[16] (1882) 21 Ch D 9.

[17] *Gould* v *Kemp* (1834) 2 My & K 304; *Caldwell* v *Fellowes* (1870) LR 9 Eq 410; *Re Hewett* [1894] 362.

[18] *Re Draper's Conveyance* [1969] 1 Ch 486.

under the first head of *Williams* v *Hensman*. Clearly such a form of severance could not be characterised as a form of alienation, but in any event doubts have been expressed as to whether the commencement of litigation can sever.[19] The obvious difficulty is that mere commencement of proceedings seems insufficiently conclusive to amount to an "act" on which severance is based because the litigation may subsequently be abandoned or discontinued. It is clear that severance may be effected by a court order,[20] but it would be a considerable stretch of logic to characterise this as based on the "act" of one of the parties merely because that party commenced the litigation.[21] It is best seen as an additional form of severance to be added to the three heads of *Williams* v *Hensman*.[22]

In the English case of *First National Securities Ltd* v *Hegerty*,[23] a husband and wife were the joint tenants of a house. The husband executed a legal charge over the house in favour of the plaintiff company forging his wife's signature to the document. Bingham J said,[24]

> If the husband and wife were up to then equitable as well as legal joint owners of the house I think that this disposition by the husband was a sufficient act of alienation to sever the beneficial joint tenancy and convert the husband and wife into tenants in common. In any case the disposition was in my view effective to create a valid equitable charge in favour of the plaintiffs of the husband's beneficial interest in the house.

Bingham J did not give any reasons for his view that the grant of an equitable charge is an act of severance. Since both husband and wife were still alive, the question of severance was *obiter*. In the earlier English case of *Re Sharer*[25] it was held that an equitable mortgage severed the joint tenancy on the basis that it could not have been the intention of the mortgagor that the security he gave should be avoided if the chanced to predecease his

19 See *eg Nielson-Jones* v *Fedden* [1975] Ch 222, 236.

20 *Sivakalunthu Kumarasamy* v *Shanmugam Nagaiah* [1988] 1 MLJ 341.

21 See *Sivakalunthu Kumarasamy* v *Shanmugam Nagaiah*, *ibid*, at 347, where Chan Sek Keong JC (delivering the judgment of the court) said, "The severance was not effected by an act of the parties but by an order of court." *Cf Malayan Banking Bhd* v *Focal Finance Ltd* [1999] 3 SLR 229 where it was held that the registration of a writ of seizure and sale does not sever a joint tenancy.

22 *Supra*, note 5.

23 [1965] 1 QB 850.

24 At 854.

25 (1912) 57 Sol Jo 60.

co-owner. However, the same might be said of a person who grants a rentcharge over his land, but it is clear that no severance occurs in this case.

Given the different views taken in England and Australia as to the effect of the grant of a mortgage by one joint tenant, what approach should be taken in Singapore? Analysing the matter in terms of whether or not a charge is a form of "alienation" or is an "act" of a party operating on his own share seems an excessively technical way of dealing with the problem. It may be more helpful to ask if there are any policy reasons for preferring one approach over the other. A registered mortgage is a public transaction. There is no risk of one joint tenant effecting a severance behind the back of his co-owner. So far as the creation of a registered mortgage is concerned, policy considerations do not seem to point clearly in favour of either approach, but as will be seen shortly it is necessary to adopt a solution which will apply to both registered and equitable mortgages.

So far as equitable mortgages are concerned, the policy considerations are much clearer. One can easily imagine a situation where A and B are joint tenants in law and equity of land. A grants an equitable mortgage of his "share". If the English approach is adopted, this severs the joint tenancy in equity, but B may know nothing about it. Suppose A repays the loan with the result that the mortgage is discharged and subsequently B dies. B's personal representatives will have no way of finding out about the creation of the mortgage and the result will be that A will succeed to the entire estate by virtue of the doctrine of survivorship. If A were to die first, however, a different result might well occur. A's personal representatives may well find documentary evidence of the creation of the mortgage while going through his papers. They will then be able to argue successfully that the joint tenancy was severed with the result that they will succeed to half the estate. Policy considerations therefore point strongly towards adopting the view that the grant of an equitable mortgage will not sever a joint tenancy.

If this approach is adopted for equitable mortgages, then by parity of reasoning it must also be applied to registered mortgages in Torrens system land. As stated above, both forms of mortgage are in reality charges and neither takes the form of a transfer. There is no valid basis for distinguishing between the two for present purposes. There is no injustice to a lender in holding that these mortgages do not sever the joint tenancy. Anyone who lends money on the security of the "share" of a joint tenant should be aware that he is taking a risk that the borrower will die before his co-owner and that in these circumstances the security will be lost. There is a simple remedy for this problem and that is to require the borrower to sever the joint tenancy by deed of declaration before agreeing to advance the money. The existence of this simple modern method of severance makes it unnecessary to strain the law so as to hold that other acts by one of the co-owners may also amount to severance.

III. Leases

Leases raise many of the same questions as mortgages so far as the law of severance is concerned. A lease is a partial alienation in the sense that the alienor still retains some interest in the land. It is also a partial alienation in the temporal sense because every lease must eventually come to an end and once this happens, the *status quo ante* will be restored. Obviously this is not necessarily the case where one joint tenant has mortgaged his interest. It is quite possible that the mortgage will not be discharged and that the mortgagee will realise his security. This difference may help to explain why it has been suggested that the grant of a lease by one joint tenant may only suspend the joint tenancy.[26]

There are relatively few reported cases dealing with the effect of a lease granted by one joint tenant. This is hardly surprising, as the idea of a lease granted by only one joint tenant – or indeed by only one tenant in common – raises many conceptual difficulties. On the one hand a lease is a grant of exclusive possession, so that the tenant has the right to exclude even his own landlord from the premises. On the other hand co-owners – whether joint tenants or tenants in common – have unity of possession, which means that each co-owner has the right to possession of all of the co-owned property. What happens then when one co-owner grants a lease to a tenant without the concurrence of his fellow co-owners? The result appears to be that the tenant has exclusive possession as against all persons other than those co-owners who did not participate in the grant of the lease. The non-participating co-owners must respect the tenant's right to possession of the entire premises but they retain their own right to share possession of the entire premises with him and they can themselves grant leases to third parties.[27] It is hardly surprising in these circumstances to find that a grant of a lease by only one co-owner is a somewhat exceptional occurrence.

There is some dispute as to whether or not the grant of a lease by one joint tenant severs the joint tenancy. There is authority in England dating back to the sixteenth century for the view that where a joint tenant of a lease grants an sublease to a third party[28] or to his fellow joint tenant,[29]

[26] This is considered further below in the text at note 39.

[27] See *Frieze* v *Unger* [1960] VR 230, 245. There do not appear to be any modern cases reported in England on the subject, but the possibility that one joint tenant might effectively grant a lease without the concurrence of his fellow joint tenant seems to be admitted in the speech of Lord Fraser in *Tilling* v *Whiteman* [1980] AC 1, 24.

[28] *Sym's Case* (1584) Cro Eliz 33.

[29] *Pleadal's Case* (1579) 2 Leon 159. For a full discussion of the old authorities see *Frieze* v *Unger, supra*, note 27, at 241-5.

the joint tenancy is severed. However, there does not appear to be any English authority clearly covering the case of a lease granted by a joint tenant of the freehold interest. Moreover, the reports of the early cases are so brief that it would obviously be unsafe to rely on them as correctly representing the modern law without further review. In *Cowper* v *Fletcher*[30] there were three executors of a will, who as such were joint tenants of certain real property. Two of them granted a lease of the property to the third and the question arose whether the two might distrain for rent in arrear. The principal issue was whether one joint tenant could validly grant a lease to his fellow joint tenant. It was held that this was possible and that the distress was therefore valid. Blackburn J said, "I am inclined to think that the effect of making a separate demise to one is a severance of the joint-tenancy."[31] Clearly these remarks were *obiter*, as the issue before the court was whether the lease was valid and not whether the lease effected severance. Indeed, it appears that all three executors were alive at the time of the case.

The leading modern case on this subject is the Irish case of *Re Armstrong*.[32] Two sisters, Elizabeth Armstrong and Sophia Barrett were joint tenants of certain land which was held in fee simple. By an agreement dated 9th April 1910 made between the two sisters it was agreed that Elizabeth should stand possessed of the land for the term of ten years at a certain annual rent. Sophia died on 10th October 1918 during the currency of the lease. The question arose whether Elizabeth took all the land now by survivorship or whether she and Sophia's estate took equal shares in the land as tenants in common. Ross J said,[33]

> [I]t is in substance a lease for a term of ten years, subject to certain charges and conditions. The agreement is either a partial alienation or a letting. A partial alienation does effect a severance; but, assuming it to be in substance a letting for ten years, does this amount to a severance? If one of two joint tenants assigns his share to a third person, this destroys the unity of title and creates a severance, and creates a tenancy in common between the assignee and the other joint tenant: Littleton's Tenures, section 292. But where one of two joint tenants in fee creates a lease for years, it appears that such lease is binding on the other joint tenant after the death of the lessor; but does it effect a severance?

30 (1865) 6 B & S 464.
31 At 472.
32 [1920] 1 IR 239.
33 At 242.

> In the case of a term of years held in joint tenancy a lease by one joint tenant for a term less than the residue does sever the joint tenancy. So it has been laid down in Coke Litt. (s. 289, s. 319); but why this should be so is far from clear. It would seem reasonable when an act is done by either joint tenant inconsistent with the chief characteristic of a joint tenancy, namely, survivorship, that such an act should effect a severance. Now a lease must effect the survivorship to some extent, because it is binding after the death of the lessor. We are not, however, left to depend on the ancient authorities, because the matter was considered by Lord Blackburn in the case of *Cowper* v *Fletcher*;[34] and he expressed the opinion that the effect of making a separate demise does sever a joint tenancy.
>
> I am of opinion that the agreement referred to did effect a severance, and direct the question to be answered accordingly.

Re Armstrong is particularly important because it is one of the few cases where the question of severance forms part of the *ratio* of the decision, and the passage quoted above represents virtually the whole judgment apart from the recitation of the facts and arguments of counsel. It is curious that, although Ross J based his decision on the view that a lease made by one joint tenant was binding after the death of the lessor, no authority was cited for this proposition.[35] Moreover, it would seem that the judgment assumes what it sets out to prove. If severance has taken place, then obviously the lease continues in force after the death of the lessor. If, however, no severance has taken place, then it is difficult to see how the lease can still be binding after the death of the lessor, since the lessor's estate has no interest in the land. There is a parallel here with the case where A, the owner of a life estate in Blackacre, grants B a lease for ten years from 1 January 2000. Should A die on 31 December 2005, B's interest will cease on the same date.[36]

Re Armstrong was distinguished in the more recent case of *Sorensen* v *Sorensen*,[37] which was decided in the Supreme Court of Alberta. A husband and wife jointly owned land on which their matrimonial home was built.

[34] *Supra*, note 30.

[35] In fact this view can be supported by reference to opinions expressed by some of the early textbook writers: see *Frieze* v *Unger*, *supra*, note 27, at 243.

[36] For the avoidance of doubt it should be said that this illustration is based on the position at common law alone without reference to the Settled Estates Act, Cap 293, 1985 Rev Ed.

[37] [1977] 2 WWR 438.

As part of a divorce settlement the husband granted the wife a lease of the land for her lifetime at a rental of $1 per year. It was held that the lease did not sever the joint tenancy. In the words of McDermid JA,[38]

> Here the lease was only for the lifetime of the tenant, the wife. Upon the death of the wife the lease would terminate and upon the death of the husband, if the wife was still living, she would succeed to the whole of the tenancy and, as a result, the lease would merge in the fee. Therefore the lease did not interfere with the chief characteristic of a joint tenancy, *viz*, survivorship. The fact that the tenancy was only for the lifetime of one of the joint tenants might well be evidence that the intention was not to sever.

The question of leases has been approached in a different way in the Australian courts. In *Wright* v *Gibbons*[39] Dixon J said *obiter*,

> One joint tenant for an estate in fee simple may grant a lease of his equal share and during the lease the jointure is suspended and there is a temporary severance and apparently it would not matter that the lease did not commence until after the death of the joint tenant granting it.

It is not entirely clear what is meant by a suspension of the joint tenancy. In *Frieze* v *Unger*[40] Sholl J understood this to mean that,

> the doctrine involves the proposition that the reversion expectant on the term will pass to the survivor of the joint tenants, so that any "severance" or "suspension" is such only as is necessary to procure for the lessee the enjoyment during the term of the grantor's moiety both after as well as before the grantor's death ... the term survives the death of the grantor, but the reversion passes to the survivor.

With respect this seems a strange explanation of the view of Dixon J. Where A and B are joint tenants in fee simple and A grants a ten year lease to C, B must respect C's right of possession during A's lifetime because it is derived from A's own right of possession. If it is true that the reversion

38 At 447-8.
39 (1949) 78 CLR 313, 330.
40 *Supra*, note 27, at 243.

passes to the survivor, then the lease should come to an end at that point of time. The leasehold interest is carved out of A's freehold interest and once this comes to an end, so must the lease. It is submitted that it is better to understand the notion of suspension of the joint tenancy as being based on the idea that, if one of the joint tenants dies *before* the lease has expired through effluxion of time, then the doctrine of survivorship will not apply. In other words, A and B are tenants in common from the moment of creation of the lease until it comes to an end. Should either A or B die before the end of the ten year lease, then the doctrine of survivorship will not apply. C will retain his leasehold interest and his lessor will be either A or the estate of A. Suppose, however, A and B do not die during the ten year period. In this case, the joint tenancy will be reconstituted when the lease expires. If A subsequently dies, B will acquire the whole estate through survivorship.

The notion of a suspension of the joint tenancy has, however, been criticised on the ground that "once a severance, albeit temporary, has occurred, surely the unity of interest of the joint tenants is destroyed, and the co-owners cannot afterward be regarded as enjoying unity of title and time."[41] This argument has a certain attraction, but one needs to bear in mind that the very idea of severance by alienation is based on a logical fallacy, as pointed out at the beginning of this article. Joint tenants do not have separate shares in the land. The alienor disposes of an interest that he does not actually have and this "transfer" creates the very interest, which was supposedly the subject matter of the transfer in the first place. The truth of the matter is that modern lawyers accept the idea of severance by alienation not because it makes any logical sense, but simply because it is enshrined in the case law. The notion of suspension of a joint tenancy may not be so solidly rooted in the case law, but it is not a new idea and can be supported by reference to the earlier literature preceding Dixon J's remarks in *Wright* v *Gibbons*.[42] Moreover, it is by no means clear that the co-owners should not be regarded as enjoying unity of title, time and interest after the expiry of the lease. So far as unity of title is concerned, the co-owners still claim title to the land under the same act or document. So far as unity of time is concerned, the interest of each co-owner did indeed vest at the same time. So far as unity of interest is concerned, once the lease has come to

[41] See Preece, "Effect of Partial Alienation by a Co-owner of Land", (1981) 55 Law IJ 155, 116-7.

[42] *Supra*, note 39. See *eg* Challis, *supra*, note 11, at 367 (note); *cf Gale* v *Gale* (1789) 2 Cox 136, 155.

an end, the interest of each joint tenant is the same in extent, nature and duration.[43]

Perhaps the strongest argument for the idea of suspension of the joint tenancy in leasehold cases arises out of practical considerations. It has been argued here that the existence of a simple method of severance under modern statute law means that there is no need to increase the number of cases of severance at common law or in equity. Indeed, it is undesirable to do so where there is a risk that this might make it possible for one co-owner to sever behind the back of his fellow co-owner. Such a risk may indeed exist in the case of leases.

Leases by one co-owner are in practice most likely to occur where the other co-owner does not have ready access to the property in question. The reason for this is simply because, unless both co-owners join in granting the lease, there is nothing to prevent the non-participating co-owner from insisting on his right of possession. Suppose A and B, who are brothers, are joint tenants of the fee simple of Blackacre, where they both live. B is planning to work abroad and before he leaves the brothers discuss what is to be done with Blackacre. A wants to rent out the property, but B is opposed. When B is out of the country, A moves into a smaller property and lets Blackacre to C on a monthly tenancy without telling B. C does not pay his rent, so A serves notice to terminate the lease. Traumatised by his bad experience, A moves back into Blackacre himself and never tells his brother about the lease. Many years later, B dies. B's executors will know nothing about the lease, and therefore A will acquire the whole property by survivorship. Suppose, however, that A were to die first. While going through his papers, A's executors may well find documents relating to the lease. They will then be able to argue that the joint tenancy was severed and that they are entitled to a half share in Blackacre. Given the state of the case law, it is difficult to argue that no severance has taken place. If, however, the view of Dixon J is adopted, it can be said that since the lease had come to an end before the death of the first co-owner, B has now acquired the whole property by survivorship. This solution has the merits of placing A and B on an equal footing. It means, of course, that should one co-owner die during the currency of the lease, then the joint tenancy will have been severed. However, it is unlikely that this would cause difficulties of the type outlined above. Where the lease is still in existence, the executors of the deceased will almost certainly be aware of what has happened and will be able to make a claim for their share of the property.

[43] See Megarry and Wade, *supra*, note 15, at 9-006 *et seq*.

The approach advocated here is consistent with the results of both *Re Armstrong*[44] and *Sorensen* v *Sorensen.*[45] In the first case, severance occurred because one of the co-owners died during the currency of the lease. In the second case, there was no severance because the lease came to an end at the time the first co-owner died.

Since the common law recognises to a certain extent that partial alienation by way of a lease will sever a joint tenancy, there is no need for equity to intervene. Presumably in England where severance at common law has been outlawed by statute,[46] equity would follow the law and the principles discussed here would be applied as an example of the act of a party operating on his own share under the first head of *Williams* v *Hensman*.[47] In any event there does not appear to be any suggestion in the case law or the literature on the subject that equity might take a different view from the common law as to the effect of a lease granted by one co-owner.

Before leaving the topic of leases, it is worth exploring one related topic which may sometimes be of practical significance. As has already been pointed out, the idea of a lease granted by only one of the co-owners is a strange one given that it does not deprive the non-participating co-owners of their right of possession. In practice therefore such leases are only likely to be granted where the other co-owner has ceded effective control of the property to the co-owner granting the lease. The non-participating co-owner has a statutory right to require his fellow co-owner to account for his share of the rent[48] and it has been suggested that, should he make such a claim, he may be held to have adopted the lease.[49] Obviously, where this occurs the lease would be deemed to be granted by both co-owners and, if they are joint tenants, there would be no severance. This is a useful suggestion because in practice the non-participating co-owner will usually make such a claim. The problems inherent in the grant of a lease by one co-owner would be avoided if the making of such a claim were held to amount to adoption of the lease.

Unfortunately, however, the Australian case of *Catanzariti* v *Whitehouse*[50] stands as authority against this proposition. A husband and wife were joint tenants of the matrimonial home. After the breakdown of the marriage Mrs

44 *Supra*, note 32.
45 *Supra*, note 37.
46 Law of Property Act 1925, s 36.
47 *Supra*, note 5.
48 Conveyancing and Law of Property, Cap 61, 1994 Rev Ed, s 73A.
49 See Tan, *Principles of Singapore Land Law* (1994), at 90-91, note 17.
50 (1981) 55 FLR 426.

Catanzariti left the house and her husband let it to a Mr Whitehouse, who knew nothing about the state of the title and who assumed that the husband had the sole right to grant him a lease of the house. When the wife found out about the letting she raised no objection because her husband told her that he was applying the rent towards paying off the mortgage. When she subsequently discovered that this was not true, she moved back into the house for the purpose of ensuring that she would receive her share of the rent being paid by Mr Whitehouse to her husband. Mrs Catanzariti caused damage to some of Mr Whitehouse's goods and he sued her for breach of the covenant of quiet enjoyment in the lease. It was held[51] that a contract can only be ratified where it purports to have been entered into by the unauthorised agent on behalf of another. As the husband did not profess to be acting on behalf of his wife when he granted the lease, she could not afterwards ratify it and therefore was not bound by the covenant of quiet enjoyment.[52] She was however liable to pay damages as she had committed the tort of trespass to chattels.

IV. Declaration of Trust

Obviously a declaration of trust by one joint tenant cannot amount to a severance at common law,[53] but it would seem to fall within the natural meaning of the phrase "act of any one of the persons interested operating upon his own share", which is the first head of severance in equity under *Williams* v *Hensman*.[54] Even if one adopts a narrower interpretation of this phrase, as suggested in much of the literature on the subject,[55] there is still the difficulty that it is accepted law that a specifically enforceable contract

[51] In reliance on the House of Lords decision in *Keighley*, *Maxsted & Co* v *Durant* [1901] AC 240.

[52] There is a curious reference in the judgment (at 431) to "adoption" as something that might possibly be different from "ratification", but the judgment simply says that, "Adoption was not argued before the trial judge or before us and we do not stay to consider whether the concept has application in the circumstances of this matter." In fact the word "adoption" when used in respect of a contract generally means "ratification" or "novation". (See *Powdrill* v *Watson* [1995] 2 AC 394, 410.) Possibly the court had in mind the possibility that the wife's actions might arguably give rise to some form of estoppel.

[53] Clearly where the trust is set up by a transfer of legal title to trustees to hold on trust for the beneficiary, there will be an alienation and thus severance at common law. The case considered here is where the settlor/joint tenant declares himself a trustee of his interest for the beneficiary.

[54] *Supra*, note 5.

[55] See, *supra*, text at note 14.

by one joint tenant to sell his share to a third party amounts to severance in equity.[56] In this case the effect of the contract is that the vendor holds his interest on a constructive trust for the purchaser. If this is a form of alienation in equity, then it is difficult to see why an express declaration of trust should not be so too. Indeed there is Canadian authority for the view that a declaration of trust severs the joint tenancy.[57]

The problem is that a declaration of trust can be a totally private matter. A trust may be fully constituted by the settlor acting alone without either the consent or the knowledge of the beneficiary. If this is an effective means of severance, it represents the easiest method of severing the joint tenancy behind the backs of the other co-owners. Even a mortgage or a lease requires the participation of at least one other person. Suppose a married couple are the joint tenants of Blackacre. The husband can sign a declaration of trust in favour of a third party and leave it amongst his papers to be discovered on his death and thereby prevent his wife from having the benefit of the doctrine of survivorship. Of course, should she die first, he can simply destroy the declaration of trust, which nobody else knows about anyway. Perhaps the best way of avoiding this difficulty is to accept that the phrase "act ... operating upon his own share" must be limited to some form of public act and should not extend to a totally private action.

V. Conclusion

The difficulties that have occurred in working out the effects of a partial alienation have their root in the doctrine that each joint tenant owns the whole of the estate and not merely a proportionate share. The problem is compounded when this is coupled with the idea that it is possible for one joint tenant to alienate an interest that he does not actually have and that he thereby creates the very interest which was supposedly the subject matter of the transfer in the first place. These notions are too firmly rooted in English law to be set aside now. However, as Lord Nicholls stated in the recent House of Lords case of *Burton* v *London Borough of Camden*,[58]

[56] See cases noted *supra* at note 17.

[57] *Sorensen* v *Sorensen*, *supra*, note 37; *Re Mee* (1971) 23 DLR (3d) 491.

[58] *The Times*, 23 February, 2000. The full text of the judgment is available on the House of Lords web site: http://www.parliament.the-stationery-office.co.uk/.

> The legal concept relied upon ... is that a joint tenant, as distinct from a tenant in common, has nothing to transfer to the other tenant, because each already owns the whole. I have to say that this esoteric concept is remote from the realities of life. It should be handled with care, and applied with caution.

An attempt has been made in this article to follow this guidance and to look at the law of severance in the light of the realities of life. The most important factor is the existence in Singapore of a simple and effective method of severance by statute. This, coupled with the need to ensure that parties are fully aware of their rights and that no one party should be able to sever behind the back of his fellow co-owners, means that the courts should not be astute to discover new methods of severance and, in particular, should avoid legitimising any form of severance which can be effected by one party without the knowledge of the other joint tenants.

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