Observations on the Law of Joint Tenancy in Wisconsin - Part One

Patrick W. Cotter

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol39/iss2/2
OBSERVATIONS ON THE LAW OF JOINT TENANCY IN WISCONSIN*

Patrick W. Cotter**

The confusion existing in the law of Joint Tenancy in the United States has been due to the enactment of statutes reflecting the hostility in this country to the presumption which had been created under the common law in England in favor of Joint Tenancy, and thereby to limit and in some cases abolish the primary incident of the tenancy—survivorship. Because of its harshness, the doctrine of survivorship became extremely unpopular in England as well as the United States. The statutes enacted to accomplish this end were of three general types: (1) those expressly abolishing joint tenancy as an estate; (2) those abolishing survivorship; and (3) those reversing the common law presumption by requiring the deed or grant to contain an expression of intention on the part of the grantor to create a joint tenancy.

* This is the first part of an article which will be presented in this and the next two succeeding issues of the Marquette Law Review.

** Associate, Wood, Warren, Tyrell & Bruce; Milwaukee, Wisconsin; B.A. University of Wisconsin 1938; LL.B. University of Wisconsin; 1940; LL.M. University of Wisconsin 1946; Member of Milwaukee County and Wisconsin Bar Associations. The Author would like to acknowledge the research assistance of Walter P. Rynkiewicz, member of the law firm of Puhr, Peters, Holden & Schlosser, Sheboygan, Wisconsin; L.L.B. Marquette University 1955.

1 In Williams v. Hensman, Johns & H. 457, we find these remarks of V.C.W. Page Wood: "In these questions of joint-tenancy the court has frequently been driven to rely on minute grounds for holding a severance to have taken place, by the unfortunate circumstance that the Legislature has not thought fit to interpose by introducing the rule, that express words shall be required to create a joint-tenancy, in place of the contrary rule which is established, that words pointing to severality of interest are necessary to constitute a tenancy in common. Under certain circumstances, as in the case of mortgages of trust money, a joint-tenancy is a considerable convenience; but it would be very desirable that, in general, in the absence of any express direction, a tenancy in common should be the construction adopted."

2 In this category Freeman, COTENANCY AND PARTITION, p. 84 (1886) places Georgia, Ohio, Oregon and Tennessee. See, however, O'Connell, Are Joint Tenancies Abolished in Oregon? 21 Ore. L. Rev. 159 (1941); Kuykendall, Joint Tenancy and Tenancy by the Entireties in Real and Personal Property in Oregon, 100 Ore. L. Rev. 388 (1931). Brewster, CONVEYANCE (1904), p. 151, lists Georgia and Oregon in this class.


The statutes adopted in Wisconsin are of the third type, and since the purpose of this paper is to present the Wisconsin law on this subject, the interesting problems and difficulties created by statutes of the first two types will not be discussed, except as they may be alluded to by way of comparison. Under the Wisconsin statutes the common law of joint tenancy is preserved, except as specifically modified by statute. The plan of presentation, therefore, is to review the principles of the common law and then to discuss the statutory changes and their interpretation and application by the Wisconsin Supreme Court.

The most inclusive definition of joint tenancy is presented by Mr. Freeman as a modification of one by Mr. Preston:

Joint Tenancy is when two or more persons, not being husband and wife at the date of its acquisition, have any subject of property jointly between them in equal shares by purchase.

Thus phrased, tenancies by the entirety are excluded and personal property is included. The most popular characterization of the estate comes from Blackstone:

The properties of a joint estate are derived from its unity which is fourfold: the unity of interest, the unity of title, the unity of time, and the unity of possession, or in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and same undivided possession.

Blackstone's "four unities" have been seized on by courts and writers as laying down the test for the creation or existence of a joint tenancy. This is not the true test, for although the unities are usually present, they are not indispensible.

Unity of interest may be lacking as where

---

6 See problems discussed by Freeman, op. cit., §§39 and 40.
8 1 Preston on Estates 136 (1820).
9 Freeman, op. cit., p. 64. Other less comprehensive definitions have been attempted by Littleton, Blackstone and Kent: "Joynentants are, as if a man be seized of certain lands or tenements, etc., and enfeoffeth two, three, or four, or more, to have and to hold to them for terme of there feoffment or lease they are seized, these are joynentants." Littleton, §277.
10 "An estate in joint tenancy is where lands or tenements are granted to two or more persons to hold in fee simple, feetal, for life, for years, or at will." 2 Bl. Comm. 180.
11 "Joint-tenants are persons who own lands by a joint title, created expressly by one and the same deed or will. They hold uniformly by purchase." 4 Kent's Comm. 357.
12 2 Bl. Comm. 180; 4 Dane's Ab. 758.
... a rent charge be granted to A and B to have and to hold to them two, vis. to A until he be married, and to B until he be advanced to a benefice, they be joint tenants in the meantime, notwithstanding the several limitations.13

Or the estate may be acquired at different times, as in the case of uses and executory devises.14 Unity of possession is common to all tenancies; and there seems to be no exception to the rule that the title of joint tenants must arise from one act, deed or devise.15

In his comments on Blackstone's four unities, Mr. Challis says:

This analysis has perhaps attracted attention rather by reason of its captivating appearance of symmetry and exactness, than by reason of its practical utility. It means only, that each joint tenant stands, in all respects, in exactly the same position as each of the others; and that anything which creates a distinction either severs the joint tenancy or prevents it from arising.16

Each joint tenant is regarded as the tenant of the whole estate for purposes of tenure and survivorship, while for the purposes of alienation and forfeiture each has an undivided share only.17

The distinguishing incident of joint tenancy, however, is the doctrine of survivorship, "by which... the entire tenancy upon the decease of any one of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it may be."18 The heirs of the deceased joint tenant take nothing. It is this incident of joint tenancy that has caused the courts so much difficulty. It was felt that it is inconsistent with normal desires for a man to hold property in such a manner that when he dies his heirs can have no interest in it.19

However, in spite of the fact that this feeling manifested itself in equity the common law judges favored the creation of joint tenancies, because, due to the doctrine of survivorship, it prevented fractions of estates and the feudal burdens of the tenants were lessened. Since only one suit and service was due the lord from all the joint tenants, on the death of one, the others acquired his share free from the burdens in favor of the lord which ordinarily accrued on the death of a

---

13 Co. Litt. 180-6; see also 4 Kent Comm. 357; note to 2 Bl. Comm. 181; Co. Litt. 184a; Crary v. Welles, 2 P. Wm.s 530; Cook v. Cook, 2 Vern. 545.
14 Thus a devise or limitation to the use of the children of A will give each child an estate as soon as born, and yet all will hold as joint tenants. 2 American Law of Property, §6.1.
15 2 American Law of Property, §6.1. Today statutes and decisions in most jurisdictions change the old common law rule which held a conveyance by a sole owner to himself and another cannot create a joint tenancy. See §230.45(3) Wis. Stats. (1953), and material in Part II of this article.
18 2 Bl. Comm. 184; Freeman, op. cit. 66.
19 Freeman, op. cit. 67.
Joint tenancy was frequently adopted to prevent dower and courtesy from attaching; it avoided wardship, primer seisin and other feudal imposts. Thus at the common law a conveyance to two or more persons, where there were no words to indicate a contrary intention, created a joint tenancy. Nor would equity refuse to follow the law in enforcing the rights of survivorship in the absence of a contrary intention. But after the abolition of feudal tenures equity was quick to find the requisite expressions of intention to defeat survivorship. If in the creation of the estate or in the severance of it a doubt existed, it was resolved by equity in favor of tenancy in common. The three most common cases in which equity inferred an intention not to create a joint tenancy were (1) where land is acquired jointly by two or more for the purpose of undertaking a partnership, (2) where money was advanced on a joint mortgage by two or more persons, and (3) where on a joint purchase of land, the purchase money is contributed in unequal shares.

It was this abhorrence of the equity courts for the doctrine of survivorship that was carried over to the colonies and was reflected in the statutes of every state in its attempt to limit its application by changing the common law rules.

Because of the presumption, no words of art were necessary for the creation of a joint tenancy—either at law or in equity. Any deed or devise to two or more persons, not husband or wife, would create a joint tenancy. In fact, words or circumstances of negation were necessary to avoid the operation of the presumption. Thus the problem of construction before the common law and equity courts, as distinguished from that which is before the Wisconsin Court today, was whether the words used by the grantor or devisor expressed an intent to create a tenancy in common.

The estate must always arise by purchase and can never be acquired by descent. “Purchase includes every mode of coming to an estate except inheritance.” A corporation may not hold in joint tenancy with an individual nor may two corporations so hold. But all natural persons may be joint tenants. Whatever property may be held in sole ownership may also be held jointly. There is no restriction on the type of property to be held in joint tenancy nor on the nature of the estate with regard to quantity of interest. It may be equitable as well as legal.

---

20 Tiffany, op. cit., 201; Co. Lit. 706; 2 Bl. Comm. 180, 193; 4 Kent Comm. 361.
21 Tiffany, op. cit., 201.
22 Cheshire, MODERN LAW OF REAL PROPERTY (5th Ed. 1944), 551 et seq.
23 2 American Law of Property §6.2. “A joint tenancy arises only by purchase; that is, by deed or by will or by adverse possession. If the property descends to heirs from an ancestor who dies intestate, the heirs take as tenant in common.”
24 2 American Law of Property, §6.3 n. 4; Tiffany, op. cit., 205; Co. Lit. 190a.
25 Freeman, op. cit., 69.
and may be undivided as well as in severalty. Hence, if three persons hold as joint tenants, and one conveys to a third, the other two will remain joint tenants as between themselves though their title is for only two-thirds of the estate.26 And all species of personalty, tangible and intangible, may be so held.27 The rule at common law as to a mortgage given to two creditors to secure a debt owed jointly to them was that such mortgage was held in joint tenancy during the existence of the mortgage and the mortgagees will have to pursue their remedy or foreclosure by a joint action. If, however, the debts secured are several debts of the mortgagees, the presumption of joint tenancy is rebutted and each mortgagee may maintain a separate action on the mortgage. Equity would even refuse to extend the former rule beyond permitting the surviving mortgagee to sue, and holding the proceeds as trustee of the representative of his deceased co-mortgagee.28

Before considering the methods by which a joint tenancy may be terminated, it would be in order to discuss the law governing the rights, duties and liabilities of joint tenants in their relation with one another and in their relations with strangers.29 Since these rules of law are, in the main, applicable to all types of cotenancies and are not peculiar to joint tenancy, they are not within the scope of this paper. However, in passing, several instances of such rules which are peculiar to joint tenancy are noted. In a conveyance by one cotenant to another, the proper mode of transfer for a joint tenant is a release to the others of his interest. However, where a form of conveyance other than a release contains terms broad enough to comprehend a release it will be allowed to operate accordingly and transfer the interest of the joint tenant; the general rule being that a deed should always be carried into effect if possible since the primary intent of the grantor is presumed to have been to pass the land.30

In actions against strangers or actions by strangers against cotenants problems of joinder of parties arise. Insofar as real actions are concerned, where title is jointly held, as in joint tenancy and coparceny, the action must also be joint. Whenever the cotenants are deemed to possess separate and distinct estates, as in tenancy in common, they must pursue their remedies separately.31 However, in personal actions based on an injury to the possession such as trespass, cotenants should join, whether they hold in joint tenancy, tenancy in common, or coparceny.32 In actions of ejectment, joint tenants may sue either jointly

26 Tiffany, op. cit., 209.
27 2 American Law of Property, §6.4.
28 Freeman, op. cit., 70.
29 Freeman, op. cit., Chaps. VIII-XVI.
30 3 American Law of Property, §12.94; 2 Cruise, Titles 18CS. §22.
31 Tiffany, op. cit., 295; Co. LiTr. 1806.
32 Ibid.
or separately depending on the nature of the fictitious demise. In equitable proceedings all cotenants must join or be joined regardless of the nature of the tenancy.

A joint tenancy may be terminated by a destruction of any one of the four unities; this act of destruction, whether done by one or more of the tenants, by a stranger, or by operation of law, is called a severance and results in the property being held thereafter in tenancy in common or in severalty. Where there are three or more joint tenants and the joint tenancy is terminated as to one, the remaining tenants continue to hold in joint tenancy among themselves, but as tenants in common with respect to the share of the joint tenant whose interest has been terminated. So also if there are eight joint tenants and five effect a severance, the three remain joint tenants with one another and the five become joint tenants of the portions severed and appropriated by them.

The unities of title and of time are destroyed by an alienation by one of the joint tenants which creates a severance as to that share. Thus a conveyance in fee by one joint tenant to a stranger creates an interest in the stranger through a different title and at a different time than the interest of the cotenants and the relationship is one of tenancy in common. A conveyance to a stranger for life will also effect a severance so that the grantee for life and the other joint tenant will hold as tenants in common and upon the death of either of the former joint tenants during the existence of the life estate, there is no right of survivorship—the interest of each passes to his heirs. Whether the joint tenancy as it originally existed revives at the termination of the life estate, both joint tenants living, is not altogether clear. Lord Coke states, "... if tenant for life dyeth in the life of both joint-tenants, they are joint-tenants again as they were before." He recognizes authority to the contrary, however.

Where the joint tenancy is in fee and one of the joint tenants makes a lease for years, the authorities are in dispute as to whether a severance is effected. Freeman says,

33 Ibid.
34 Ibid., Story's Eq. Pl. §159.
35 Freeman, op. cit., §29 et seq. seems to consider partition as a means of terminating a joint tenancy as distinct from severance. Cheshire, op. cit., §155 considers that a joint tenancy in any event is terminated by a severance of which there are four modes: (1) Alienation by one joint tenant; (2) Acquisition by one tenant of a greater interest than those held by his cotenants; (3) partition; (4) sale. Tiffany, op. cit., 208 also considers partition as a mode of severance destroying the unity of possession.
36 Freeman, op. cit., §4.
37 Tiffany, op. cit., p. 209; Co. Litt. 193a. The following comment is made in 2 PresTOn ON ABSTRAcrs (1824) 59: "And if two or more persons are joint-tenants in fee, in tail, or for any less estate of freehold, and one of them grant a particular estate of freehold, retaining a reversion, this grant will suspend the joint-tenancy. Should the particular estate determine during the lives of the joint-tenants, the joint-tenancy will be revived."
A demise by one of the joint tenants severs the joint-tenancy and turns it into a tenancy in common, although the lease is not to commence until after the lessor's death.\textsuperscript{38} Cheshire maintains that where a joint tenancy is in fee and one joint tenant makes a lease for years, the better opinion is that no severance is effected. Whereas, on the other hand, if the subject of the joint tenancy is itself a term for years, a lease for years by one of the joint tenants produces a complete severance.\textsuperscript{39} Tiffany refuses to commit himself on the first proposition stated by Cheshire but agrees on the second.\textsuperscript{40}

Because of the doctrine of survivorship, no severance can result from a disposition by will.\textsuperscript{41} A contract of sale by a joint tenant effects a severance in equity.\textsuperscript{42} At common law when a joint tenant mortgages his interest a severance will result.\textsuperscript{43} Sale on execution upon a judgment against a joint tenant will sever the tenancy,\textsuperscript{44} and even a mere seizure under execution apart from sale or issuance of execution, if without any further proceedings a venditioni exponas may be taken out and the lands sold, has been held to effect a severance.\textsuperscript{45} An agreement by the joint tenants to hold as tenants in common or that the tenancy be severed will be given effect.\textsuperscript{46}

Not only does the conveyance to a stranger have the effect of a severance but the same result will occur where one joint tenant releases his interest to another joint tenant,\textsuperscript{47} and if there is only one other joint tenant the tenancy is terminated because there is no longer a concurrent ownership. If there are two or more joint tenants beside the releasing tenant, the remaining ones continue to hold their interest in joint tenancy and are tenants in common with respect to the interest released.\textsuperscript{48}

Unity of interest may be destroyed and the tenancy severed when one of the joint tenants acquires an interest greater in quantum than that held by his cotenants;\textsuperscript{49} this might occur among joint tenants for

\textsuperscript{38} Freeman, \textit{op. cit.}, 82.
\textsuperscript{39} Cheshire, \textit{op. cit.}, 555 \textit{et seq.}
\textsuperscript{40} Tiffany, \textit{op. cit.}, p. 210.
\textsuperscript{41} 2 BL COMM. 185-6.
\textsuperscript{42} 2 American Law of Property, \S 6.2, \S 6.3.
\textsuperscript{43} Tiffany, \textit{op. cit.} 210. York v. Stone, 1 Eq. Cos. Abr. 293. The same result undoubtedly follows in jurisdictions where a mortgage operates to transfer legal title would not operate as a severance. Co. Litt. p. 286; Co. Litt. 184, 185a. \textit{Erry} \S 1781. Although in one lien theory state the same result was reached, Wilkins v. Young, 144 Ind. 1, 41 N.E. 68, it would seem an analogy to common law authority on charges on land or grants of a mere incorporeal thing such as a right of profit, that a mortgage which does not involve a transfer of legal title would not operate as a severance. Co. Litt. p. 286; Co. Litt. 184, 185a. Tiffany, \textit{op. cit.} 210.
\textsuperscript{44} Tiffany, \textit{op. cit.}, \S 211.
\textsuperscript{45} Tiffany, \textit{op. cit.}, \S 211.
\textsuperscript{46} Freeman, \textit{op. cit.}, 83.
\textsuperscript{47} Tiffany, \textit{op. cit.}, \S 211.
\textsuperscript{48} \textit{Ibid}.
\textsuperscript{49} Cheshire, \textit{op. cit.}, 556.
life where one tenant acquires the fee either by purchase or inheritance. Unity of possession may be destroyed by a partition or by a sale. All the tenants might join and make a deed to a stranger and that would operate to terminate the tenancy. Partition may be either voluntary, where all the tenants agree, or compulsory, where the court will effect a partition or a sale and the distribution of the proceeds on the petition of one or more of the joint tenants.

(To be continued)

---

50 Tiffany, op. cit., §212.
51 On the subject of partition see Freeman, op. cit., Chaps. XVIII-XXIX; Tiffany, op. cit., §§468, 473.
LAW REVIEW BOARD

DONALD D. ECKHARDT  Editor-in-Chief
RICHARD J. ASH
DAVID M. KAISER
CLAUDE KORDUS
CLIFFORD K. MELDMAN
GEORGE RADLER
ROBERT E. SHARP
JOHN SWIETLIK
JOSEPH SWIETLIK
JAMES WILLIAMSON
ERWIN A. ELIAS

STUDENT CONTRIBUTORS TO THIS ISSUE

Robert E. Sharp
Joseph Swietlik
George Radler
Erwin A. Elias

Circulation Manager
Floyd Marenda

Advertising Manager
Paul Gergen

Faculty Advisor
Leo W. Leary

"MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS"