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## JOINT TENANCY — CREDITOR-DEBTOR RELATIONS

KENNETH S. TREADWELL\* &  
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The nature of joint tenancy is such that it has created unique relationships and problems in the creditors' rights field of law. "The theoretical peculiarity of a joint tenancy at common law, and also by the law as it still generally prevails,<sup>1</sup> is the co-existence of the four unities, the unity of interest, the unity of title, the unity of time, and the unity of possession, that is to say, 'joint tenants have one and the same interest accruing by one and the same conveyance, at one and the same time, and hold by one and the same undivided possession.'<sup>2</sup>"<sup>3</sup> The principal characteristic of a joint tenancy is survivorship. On the death of one joint tenant, title passes to the surviving joint tenant or tenants if there has been no intervening severance of his interest.

"A joint tenancy is always created by act of the parties and never by operation of law."<sup>4</sup> The courts and state legislatures in the United States have attempted to thwart or destroy the acts of the parties in creating a joint tenancy relationship, resulting in a preference for finding a tenancy in common rather than a joint tenancy, or the abolition of the right of survivorship.<sup>5</sup>

By Initiative No. 208, adopted and now codified as RCW 64.28, the former prohibition against joint tenancy with the right of survivorship has been repealed and substituted with "... a form of co-ownership of property, real and personal, known as joint tenancy."<sup>6</sup> The proviso

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<sup>1</sup> Except perhaps in Iowa where "the intention of the parties should prevail." See *In re Baker's Estate*, 247 Iowa 1380, 78 N.W.2d 863 (1956); *Switzer v. Pratt*, 237 Iowa, 788, 23 N.W.2d 837 (1946); *Conlee v. Conlee*, 222 Iowa 561, 269 N.W. 259 (1936).

<sup>2</sup> *Porter v. Porter*, 381 Ill. 322, 45 N.E.2d 635 (1942). See also KRATOVIL, *REAL ESTATE LAW* 299 (2d ed. 1952).

<sup>3</sup> Annot., 64 A.L.R.2d 918, 922 (1959). (Footnotes renumbered.)

<sup>4</sup> 14 AM. JUR. *Co-tenancy* § 11 (1938); MOYNIHAN, *SURVEY OF REAL PROPERTY* 130 (1940). At common law a conveyance to two or more persons was construed to create a joint tenancy, in the absence of a contrary expression of intent. After the abolition of the feudal incidents of tenure, the courts showed a disposition to seize upon any words that could be construed to indicate an intention to create a tenancy in common rather than a joint tenancy.

<sup>5</sup> See Cross, *Joint Tenancy for Washington?*, 35 WASH. L. REV. 292, 294 (1960). Washington destroyed the right of survivorship by statutory enactment. Wash. Terr. Sess. Laws 1885 at 165.

<sup>6</sup> RCW 64.28.010 provides: "Joint tenancies with right of survivorship authorized —Methods of creation—Creditors rights saved. Whereas joint tenancy with right of

that the transfer shall not derogate from the rights of creditors raises serious questions of meaning and interpretation. If the proviso means that the rights of creditors will not be changed by joint tenancy ownership, then this article will serve little purpose. If the proviso is to be applied only to the creditors existing at the time of the creation of the joint tenancy, then all subsequent creditors must look to the common law for their rights and remedies. If the proviso applies only to the original transfer creating the joint tenancy, an existing creditor may ignore the transfer and treat the debtor as the sole owner,<sup>7</sup> but if the proviso be given a broader interpretation to permit its application to the "passage" of title occurring at the death of a joint tenant, it will create creditors' rights and incidents of joint tenancy beyond the incidents at common law.<sup>8</sup> RCW 64.28.010 further provides, "... a joint tenancy shall have the incidents of survivorship and severability as at common law." The better approach would be to limit the proviso to the original transfer, though the matter will not be laid to rest until the supreme court has passed upon this specific point.

#### THE SECURED CREDITOR AND JOINT TENANCY

The relationship of joint tenants with their creditors necessarily divides itself, as in other areas of law, into transactions with secured creditors and relationships with the unsecured creditor. The most frequent voluntary transaction is that of the execution and delivery of a mortgage by one or more joint tenants to a mortgagee.

The greatest concern of the mortgagee in joint tenancy relationships with one or more joint tenants, but less than all, is that his security be

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survivorship permits property to pass to the survivor without the cost or delay of probate proceedings, there shall be a form of co-ownership of property, real and personal, known as joint tenancy. A joint tenancy shall have the incidents of survivorship and severability as at common law. Joint tenancy may be created by written agreement, written transfer, deed, will or other instrument of conveyance, when expressly declared therein to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants: *Provided however*, That such transfer shall not derogate from the rights of creditors."

<sup>7</sup> The question has already been raised by Professor Cross, *supra* note 5, at 299-300.

<sup>8</sup> The Washington Land Title Association, in a paper dated January 24, 1961, and titled "Joint Tenancy" states at page 6: "The proviso may refer to the original 'transfer' of title which creates a joint tenancy holding or the word 'transfer' as used in the proviso may be interpreted to relate to the concept, elsewhere expressed in the initiative, of a 'passage' of title to the survivor upon the death of a joint tenant. Until the Supreme Court has construed the initiative measure in this regard, it is quite obvious that the proviso must be interpreted as applying both to creation of the joint tenancy and to the 'passage' of title occurring at the time of death of a joint tenant." This conclusion is not "quite obvious," for the doctrine of survivorship is based upon the theory that the joint tenants together own but one estate, and the death of one merely extinguishes his claim to the estate. The survivor or survivors take no new title, nor has there been any "passage" of title to them. 2 TIFFANY, REAL PROPERTY, § 419 (3d ed. 1939); *In re Peterson's Estate*, 182 Wash. 29, 45 P.2d 45 (1935).

protected from the consequences of the death or termination of the interests of one of the joint tenants and the ensuing survivorship characteristics. The transformation of the mortgagor's joint tenancy interest to an interest in common will be desired by the mortgagee whose security instrument has been executed by less than all of the joint tenants. This is accomplished by a termination of the right of survivorship, called severance.<sup>9</sup> The destruction of any of the four unities (time, title, interest and possession) results in a severance which terminates the joint tenancy, and abolition of the right of survivorship. The parties would then hold as tenants in common.

Where giving a mortgage does not sever the joint tenancy relationship the consequences of a mortgagee taking security from one or more, but less than all of the joint tenants, may be disastrous, as illustrated in *People v. Norgarr*.<sup>10</sup> In *Norgarr*, one joint tenant, without the knowledge or consent of his co-tenant, mortgaged his undivided interest in land. After his death the mortgagee's claim to an interest in the land was upheld by the trial court. On appeal by the surviving joint tenant, the trial court was reversed. Since the mortgage executed by one of two joint tenants was only a lien or charge on the mortgaging joint tenant's interest and did not operate to transfer the legal or any other title to the mortgagee nor entitle him to possession, none of the unities essential to the joint tenancy were destroyed and the joint tenancy was not severed. When the mortgaging joint tenant died, his interest ceased to exist and the lien of the mortgage expired with it, leaving the surviving, non-mortgaging joint tenant to take the property free of the lien. The court reasoned that since California is a "lien theory" state, (as opposed to a "title theory" state), the unity of title was not impaired.<sup>11</sup>

The *Norgarr* case is important, because Washington falls into the camp of lien theory states,<sup>12</sup> and only one other lien state seems to have passed upon the problem.<sup>13</sup> There appears to be little justification

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<sup>9</sup> The severance could occur by a sale or other voluntary transfer by one or more of the joint tenants, or by the act of a third party; e.g., attachment or execution sale resulting in an involuntary severance.

<sup>10</sup> 164 Cal. App. 2d 591, 330 P.2d 858 (Dist. Ct. App. 1958).

<sup>11</sup> 164 Cal. App. 2d 591 at 593-94, 330 P.2d 858, 860-61 (Dist. Ct. App. 1958). See 11 STAN. L. REV. 574, 575 (1959), for a critical comment.

<sup>12</sup> *Swanson v. United States*, 156 F.2d 442 (9th Cir. 1946), cert. den., 329 U.S. 800 (1947); *Seattle Savings & Loan Ass'n v. King County*, 189 Wash. 563, 65 P.2d 1274 (1937); *Cochran v. Cochran*, 114 Wash. 499, 195 Pac. 224 (1921).

<sup>13</sup> *Wilkins v. Young*, 149 Ind. 1, 41 N.E. 68 (1895). Accord, *Tracy-Collins Trust Co. v. Goeltz*, 5 Utah 2d 350, 356, 301 P.2d 1086, 1090 (1956) (dictum). The court in the *Norgarr* case rejected the *Wilkins* decision, stating that it relied upon holdings in title theory jurisdictions.

for the decision in the *Norgarr* case. The only substantial difference between the title and lien theories is that in title jurisdictions the mortgagee is given a right of entry, which he is denied in lien jurisdictions.<sup>14</sup> The justification for holding that there is a severance upon giving a mortgage, even in a lien theory jurisdiction, is not upon any destruction of the unity of title, but rather that the unity of interest is destroyed.<sup>15</sup>

If the *Norgarr* case represents the lien theory approach to the severance question, (and technically speaking it is not the mortgagee's interest with which we are concerned here, but rather, whether or not there is a severance which terminated the right of survivorship), then the Washington courts may face a dilemma. The title theory states and England, representing the common law, hold that there is a severance upon the giving of a mortgage and the joint tenants become tenants in common,<sup>16</sup> while the lien theory appears to be that there is no severance upon the giving of the mortgage; at least without the knowledge and consent of the other joint tenants.<sup>17</sup> But what of that portion of RCW 64.28.010 which provides "... a joint tenancy shall have the incidents of survivorship and severability as at common law"? Is this a mandate that the common law theory, *i.e.* the title theory, be adopted in our otherwise lien theory jurisdiction? It is submitted that no matter which label is given, the better approach is that there is a severance of the unity of interest, and the lien of the mortgage attaches to the property even after the death of the mortgaging joint tenant. Other methods of protecting the mortgagee have been proposed, but they deviate from common law.<sup>18</sup>

There appears to be no basis for supposing that the mere act of both or all of the joint tenants in executing a mortgage on the joint property will sever the joint tenancy.<sup>19</sup> Whether there has been a severance is

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<sup>14</sup> OSBORNE, MORTGAGES § 15 (1951).

<sup>15</sup> 2 AMERICAN LAW OF PROPERTY § 6.2 (Casner ed. 1952).

<sup>16</sup> *Simpson's Lessee v. Ammons*, 1 Binn 175, 2 Am. Dec. 425 (Pa. 1806); *In re Pollard's Estate*, 3 De G. J. & S. 541, 46 Eng. Rep. 746 (Ch. 1863); *Gale v. Gale*, 2 Cox's Ch. Cas. 136, 30 Eng. Rep. 63 (Ex. 1789); *York v. Stone*, 1 Salk 158, 91 Eng. Rep. 146 (Ch. 1709); Annot., 64 A.L.R.2d 918, 934 (1959).

<sup>17</sup> *People v. Norgarr*, 164 Cal. App. 2d 591, 330 P.2d 858 (Dist. Ct. App. 1958).

<sup>18</sup> See 11 STAN. L. REV. 574, 577 (1959), where three separate means of protecting the mortgage have been cited: "First, the joint estate may remain intact, the surviving joint tenant taking the land subject to the mortgagee's interest. Second, survivorship may be suspended during the term of the mortgage. During this period of suspension the estate of a deceased joint tenant will go to his heirs, and removal of the mortgage will re-establish the full incidents of the joint tenancy. Third, the right of survivorship may be completely destroyed, creating an estate in common."

<sup>19</sup> In *Illinois Public Aid Comm'n v. Stille*, 14 Ill. 2d 344, 153 N.E.2d 59, 63-4 (1958), the court stated that "it has been assumed" that where both joint tenants join in the

of no concern to the mortgagee because his lien is effective against all of the property. Since the unity affected by a mortgage is the unity of interest, it would seem clear that there would be no severance where all owners joined in the mortgage, since the interest of each would be identical. From a practical standpoint, few financial institutions would risk loaning funds to a joint tenant unless all of the joint tenants joined in the transaction. The problem will arise where security is hastily taken to secure an antecedent debt, and in chattel transactions where the husband, as the statutory agent of the community, effects transactions under his sole signature, often without the knowledge of his wife. In this latter situation, the lender may wisely determine the character of ownership of the chattel or demand the wife's signature on the security instrument as a precaution.

#### STATUTORY LIENS

Persons who perform labor, furnish materials or supply equipment who are otherwise entitled to a lien by statute will have to exercise a new degree of caution, particularly in situations where the owner or reputed owners are husband and wife. The lien claimant, particularly the materialman, who generally does a poor job of preparing and filing his lien, will have to make a record search or make inquiry to determine the character of the ownership so that he may protect his lien by proper notice.

If the person ordering the work to be performed is the agent of the owner, then the owner's property is subjected to the lien,<sup>20</sup> but it is not always easy to prove that the person ordering the work to be done has the authority to order the performance.<sup>21</sup>

In order to enforce his lien, the materialman must give notice within

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mortgage there is no severance, "and that when the mortgage is released the joint tenancy continues unimpaired."

<sup>20</sup> RCW 60.04.010.

<sup>21</sup> In *Larson v. Duclos*, 46 Wn.2d 334, 281 P.2d 458 (1955), the husband was the administrator of the wife's estate and there were two minor children. The husband ordered extensive repairs and additions made to the family residence. The materialmen gave timely statutory notice to the husband and filed liens. Upon foreclosure the lower court held the liens to be valid against the interests of the minor children. On appeal the court reversed the judgment to the extent that it impressed liens on the interests of the children. The court stated that if the liens against the interests of the children were to be upheld it could be done only by recognizing the validity of the act of the administrator, keeping in mind that he had never applied for nor received authority or approval of the court to bind the estate or the interests of anyone therein. The court concluded, "If the administrator cannot charge against the estate the cost of erecting an addition to estate property, in the absence of court approval, it follows that no lien attached to the interest of the minor heirs in the instant case." *Id.* at 339, 281 P.2d at 461.

ten days after first delivery<sup>22</sup> to the owner or reputed owner of the property to the effect that he has furnished materials or supplies, and that he claims a lien.<sup>23</sup> Where community property is involved the lien claimant is protected in his notice as against the spouse who does not receive the statutory notice.<sup>24</sup> This convenient protection will not be available to the lien claimant where the husband and wife own as joint tenants, and unless the materialman gives the statutory notice to all of the joint tenants, his lien, which otherwise may be valid against the whole property, will be enforceable only against the undivided interest of the joint tenant to whom he gives notice.

Unlike a mortgage, a statutory lien is inchoate until reduced to judgment, and until such time as the lienor has severed the joint tenancy his lien on the property of one or more, but less than all of the joint tenants will expire upon the death of the joint tenant.

Real and chattel mortgage transactions and statutory lien situations are the only major secured creditor areas in which the adoption of joint tenancy will be a caveat to the creditor.

#### THE UNSECURED CREDITOR AND JOINT TENANCY

The unsecured creditor of one or more, but less than all of the joint tenants, fares somewhat better in his pursuit for recovery of his claim than does the unsecured creditor holding a separate claim against one of the spouses in a community property relationship. In the community property relationship the separate creditor cannot reach the community assets to satisfy his claim,<sup>25</sup> while a separate creditor of one joint tenant can reach the undivided interest of the joint tenant in property held in co-tenancy.

Attachment and garnishment, coupled with levy of execution are the legal weapons of the unsecured creditor. Generally, every kind of property or interest therein, not otherwise exempt, may be reached by an execution issued on judgment.<sup>26</sup> The problems that arise relate

<sup>22</sup> Sixty days for construction, alteration or repairs to buildings, wharfs, *etc.*, other than single family residences or garages. RCW 60.04.020.

<sup>23</sup> RCW 60.04.020.

<sup>24</sup> RCW 60.04.160 "Effect of filing claim on community interest. The claim of lien, when filed as required by this chapter, shall be notice to the husband or wife of the person who appears of record to be the owner of the property sought to be charged with the lien, and shall subject all the community interest of both husband and wife to said lien."

<sup>25</sup> See *Katz v. Judd*, 108 Wash. 557, 185 Pac. 613 (1919). In addition to the unavailability of the whole of the community property to the claims of a separate creditor, the separate obligation cannot be enforced against the debtor's half interest in community property. *Stockland v. Bartlett*, 4 Wash. 730, 31 Pac. 24 (1892).

<sup>26</sup> 33 C.J.S. *Executions* § 18 (1942).

to the acts which give rise to a severance of the joint tenancy, the rights and relationships of the co-tenants under a redemption, and the status of the creditor if the judgment debtor dies.

Where the creditor has reduced his claim to judgment, a writ of execution may be levied on the interest of a judgment debtor in land.<sup>27</sup> "Usually this is done by levying on the entire tract, joining all owners as parties defendant; and such a levy will be valid as to the debtor's portion."<sup>28</sup>

In the case of land transactions, there is some question as to whether a severance of the joint tenancy will occur upon the levy of execution, the sale on execution, or only after the sheriff's deed has been issued. The authorities are clear, however, that a mere judgment lien against a joint tenant's interest in joint property is not, of itself, sufficient to operate as a severance of the joint tenancy.<sup>29</sup>

If the creditor is paid out of the proceeds of judicial sale it makes little difference when the severance does occur, but if he becomes the purchaser of an undivided interest it is of extreme importance to him.<sup>30</sup> The longer the creditor has to wait until his claim severs the joint tenancy and ripens into a tenancy in common with the other co-tenants, the greater the opportunity for the death of the debtor and the expiration of the claim. It has been held in some cases that a levy of execution against the interest or share of one joint tenant is effective to sever the joint tenancy,<sup>31</sup> while the generally accepted view is that the severance does not occur until the sale on execution,<sup>32</sup> the theory being that the making of a levy of execution upon the interest of a joint tenant debtor would not be such an act as would sever the joint estate, since the levy gives no greater interest than that which the judgment creditor already possesses.<sup>33</sup> The right of possession may be

<sup>27</sup> RCW 6.04.110 "Levy on joint realty. When a defendant in execution owns real estate subject to execution, jointly or in common with any other person, the judgment shall be a lien, and the execution be levied upon the interest of the defendant only." RCW 6.04.120 covers the levy on joint personalty.

<sup>28</sup> See Comment, *Execution Against Co-Tenants*, 8 CLEV.-MAR. L. REV. 351, 357 (1946).

<sup>29</sup> *Ziegler v. Bonnell*, 52 Cal. App. 2d 217, 126 P.2d 118 (Dist. Ct. App. 1942); *Van Antwerp v. Horan*, 390 Ill. 449, 61 N.E.2d 358 (1945); *People's Trust & Sav. Bank v. Haas*, 328 Ill. 468, 160 N.E. 85 (1927); *Musa v. Segelke & Kohlhaus Co.*, 224 Wis. 432, 272 N.W. 657 (1937); Annot., 161 A.L.R. 1139 (1946).

<sup>30</sup> And, of course, it is extremely important to the third party purchaser, who purchases no more than the sheriff can convey.

<sup>31</sup> *Dover Trust Co. v. Brooks*, 111 N.J. Eq. 40, 160 Atl. 890 (Ch. 1932); *Davidson v. Heydon*, 2 Yeates 459 (Pa. Sup. Ct. 1799); *American Oil Co. v. Falconer*, 136 Pa. Super. 598, 8 A.2d 418 (1939); Annot., 161 A.L.R. 1139, 1141 (1946).

<sup>32</sup> See Annots., 161 A.L.R. 1139, 1140 (1946); 159 A.L.R. 395, 397 (1945); 111 A.L.R. 171, 173 (1937).

<sup>33</sup> *Van Antwerp v. Horan*, 390 Ill. 449, 61 N.E.2d 358 (1945).



the criterion as to whether the purchaser of an undivided interest at a judicial sale becomes a tenant in common with the owner of the remaining interest. If the debtor has the right to remain in possession for a period after the sale, then a severance of the joint tenancy and the conversion into a tenancy in common may occur only after the right to possession by the debtor has expired or is released.<sup>34</sup> Under this view, if the debtor dies while still vested with a right to possession, the co-tenants will take the whole by survivorship, free of the creditor's judgment. Such would be the case in a mortgage foreclosure sale on the debtor's homestead, and the mortgagee of one joint tenant would lose his interest to the survivor. While the unity of title and the unity of possession are not severed, it should still be the better view that the unity of interest has been severed at the time of the execution of the mortgage.

While one ponders whether there is a severance upon the levy of execution, or only after the execution sale, a third view is suggested which may well control the court in Washington should the question arise. That is, that there will be no severance of the joint tenancy until such time as the sheriff's deed is delivered to the purchaser. The Washington Supreme Court has long and consistently held that a certificate of sale executed by a sheriff does not vest title, being at most but evidence of an inchoate estate that may or may not ripen into an absolute title.<sup>35</sup> Accordingly, there will be no severance of the unity of title until the sheriff's deed is delivered, and if a declaration of homestead has been timely filed, judgment debtors have the right to possession during the period of redemption under RCW 6.24.210, even though homestead is subject to execution under the provisions of RCW 6.12.100,<sup>36</sup> so the unity of possession is not disturbed. The judgment creditor then, who has a sheriff's certificate of sale, without the right to possession (assuming a homestead declaration is applicable) will not sever the joint tenancy during the period of redemption. If the court should adopt a theory that the right of survivorship is suspended during the period of redemption, then upon

<sup>34</sup> Hay v. Crawford, 159 Kan. 723, 158 P.2d 463 (1945). See Annot., 159 A.L.R. 395, 396 (1945).

<sup>35</sup> Bonded Adjustment Co. v. Helgeson, 188 Wash. 176, 61 P.2d 1267 (1936); Atwood v. McGrath, 137 Wash. 400, 242 Pac. 648 (1926); Ford v. Nokomis State Bank, 135 Wash. 37, 237 Pac. 314 (1925). The rule once was that the certificate of purchase and confirmation of sale were alone essential to pass the substantial title of the debtor. Diamond v. Turner, 11 Wash. 189, 192, 39 Pac. 379 (1895).

<sup>36</sup> First Nat'l Bank v. Tiffany, 40 Wn.2d 193, 242 P.2d 169 (1952), *overruling*, State ex rel. Ritchie v. Douglas, 198 Wash. 564, 89 P.2d 227 (1939) and First Nat'l Bank v. Mapson, 181 Wash. 196, 42 P.2d 782 (1935).

redemption the joint tenancy would continue,<sup>37</sup> provided RCW 64.28.010 does not prohibit such a theory. If the historical approach, *i.e.* the tenancy in common favored over joint tenancy, is any guide, then the courts will probably reject the suspension theory.

When the purchaser at the sale is entitled to possession, or where a sheriff's deed has been issued, the purchaser becomes a tenant in common with the other co-tenants, and partition is the more obvious method of reducing his interest to cash.

### JOINT BANK ACCOUNTS

The interests of a co-owner of a joint bank account with a right of survivorship is subject to garnishment or seizure under an execution against such owner, and generally the execution or garnishment has the effect of creating a tenancy in common and terminates the right of survivorship.<sup>38</sup> The entire account may be subject to seizure under execution against one depositor.<sup>39</sup> Though the label of joint tenancy is attached to joint and survivorship bank accounts, courts have often recognized that a true joint tenancy does not exist. Consequently, whenever joint tenancy law contravenes the real nature of the account, courts, though using joint tenancy terminology, do not reach joint tenancy results.<sup>40</sup> Legislation has not been of much assistance in this respect, though almost all of the state legislatures have enacted joint tenancy provisions for bank accounts.<sup>41</sup> Interestingly, little litigation has occurred in this area of creditors' rights.

### BANKRUPTCY

A joint tenancy can be severed by one of the tenants by conveying his interest in the property. Accordingly, the voluntary or involuntary filing of a petition in bankruptcy by one of the joint tenants severs the relationship and vests an undivided interest in the trustee.<sup>42</sup> The

<sup>37</sup> Professor Cross raises the suspension argument in *Cross, Joint Tenancy for Washington?*, 35 WASH. L. REV. 292, 298 (1960). See also, Comment, 11 STAN. L. REV. 574, 577 (1959).

<sup>38</sup> *Dover Trust Co. v. Brooks*, 111 N.J. Eq. 40, 160 Atl. 890 (Ch. 1932); 33 C.J.S. *Executions* § 38 (1942). The same questions of severance as in executions against real property should be applicable.

<sup>39</sup> *Park Enterprises v. Trach*, 233 Minn. 473, 47 N.W.2d 197 (1951).

<sup>40</sup> See Note, 42 IOWA L. REV. 551 and cases cited n.58 at 561 (1957).

<sup>41</sup> RCW 30.20.015 (commercial banks); RCW 31.12.140 (credit unions); RCW 32.12.030(3) (mutual savings banks); RCW 33.20.030 (savings and loan institutions). *In re Ivers' Estate*, 4 Wn.2d 477, 104 P.2d 467 (1940), lends support to the suggestion that these statutes were enacted for the protection of the depository.

<sup>42</sup> *In re DeFree*, 30 Am. Bankr. R. (n.s.) 629 (W.D. Mich. 1935); *In re Brown*, 60 F.2d 269, 21 Am. Bankr. R. (n.s.) 359 (W.D. Ky. 1932); 3 REMINGTON, BANKRUPTCY § 1260 (1957).

trustee of any of the owners, whether in part or in whole, is entitled to whatever interest the bankrupt on the date of bankruptcy could have lawfully transferred or which was subject to levy by any of his creditors.<sup>43</sup> When the trustee sells the undivided interest of the bankrupt at a bankruptcy sale, the purchaser becomes a co-tenant with the owner of the remaining undivided interest in the property.<sup>44</sup>

#### EXEMPTIONS

The interest of a joint tenant in personal property should be available to him under a claim of exemption from execution or attachment, provided the claimant otherwise qualifies as a householder.<sup>45</sup> Where the joint tenants are husband and wife, the wife's interest in the property held in co-tenancy (being her separate property) is exempt from execution and attachment except for her individual debts or those obligations categorized as family expenses.<sup>46</sup>

Where the statutory requisites are present most jurisdictions hold that a joint tenant may select a homestead in the undivided common property.<sup>47</sup> This rule is based on the sound public policy that homestead statutes are intended to protect a person in his home and that the character of his title is secondary thereto. A small minority of states reach a contrary conclusion which is usually based on strictly worded homestead statutes that prohibit selection of a homestead in property owned in common.<sup>48</sup> Where the husband holds as co-tenant with someone other than his wife, or where the husband and wife own as co-tenants with one or more other co-tenants, it is held that the consent of the other co-tenant to the occupancy of the homestead by the claimant is not necessary to sustain the exemption in a contest with creditors.<sup>49</sup> The lack of consent by a joint tenant from the other joint tenants to occupancy of the common property is not a matter that creditors should be able to raise.

The usual situation will arise where the husband and wife only are holding as joint tenants. The Washington statutes provide that a homestead consists of the dwelling house in which the claimant resides

<sup>43</sup> *Butterer v. Santow*, 24 N.J. Super. 361, 94 A.2d 525 (Super. Ct. Ch. 1933); 4 COLLIER, BANKRUPTCY § 70.18(7) (1942).

<sup>44</sup> *Jasper State Bank v. Braswell*, 107 S.W.2d 681 (Tex. Civ. App. 1937), *rev'd on other grounds*, 130 Tex. 549, 111 S.W.2d 1079 (1938); *Battle v. John*, 49 Tex. 202 (1878); Annot., 159 A.L.R. 395, 399 (1945).

<sup>45</sup> RCW 6.16.

<sup>46</sup> RCW 6.16.070; 26.16.205.

<sup>47</sup> Annot., 89 A.L.R. 511 (1934).

<sup>48</sup> *Id.* at 548.

<sup>49</sup> 26 AM. JUR. *Homesteads* § 62 (1940).

and the land on which the same is situated, or land without improvements purchased with the intention of building a house and residing thereon.<sup>50</sup> The homestead may be selected by the husband from community property or his separate property.<sup>51</sup> The homestead cannot be selected from the separate property of the wife by the husband without her consent, which can be evidenced only by her making the declaration of homestead.<sup>52</sup> The homestead declaration may be made by the wife out of her separate property and that of her husband, by showing that her husband has not made such declaration and that she is making the declaration for their joint benefit.<sup>53</sup> Assuming that Washington will follow the majority rule and permit a claim of homestead to be made out of jointly owned real property,<sup>54</sup> there still remains the limitation on who may make the declaration. A declaration made by the husband will isolate only his interest in the common property. On the other hand, a declaration made by the wife could include not only her interest but also the interest of her husband where the declaration is made for their joint benefit.<sup>55</sup> Until the legislature sees fit to remedy this situation, the careful lawyer will have the declaration executed by both husband and wife.

### CONCLUSION

The adoption of joint tenancy creates numerous problems in itself, but the problems are compounded by the language of RCW 64.28.010, the most obvious of which is the proviso affecting creditors. It will take extensive litigation and probably legislation to clarify the many questions raised.

Severance of a joint tenancy interest, particularly the event upon

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<sup>50</sup> RCW 6.12.010.

<sup>51</sup> RCW 6.12.020.

<sup>52</sup> RCW 6.12.030.

<sup>53</sup> RCW 6.12.060(1).

<sup>54</sup> There is no requirement as to character of ownership. See State *ex rel.* Van Doren v. Superior Court, 179 Wash. 241, 37 P.2d 215 (1934), which held that a debtor could properly claim a homestead in an apartment of a building of several stories containing thirty-five apartments. The court said, "There is no limitation or qualification to the effect that the real estate selected shall be of any particular area or description. . . . The only limitations prescribed are residence and value." *Id.* at 243, 37 P. 2d at 215-16.

<sup>55</sup> The California Civil Code contains homestead statutes similar to those of Washington. The courts, however, followed the minority rule and held that a homestead could not be claimed out of an undivided interest in real estate. By statutory amendment, adopted in 1929, a spouse was permitted to declare a homestead in property held by both as joint tenants. Prior to the statutory amendment the courts had ruled that although a husband could not claim a homestead in property held in joint tenancy, the wife could for she had a right under the Code to declare a homestead in her separate property and also in the separate property of her husband. See *Swan v. Walden*, 156 Cal. 195, 103. Pac. 931 (1909).

which it takes effect, will be a major area of concern to secured and unsecured creditors who deal with one or more but less than all of the joint tenants. The debtor, in order to isolate his property from claims of creditors will face new problems, particularly where a homestead is claimed out of property held in joint tenancy. Creditors having contractual or statutory lien rights will be most concerned with the character of ownership, and the wife's individual obligation will undoubtedly be sought on more commercial transactions.