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4-2021

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#### Citation

SEE, Alvin W. L.. Reconciling joint tenancies with writs of seizure and sale. (2021). *Conveyancer and Property Lawyer*. 85, 45-54. Research Collection School Of Law.

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# Reconciling Joint Tenancies with Writs of Seizure and Sale

Alvin W-L See\*

Co-ownership; Joint tenancies; Judgment debtors; Power of sale; Powers of seizure; Severance; Singapore; Writs

## Abstract

*This article examines the use of the writ of seizure and sale as a method of execution against a joint tenant's interest in land and how it is to be reconciled with established principles of co-ownership law, in particular the fundamental distinction between a joint tenancy and a tenancy in common.*

## Introduction

In many common law countries, one of the primary methods of enforcing a money judgment is by way of a writ of seizure and sale (WSS).<sup>1</sup> Originally applicable only to chattels, the WSS has since been adapted for use against land. In Singapore, following the abolishment of the charging order in 1991, the WSS has been the principal mode of execution against an interest in land. However, whether a WSS can be used against one joint tenant has been uncertain. The crux of the disagreement is whether a joint tenant owns a distinct interest in the land that can be seized and sold. At present, the question has been directly addressed in six High Court decisions: two answering in the negative<sup>2</sup> and four in the affirmative.<sup>3</sup> This uncertainty gave rise to concerns among judgment creditors especially as the majority of residential property in Singapore are jointly held for social and economic reasons.<sup>4</sup>

Although the disagreement has spanned more than two decades, with two of the six cases eventually going up to the Singapore Court of Appeal, the apex court has yet to be presented with the opportunity to directly address the matter. In one case, the appealing judgment creditor did not challenge the lower court's holding that a joint tenant has no distinct interest that can be seized and sold but instead focused on arguing that a severance has occurred prior to the registration of his WSS.<sup>5</sup> The other case concerned a competition between two judgment creditors

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<sup>1</sup> The WSS has its origin in the writ of fieri facias.

<sup>2</sup> *Malayan Banking Bhd v Focal Finance Ltd* [1998] S.G.H.C. 402; [1998] 3 S.L.R.(R.) 1008; *Chan Lung Kien v Chan Shwe Ching* [2017] S.G.H.C. 136; [2018] 4 S.L.R. 208.

<sup>3</sup> *Chan Shwe Ching v Leong Lai Yee* [2015] S.G.H.C. 210; [2015] 5 S.L.R. 295; *Peter Low LLC v Higgins, Danial Patrick* [2018] S.G.H.C. 59; [2018] 4 S.L.R. 1003; *Ong Boon Hwee v Cheah Ng Soo* [2019] S.G.H.C. 65; [2019] 4 S.L.R. 1392; *Chain Land Elevator Corp v FB Industries Pte Ltd* [2020] S.G.H.C. 2; [2020] 5 S.L.R. 1336.

<sup>4</sup> *Lau Siew Kim v Yeo Guan Chye Terence* [2007] S.G.C.A. 54; [2008] 2 S.L.R.(R.) 108 at [1].

<sup>5</sup> *Chan Lung Kien v Chan Shwe Ching* [2018] S.G.C.A. 24; [2018] 2 S.L.R. 84, noted in A. W. L. See, "Severance by Unilateral Declaration: Lessons from Singapore" [2019] Conv. 138. The respondent (also a judgment creditor),

over the surplus sale proceeds after the land was sold by an existing mortgagee.<sup>6</sup> Unsurprisingly, neither of them challenged the lower court's holding that a WSS can be used against a joint tenant.<sup>7</sup> The Court of Appeal's refusal to make any pronouncement on the matter without the benefit of submissions on both views, whilst perfectly understandable, illustrates the role of luck in the development of the common law.

The issue at hand presents itself at the intersection between procedural and substantive laws. Beyond its practical importance in civil litigation, the issue also provides us with an opportunity to revisit certain fundamental concepts of co-ownership law, which will be of interest to land lawyers. In particular, the issue is closely related to the question whether, in the process of execution, the joint tenancy is severed at some point and if so when and on what basis. Although the more recent decisions have identified almost every conceivable reason why the use of a WSS against one joint tenant should be allowed—focusing on legislative intent, consistency with other Commonwealth jurisdictions, question of fairness, and other practical considerations—the courts have been unable to reconcile the desired outcome with the basic principle that joint tenants own everything together but nothing on their own, which in turn implies that each joint tenant has no distinct interest that can be seized and sold. The increasingly popular view that each joint tenant has a distinct, albeit notional, interest that can be seized and sold has the unfortunate effect of unsettling the fundamental distinction between a joint tenancy and a tenancy in common. Taking the view that the distinction ought to be preserved, this article offers an alternative explanation which locates the issue within a recognised mode of severance. In short, the joint tenancy is severed when the Sheriff exercises a statutory power to alienate the interest of the judgment debtor, which is conceptually identical to alienation by the joint tenant him or herself.

## **The requirement of a distinct interest and the imaginary aliquot share**

The debate centres around a literal reading of the Land Titles Act s.135(1), which states that the Sheriff may only sell “the interest which belongs to the judgment debtor at the date of the registration of the writ”.<sup>8</sup> Where the execution debtor is a co-owner of land, precisely what belongs to him or her will depend on the type of co-ownership in question. The issue is straightforward insofar as a tenancy in common is concerned. As each tenant in common has an undivided share, the Sheriff can sell the judgment debtor's share without affecting the share of the other tenant in common.

However, if the judgment debtor is a joint tenant, a difficult question arises as to what he or she actually owns given the settled principle that “each joint tenant holds the whole jointly and nothing severally”.<sup>9</sup> As Latham CJ explained in *Wright v Gibbons*:

whose WSS was registered prior to the alleged severance, had the greater incentive to challenge the lower court's decision. However, the respondent did not participate in the appeal proceedings.

<sup>6</sup> *Singapore Air Charter Pte Ltd v Peter Low & Choo LLC* [2020] S.G.C.A. 99; [2020] 2 S.L.R. 1399.

<sup>7</sup> The joint tenants, who could have challenged that holding, did not do so.

<sup>8</sup> Land Titles Act Cap.157, 2004 Rev. Ed.

<sup>9</sup> *Goh Teh Lee v Lim Li Pheng Maria* [2010] S.G.C.A. 18; [2010] 3 S.L.R. 364 at [11].

“The interests of each joint tenant in the land held are always the same in respect of possession, interest, title and time. No distinction can be drawn between the interest of any one tenant and that of any other tenant.”<sup>10</sup>

One way of approaching this issue is by reasoning backwards. In *Malayan Banking Bhd v Focal Finance Ltd*, Tay JC (as he then was) explained that if the jointly held interest (i.e. the entire estate) is allowed to be taken in execution, the Sheriff would be selling not only what belongs to the judgment debtor but also what belongs to the other joint tenant(s).<sup>11</sup> Such an outcome would contradict the wording of s.135(1). From this, the learned judge inferred that any interest to be taken in execution “must be distinct and identifiable and cannot be a joint interest held with someone not subject to the judgment and the execution”.<sup>12</sup> In that case, the WSS was held to be invalid in the absence of severance of the joint tenancy.<sup>13</sup>

The decision in *Malayan Banking* was swiftly met with criticism by Professor Tan, who argued that even in the absence of severance, a joint tenant has a distinct interest that can be seized and sold.<sup>14</sup> As she explained:

“[S]everance into undivided shares is not a prerequisite for the issuance of a writ of seizure and sale against a joint tenant’s interest. He has an interest, which can be converted into an undivided share by alienation, and ‘for the purposes of alienation each is conceived as entitled to dispose of an aliquot share’.”<sup>15</sup>

The second half of this statement was derived from the seminal judgment of Dixon J in *Wright v Gibbons*, which referred to the “two not altogether compatible aspects of joint tenancy”.<sup>16</sup> The general principle is that joint tenants own nothing on their own but everything together. Between them there is unity of interest, which means that joint tenants hold onto the very same estate. However, this general principle is subject to the qualification that a joint tenant has the power to dispose of an aliquot share. As Dixon J explained, “[f]or purposes of alienation each is conceived as entitled to dispose of an aliquot share”.<sup>17</sup> Indeed, alienation, being an act of operating upon one’s own share, has traditionally been recognised as a principal mode of unilateral severance.<sup>18</sup>

Arguably the best way of explaining this qualification is to regard it as a fiction that is necessary to address the logical difficulty of allowing a joint tenant to alienate what he or she does not actually have.<sup>19</sup> If the proper sequence of events were to be insisted, the joint tenancy would have to be severed first, and only then

<sup>10</sup> *Wright v Gibbons* [1949] H.C.A. 3; (1949) 78 C.L.R. 313 at 323.

<sup>11</sup> *Malayan Banking Bhd v Focal Finance Ltd* [1998] S.G.H.C. 402; [1998] 3 S.L.R.(R.) 1008 at 15.

<sup>12</sup> *Malayan Banking Bhd v Focal Finance Ltd* [1998] S.G.H.C. 402; [1998] 3 S.L.R.(R.) 1008 at 15.

<sup>13</sup> See *Severance upon the registration of the WSS* below.

<sup>14</sup> S. Y. Tan, “Execution Against Co-Owned Property” [2000] S.J.L.S. 52.

<sup>15</sup> S. Y. Tan, “Execution Against Co-Owned Property” [2000] S.J.L.S. 52, 57. See also H. W. Tang and K. F. K. Low, *Tan Sook Yee’s Principles of Singapore Land Law*, 4th edn (Singapore: LexisNexis, 2019), pp.212–213.

<sup>16</sup> *Wright v Gibbons* [1949] H.C.A. 3; (1949) 78 C.L.R. 313 at 330.

<sup>17</sup> *Wright v Gibbons* [1949] H.C.A. 3; (1949) 78 C.L.R. 313 at 330.

<sup>18</sup> *Williams v Hensman* (1861) 1 John & H. 547. This mode of severance has been recognised by the Singapore Court of Appeal in many occasions: *Jack Chia-MPH Ltd v Malayan Credit Ltd* [1984] S.G.C.A. 8; [1983–1984] S.L.R.(R.) 420; *Sivakolunthu Kumarasamy v Shanmugam Nagaiah* [1987] S.G.C.A. 21; [1987] S.L.R.(R.) 702; *Diaz Priscillia v Diaz Angela* [1997] S.G.C.A. 55; [1997] 3 S.L.R.(R.) 759 at 27; *Chan Lung Kien v Chan Shwe Ching* [2018] S.G.C.A. 24; [2018] 2 S.L.R. 84 at [19].

<sup>19</sup> As Professor Crown observed, “[t]he 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”: B. C. Crown, “Severance of joint tenancy of land by partial alienation” (2001) 117 L.Q.R. 477, 488.

the severing joint tenant (now a tenant in common) would acquire an undivided share which can be the subject of alienation. The role of the fiction is to gloss over this logical difficulty. As Gray and Gray explained:

“The only way in which the alienor can validly dispose of an ‘interest’ is on the assumption that severance has already occurred. The act of alienation is thus, paradoxically, both the source and the vehicle of the interest conveyed.”<sup>20</sup>

The real problem arises when the fiction is taken too seriously and beyond its original scope, i.e. where alienation is not an issue. In *Ong Boon Hwee v Cheah Ng Soo*, Chan J agreed with Professor Tan that “the WSS may attach to a joint tenant’s interest in land independent of severance”.<sup>21</sup> This was building upon the opinion of Pang JC in *Peter Low LLC v Higgins, Danial Patrick* that even in the absence of severance a joint tenant has “a real and present interest ... as opposed to a future, contingent or speculative interest”.<sup>22</sup> Emphasis was placed on “the severability of the joint tenancy and the ability of a joint tenant to alienate his aliquot share (or potential aliquot share) without the consent of the other joint tenants”.<sup>23</sup> Most recently, in *Chain Land Elevator Corp v FB Industries Pte Ltd*, Tan J attempted the impossible task of distinguishing the positions pre and post severance:

“[T]he law recognises [a joint tenant] as having a notional, aliquot share, i.e. a share that is a potentially rather than actually divided share in property. A joint tenant’s aliquot share is converted into actual, undivided shares in property held as a tenant in common upon severance.”<sup>24</sup>

With respect, it is difficult to discern any conceptual difference between a pre-severance aliquot share under a joint tenancy and a post-severance undivided share under a tenancy in common. Although Tan J regarded the pre-severance aliquot share as merely notional rather than actual, the distinction is clearly illusory as the notional share is treated as having the same effect as a post-severance undivided share. Both types of interests can be seized and sold.

The fundamental objection to recognising a pre-severance aliquot share is that any notion of shareholding is conceptually at odds with the rule of survivorship, the hallmark of a joint tenancy. The error likely stems from the failure to distinguish between an inchoate interest and an actual interest. As Gray and Gray observed:

“[E]very joint tenancy is also potentially a tenancy in common, and every joint tenant is proleptically a co-owner in equal shares and thus entitled to dispose of his aliquot share ... There is sometimes an irresistible temptation to refer to joint tenants as being already entitled to equal shares, but this merely reflects the extremely marginal nature of the legal distinction between the actual and the inchoate rights of the joint tenant.”<sup>25</sup>

<sup>20</sup> K. Gray and S. F. Gray, *Elements of Land Law*, 5th edn (Oxford: OUP, 2008), p.946. See also B. C. Crown, “Severance of joint tenancy of land by partial alienation” (2001) 117 L.Q.R. 477, 478.

<sup>21</sup> *Ong Boon Hwee v Cheah Ng Soo* [2019] S.G.H.C. 65; [2019] 4 S.L.R. 1392 at [50] (emphasis in original).

<sup>22</sup> *Peter Low LLC v Higgins, Danial Patrick* [2018] S.G.H.C. 59; [2018] 4 S.L.R. 1003 at [71].

<sup>23</sup> *Peter Low LLC v Higgins, Danial Patrick* [2018] S.G.H.C. 59; [2018] 4 S.L.R. 1003 at [88].

<sup>24</sup> *Chain Land Elevator Corp v FB Industries Pte Ltd* [2020] S.G.H.C. 2; [2020] 5 S.L.R. 1336 at [46].

<sup>25</sup> K. Gray and S. F. Gray, *Elements of Land Law*, 5th edn (Oxford: OUP, 2008), p.915. See also S. Bridge, E. Cooke and M. Dixon, *Megarry & Wade: The Law of Real Property*, 9th edn (London: Sweet & Maxwell, 2019), p.495; B. Edgeworth, *Butt’s Land Law*, 7th edn (Sydney: Lawbook Co, 2017), p.240.

An inchoate interest is, in reality, nothing at all. What the joint tenant has is a *power* to sever jointly held interest into *aliquot undivided shares*, thereby converting the joint tenancy into a tenancy in common.<sup>26</sup> Importantly, merely because he or she could exercise this power does not mean that he or she certainly would. In the absence of any conduct indicating that the power has been exercised, there is simply no good justification for invoking another fiction. If one accepts that the fundamental distinction between a joint tenancy and a tenancy common should be maintained, then it would be logical to focus instead on the issue of severance.

## Severance upon the registration of the WSS

Interestingly, although *Peter Low* was instrumental in promulgating the fiction of a pre-severance aliquot share, the decision ultimately rested on the finding of a severance upon the registration of the WSS.<sup>27</sup> This is consistent with Dixon J's obiter statement in *Wright v Gibbons*: "Execution on a judgement for debt against one joint tenant bound his aliquot share and continued to do so in the hands of the survivor if the execution debtor afterwards died".<sup>28</sup> The only logical explanation as to why the rule of survivorship does not apply to extinguish the execution debtor's interest is that the joint tenancy has been severed.

Although the focus on severance preserves the distinction between a joint tenancy and a tenancy in common, this cannot in itself be the reason for finding a severance. A separate justification has to be found. In *Peter Low*, the learned judge explained that "severance of a joint tenancy occurs when the debtor-joint tenant's interest is seized and this seizure occurs when the WSS is registered".<sup>29</sup> With respect, this is reading too much into what seizure entails. Under the Torrens system, seizure is achieved notionally by a direction to the Registrar of Titles to refrain from registering any instrument of dealing executed by the judgment debtor.<sup>30</sup> Certainly, although this prohibition is specifically directed at the judgment debtor, the other joint tenant(s) may also be affected. Thus, any attempt by both joint tenants to deal with the entire interest in the land will be denied registration, as one of them is forbidden from doing so. Notwithstanding this, it remains true that a WSS does not involve the seizure of any specific interest of the judgment debtor.<sup>31</sup> For this reason, a notional seizure does not necessarily result in severance of the joint tenancy.<sup>32</sup>

Having said this, the view in *Peter Low* finds support in a literal reading of the Land Titles Act s.135(1), which allows the Sheriff to sell only "the interest which belongs to the judgment debtor *at the date of the registration of the writ*".<sup>33</sup> This

<sup>26</sup> B. Edgeworth, *Butt's Land Law*, 7th edn (Sydney: Lawbook Co, 2017), p.268.

<sup>27</sup> *Peter Low LLC v Higgins, Danial Patrick* [2018] S.G.H.C. 59; [2018] 4 S.L.R. 1003 at [97].

<sup>28</sup> *Wright v Gibbons* [1949] H.C.A. 3; (1949) 78 C.L.R. 313 at 330. See also *Guthrie v ANZ Banking Group Ltd* (1991) 23 N.S.W.L.R. 672 at 680.

<sup>29</sup> *Peter Low LLC v Higgins, Danial Patrick* [2018] S.G.H.C. 59; [2018] 4 S.L.R. 1003 at [97].

<sup>30</sup> Land Titles Act s.133. Even under the common law, seizure in the context of land merely defines the priorities between a person who has dealt with the Sheriff and a person who has dealt with the judgment debtor. See E. I. Sykes, "The Effect of Judgments on Land in Australia" (1953) 27 A.L.J. 226 (Pt 1).

<sup>31</sup> *United Overseas Bank Ltd v Chia Kin Tuck* [2006] S.G.H.C. 87; [2006] 3 S.L.R.(R.) 322 at [10]; *Hall v Richards* (1961) 108 C.L.R. 84. See also J. Baalman, *The Singapore Torrens system: being a commentary on the Land Titles Ordinance 1956 of the State of Singapore* (Singapore: Government Printer, 1961), p.211; E. I. Sykes, "The Effect of Judgments on Land in Australia" (1953) 27 A.L.J. 226 (Pt 1), 227.

<sup>32</sup> S. Y. Tan, "Execution Against Co-Owned Property" [2000] S.J.L.S. 52, 57.

<sup>33</sup> Emphasis added.

seems to suggest that the interest of the judgment debtor crystallises upon registration, which in turn means that the joint tenancy has been severed at that point.<sup>34</sup> If this were right, then the death of a joint tenant thereafter would have no impact on the outcome whatsoever.

The objection to this approach is that it ignores the conventional criterion for identifying a court order that results in a severance. The broadly accepted view is that a court order has this effect only if it “requires the property to be dealt with in a manner that expressly or by necessary implication is inconsistent with continuance of the joint tenancy”.<sup>35</sup> For example, in a divorce proceeding, the court might order the land to be sold and for the sale proceeds to be distributed equally between the joint tenants. In such a case, the court order is intended to be final and unaffected by the chance of survivorship.<sup>36</sup> To avoid frustrating the court order, equity characteristically regards as done that which ought to be done, such that the joint tenancy is immediately severed even before the court order is duly carried though to performance.<sup>37</sup> Another example is where a joint tenant has been adjudicated bankrupt. A bankruptcy order operates by effecting an involuntary alienation of the joint tenant’s aliquot share to the trustee in bankruptcy, which would result in a severance. As the order is meant to be final, severance is deemed to have occurred when the bankruptcy order was issued. A WSS is distinguishable from the given examples as it merely empowers, rather than mandate, the Sheriff to sell. The Sheriff is required to sell only if the judgment debt remains unsatisfied. If the judgment debtor decides to pay up, the WSS loses its purpose. To leave the door open for such an eventuality, the order is not *final* until the point of sale.

If severance were to be found, what would be the position if the WSS is subsequently withdrawn? Do the co-owners continue to hold as tenants in common or do they revert to being joint tenants? To reconvert a tenancy into common to a joint tenancy is not without conceptual difficulties.<sup>38</sup> But to leave it as it is would undermine the co-owners’ preferred manner of co-ownership. In *Malayan Banking*, the learned judge preferred to avoid this potential mess by refraining from finding a severance.<sup>39</sup> However, a possible solution, as the subsequent cases were prepared to adopt,<sup>40</sup> is the idea of temporary severance (or suspension of the joint tenancy), which has been employed in the context of a lease granted by one joint tenant.<sup>41</sup> In other words, if the registration of the WSS is subsequently withdrawn, the tenancy in common reverts to a joint tenancy. What remains unclear is what happens if one joint tenant dies after the registration of the writ but before the abandoned sale.

<sup>34</sup> For an alternative interpretation of the Land Titles Act s.135, see *Severance at the point of sale* below.

<sup>35</sup> B. Edgeworth, *Butt’s Land Law*, 7th edn (Sydney: Lawbook Co, 2017), p.282.

<sup>36</sup> *Sivakolunthu Kumarasamy v Shanmugam Nagaiah* [1987] S.G.C.A. 21; [1987] S.L.R.(R.) 702 at 38–41. See also *Toh Ah Poh v Tao Li* [2020] S.G.C.A. 18; [2020] 1 S.L.R. 837.

<sup>37</sup> K. Gray and S. F. Gray, *Elements of Land Law*, 5th edn (Oxford: OUP, 2008), pp.957–958.

<sup>38</sup> On the finality of severance, see B. Edgeworth, *Butt’s Land Law*, 7th edn (Sydney: Lawbook Co, 2017), p.268.

<sup>39</sup> *Malayan Banking Bhd v Focal Finance Ltd* [1998] S.G.H.C. 402; [1998] 3 S.L.R.(R.) 1008 at 18; *Chan Lung Kien v Chan Shwe Ching* [2017] S.G.H.C. 136; [2018] 4 S.L.R. 208 at [29].

<sup>40</sup> *Peter Low LLC v Higgins, Danial Patrick* [2018] S.G.H.C. 59; [2018] 4 S.L.R. 1003 at [99], [103]–[105]; *Chain Land Elevator Corp v FB Industries Pte Ltd* [2020] S.G.H.C. 2; [2020] 5 S.L.R. 1336 at [78]–[79].

<sup>41</sup> *Wright v Gibbons* [1949] H.C.A. 3; (1949) 78 C.L.R. 313 at 130.

## Severance at the point of sale

The remaining possibility is that severance occurs at the point of sale. In *Chan Shwe Ching v Leong Lai Yee*, Leow JC observed that “when a sheriff decides to sell the land under a WSS severance of a joint tenancy will occur”.<sup>42</sup> The implied assumption is that the judgment debtor’s interest can be determined at the point of sale.<sup>43</sup> However, this begs the question of what precisely can be sold, which brings us back to the interpretation of the Land Titles Act s.135(1).

In the drafter’s commentary on this provision, he cited the case of *Registrar-General v Wood*<sup>44</sup> for the proposition that “the interest of a joint tenant can be taken under writ”.<sup>45</sup> In that case, the co-owners, who were husband and wife, registered themselves as tenants by entireties, which conferred on neither a power of severance.<sup>46</sup> Subsequently a writ of fieri facias was issued against the wife and the question arose as to whether she had any interest that can be taken in execution. The majority in the High Court of Australia held that, following the passing of the Married Women’s Property Act 1901, the wife could alienate her interest as if she was not married, as in the case of a joint tenancy. Therefore the Sheriff was obliged to sell the wife’s interest pursuant to the writ. It is important to observe that although the bench was divided on whether the tenancy by entireties survived the 1901 legislation, the common assumption was that the writ was effective only if severance was possible. However, as neither co-owner had died, the timing of severance was not tested. Severance could have occurred either at the time the writ was issued or at the point of sale.

Thus, despite the reference to the time of registration in s.135(1), it hasn’t been all that obvious that its drafter had given any thought to the timing of severance. He could have, but did not, cite Dixon J in *Wright v Gibbons* who took a clear stance on this matter. In fact, from his commentary, the reference was aimed at emphasising the conclusiveness of the land titles register with the specific goal of avoiding a priority dispute arising from pre-existing interests which do not appear on the land titles register when the WSS is registered.<sup>47</sup> Thus, subs.(2) clarifies that “[f]or the purpose of determining the interest in land which belongs to a judgment creditor”, the Sheriff is entitled to execute a transfer free of two types of interests: first, any interest created after the registration of the WSS; and secondly, any interest created prior to the registration of the WSS but not notified on the land titles register at least three clear days before the Sheriff sale. One should also note that the reference to a joint tenant as having a separate interest does not necessarily contradict the continued existence of a joint tenancy. As explained earlier, this is a loose reference that is not uncommonly seen in some of the older cases.<sup>48</sup> In short, s.135(1) does not say anything about the timing of severance.

If this much is accepted, we may proceed to answer the million-dollar question of why severance occurs at the point of sale. The general rule is that only a

<sup>42</sup> *Chan Shwe Ching v Leong Lai Yee* [2015] S.G.H.C. 210; [2015] 5 S.L.R. 295 at [20].

<sup>43</sup> *Chan Shwe Ching v Leong Lai Yee* [2015] S.G.H.C. 210; [2015] 5 S.L.R. 295 at [20].

<sup>44</sup> *Registrar-General v Wood* [1926] H.C.A. 43; (1926) 38 C.L.R. 46.

<sup>45</sup> J. Baalman, *The Singapore Torrens system: being a commentary on the Land Titles Ordinance 1956 of the State of Singapore* (Singapore: Government Printer, 1961), p.218.

<sup>46</sup> The tenancy by entireties regarded the husband and wife as a compound person.

<sup>47</sup> J. Baalman, *The Singapore Torrens system: being a commentary on the Land Titles Ordinance 1956 of the State of Singapore* (Singapore: Government Printer, 1961), p.218.

<sup>48</sup> In fact, such loose reference can be found in *Registrar-General v Wood* [1926] H.C.A. 43; (1926) 38 C.L.R. 46.



registered proprietor is competent to execute a registered transfer.<sup>49</sup> However, it would be unrealistic to expect the judgment debtor, an unsuccessful litigant, to execute the necessary transfer so that his or her adversary could realise the fruits of the judgment. In recognition of this practical difficulty, the Sheriff is statutorily empowered to execute a registered transfer in favour of a purchaser under a Sheriff sale.<sup>50</sup> It is important to recognise that this transfer is executed on behalf of the judgment debtor.<sup>51</sup> This is consistent with the point that the Sheriff does not actually seize any interest in the land for the purposes of sale. Instead, the Sheriff is merely allowed to act in the very same manner the judgment debtor is entitled to. As explained earlier, it is settled law that a joint tenant has the power to alienate an aliquot share, which simultaneously results in severance of the joint tenancy. A Sheriff sale has the very same effect. The advantage of this explanation is that it locates the issue squarely within the recognised category of severance by alienation. It does not rely on any new fiction in addition to the existing one.

If indeed severance occurs only at the point of the Sheriff sale, then certain events that happen between the registration of the WSS and the time of sale could vary the extent of the interest belonging to the judgment debtor. There are three possible situations, using examples involving three joint tenants—A, B and C—with A being the judgment debtor. First, if A predeceases B and C, A's interest will be extinguished. The WSS loses its subject matter. Secondly, if B (or C) dies, A's interest is correspondingly enlarged. The Sheriff may sell a half share instead of a one third share. Thirdly, if A is the sole surviving joint tenant, the subject matter of the WSS is further enlarged and the Sheriff may sell the entire estate.

This inherent uncertainty has not been addressed in the cases dealing with the WSS most likely because it is incredibly rare for the judgment debtor to die during the short span of time between the registration of the WSS and the planned Sheriff sale. Nonetheless, the possibility remains. Interestingly, the same issue has generated some amount of debate in the context of a mortgage granted by one joint tenant. Although a mortgage is a security interest in land whereas a WSS is not, the two instruments are sufficiently similar in many other respects such that a meaningful comparison can be made.<sup>52</sup> Because a Torrens mortgage operates as a security only and does not entail any conveyance of title,<sup>53</sup> the granting of the mortgage does not sever the joint tenancy.<sup>54</sup> When a mortgagee invokes a statutory power of sale, he or she executes a transfer on behalf of the mortgagor, in the same way as how a Sheriff sale works. What the mortgagee is entitled to sell will be affected

<sup>49</sup> Land Titles Act s.63(1).

<sup>50</sup> Land Titles Act s.132(4).

<sup>51</sup> *United Overseas Bank Ltd v Chia Kin Tuck* [2006] S.G.H.C. 87; [2006] 3 S.L.R.(R.) 322 at [14]; *Peter Low LLC v Higgins, Daniel Patrick* [2018] S.G.H.C. 59; [2018] 4 S.L.R. 1003 at [71]. See also J. Baalman, *The Singapore Torrens system: being a commentary on the Land Titles Ordinance 1956 of the State of Singapore* (Singapore: Government Printer, 1961), p.211.

<sup>52</sup> The only significance of the mortgage being an interest in land is that it gives the mortgagee a priority in the event of the mortgagor's insolvency. cf. *Singapore Air Charter Pte Ltd v Peter Low & Choo LLC* [2020] S.G.C.A. 99; [2020] 2 S.L.R. 1399 at [59].

<sup>53</sup> Land Titles Act s.68(3). The same describes an equitable mortgage created by agreement accompanied by the deposit of a document of title.

<sup>54</sup> J. Baalman, *The Singapore Torrens system: being a commentary on the Land Titles Ordinance 1956 of the State of Singapore* (Singapore: Government Printer, 1961), p.130. See also *Lyons v Lyons* [1967] V.R. 169; *Re Shannon's Transfer* [1967] Tas. S.R. 245. The position under English law is different: *First National Securities Ltd v Hegerty* [1985] Q.B. 850; [1984] 3 W.L.R. 769.

by any operation of the rule of survivorship. If the joint tenancy remains intact, it will be severed at the point of sale.<sup>55</sup>

A number of scholars have advocated for the avoidance of the survivorship wheel of fortune by finding a severance upon the granting of the mortgage.<sup>56</sup> To sidestep the fact that no alienation occurs before sale, the argument for severance has generally shifted the focus to an intention to sever. As Professor Nield argues, “[i]t is perhaps time to recognise that the source of severance should lie with the intention of the parties” and that intention can be “presumed or implied, either from the nature of a particular transaction or the course of the joint tenants’ conduct”.<sup>57</sup> Without commenting on the merits of this proposal in respect of mortgages, it is at least clear that it is unworkable insofar as a WSS is concerned. Unlike a mortgage, which is intentionally granted, a WSS is forcibly imposed on the judgment debtor. It would be most unrealistic to expect to find, on the part of the judgment debtor as a losing party, any manifestation of intention to sever in favour of the judgment creditor.

This leaves us with an argument from fairness. As Lord Chancellor Cowper said in *York v Stone*, “a joint tenancy is an odious thing in equity”.<sup>58</sup> However, any reliance on such a statement is bound to run into serious counter arguments. In the first place, equity’s abhorrence of the joint tenancy is balanced by the common law’s preference for a joint tenancy. This has been reinforced by a statutory presumption that if the instrument of transfer does not specify that the co-owners will hold as tenants in common, they will hold as joint tenants.<sup>59</sup> Even within the realm of equity, there have been increasingly judicial statements to the effect that equity follows the law, especially when the joint tenants are married<sup>60</sup> or in a de facto relationship.<sup>61</sup> This reflects the acceptance that there is nothing inherently unfair about the rule of survivorship. Each joint tenant has an equal chance of gaining or losing from the operation of the rule.<sup>62</sup> Similarly, while a judgment creditor might recover nothing, he or she would also benefit from any enlargement of the judgment debtor’s interest.

Having said this, an important point of distinction is that, unlike the judgment debtor, the judgment creditor did not choose to be subjected to the rule of survivorship. The judgment debtor may withdraw from the gamble by unilaterally severing the joint tenancy whereas the judgment creditor does not have this option. Perhaps the simple response is that litigation is far from being a risk-free endeavour and there are certain kinds of risk that litigants can be expected to bear. Indeed, the interest of the judgment creditor has to be weighed against the interest of the other joint tenant(s), who is equally innocent. To find severance when none of the

<sup>55</sup> J. Baalman, *The Singapore Torrens system: being a commentary on the Land Titles Ordinance 1956 of the State of Singapore* (Singapore: Government Printer, 1961), p.130.

<sup>56</sup> S. Nield, “To sever or not to sever: the effect of a mortgage by one joint tenant” [2001] Conv. 462, 473; D. M. Costa, “Co-ownership under Victorian Land Law: Part III” (1961) 3 M.U.L.R. 433, 448–454; T. Wells, “Mortgage by a joint Tenant—Torrens System” (936) 9 A.L.J. 22; R. F. Baird, “Mortgage by a Joint Tenant—Torrens System” (1936) 9 A.L.J. 431.

<sup>57</sup> S. Nield, “To sever or not to sever: the effect of a mortgage by one joint tenant” [2001] Conv. 462, 474.

<sup>58</sup> *York v Stone* (1709) 91 E.R. 146; (1709) 1 Salk 158.

<sup>59</sup> Land Titles Act s. 53(1).

<sup>60</sup> *Lau Siew Kim v Yeo Guan Chye Terence* [2007] S.G.C.A. 54; [2008] 2 S.L.R.(R.) 108 at [97]–[107]; *Chan Yuen Lan v See Fong Mun* [2014] S.G.C.A. 36; [2014] 3 S.L.R. 1048 at [160]; *Pereira Dennis John Sunny v Faridah bte V Abdul Latiff* [2017] S.G.H.C. 167; [2017] 5 S.L.R. 529 at [59].

<sup>61</sup> *Stack v Dowden* [2007] UKHL 17; [2007] 2 A.C. 432 at [56].

<sup>62</sup> *Cray v Willis* 24 E.R. 847; (1729) 2 P. Wins. 529.

joint tenants have attempted to disrupt the four unities would undermine their conscious choice to hold as joint tenants. On a balance, therefore, it is argued that the status quo ought to be preserved.

## **Conclusion**

The study of co-ownership law has largely been about identifying the form of co-ownership in any given case and the ensuing implications. Unsurprisingly, the doctrine of severance, which operates at the boundary, has always been a flashpoint. As its focus is on the conversion of a joint tenancy into a tenancy in common, the doctrine impliedly recognises the fundamental distinction between these two forms of co-ownership. The suggestion that a joint tenant has a separate and distinct share that can be taken in execution, which conflates actual and inchoate interests, undermines the fundamental distinction altogether. The alternative explanation offered in this article, which focuses on the vicarious nature of a Sheriff sale, identifies the issue as one of severance by alienation, thus placing it squarely within established principles of co-ownership law. If any broad lesson is to be derived from the current debate, it would be that, in any attempt to find a solution to a specific problem, the larger picture needs to be taken into account to avoid unintentionally throwing the baby out with the bathwater.