

UNIVERSITY OF THE WEST INDIES FACULTY OF LAW REAL PROPERTY I

Worksheet 8

2018-2019

Co-Ownership

LEARNING OBJECTIVES

By the end of this lesson, you should be able to:-

- *Explain joint tenancy and tenancy in common*
- *Explain the 4 unities*
- *Discuss the difference between joint tenancy and tenancy in common*
- *Discuss severance of a concurrent interest*
- *Explain the meaning of coparcenary and tenancy by entirety*

Required Readings:

- Owusu, CCLL, Taylor and Francis, London, Chp.9
- Kodilinye, CCPL, Cavendish, London, Chp.7

A. NATURE

Where two or more persons are entitled to the simultaneous enjoyment of land they are said to have concurrent interests or to hold in co-ownership.

Four types:-

- 1) *Joint Tenancy***
- 2) *Tenancy in Common***
- 3) *Co-parcenary and***
- 4) *Tenancy by Entireties***

We will not deal with Co-Parcenary. In old English law, this was a form of inheritance where the female members of the family shared the property when the male line died out. In India, this seems to be a type of ownership where multiple generations are co-owners (parent, child, grandchild).

A tenancy by entirety is a form of joint tenancy which only applies between husband and wife. It is obsolete in our jurisdiction but still arises in the US. Unlike a joint tenancy, the entirety can

only be severed with the agreement of both parties, and both parties must sign any transfer of the interest. The tenancy by entirety is automatically severed on divorce.

TENANCY IN COMMON

Where land is limited to two or more persons with words of severance e.g. a grant of Blueacre to A and B equally and see *Christian v Mitchell Lee* (1989) 13 W.I.R. 392; *Martin v Colebrook* Vol. I Stephens Rep. 891-892.

Note they hold in undivided shares i.e. each tenant in common has a distinct fixed interest in property which has not yet been divided among the co-tenants.

Only unity of possession is necessary for tenancy in common. There is no right of survivorship.

JOINT TENANCY

Where land is conveyed or devised to two or more persons without any words to show that they are to take separate and distinct shares i.e. without words of severance. E.g., "To A and B in fee simple" and see Re Meyers Cooper Deceased, vol. II Stephens Rep. 2203-2204.

They constitute one single owner as far as other persons are concerned: they do not hold separate shares or even undivided shares. Note that even a life interest may be the subject of concurrent interests. Martin v Colebrooke vol.I Stephens Rep. 891

Characteristics

Joint tenancy has the following characteristics: Four Unities - Title, Time, Interest and Possession; right of survivorship ("*jus accrescendi*")

Unity of Possession

A co-tenant in possession not an adverse possessor (unless, as in Jamaica, statute provides otherwise, see *Wills v Wills*).

In general they will all be equally entitled to the entire plot, though this must be interpreted reasonably:

“If they live together in the mansion house, still each has exclusive possession of his own bedroom. If the property be a farm, unless they are willing to go into partnership, one must till certain fields and one, other fields. Two men cannot

plow the same furrow”: Mastbaum v. Mastbaum 126 N.J. Eq. 366, 9 A.2d 51 N.J.Ch. 1939

Immunity from action in trespass by a co-tenant out of possession

- Jacobs v. Seward (1872) LR 5 HL 464

Exceptions

1. *Ouster or Eviction*

- **Forbes v. Bonnick** (1968) 11 J.L.R. 67
“.....when there are two equitable tenants in common, then until the place is sold, each of them is entitled concurrently with the other to the possession of the land and to the use and enjoyment of it in a proper manner; and that neither of them is entitled to turn out the other”: **Bull v Bull** [1955] 1 Q.B. 234, 238, per Denning MR.

2. *Statutory exception - Statute of Anne*

3. *Agreement*

4. *Liability to pay rent*

Unity of Interest

- Singh v. Mortimer (1967) 10 W.I.R. 65

Unity of Title

The co-owners must take their property by way of the same instrument (will or conveyance).

Unity of Time

The interest of the co-owners must arise at the same time.

Ius Accrescendi

When one joint tenant dies, the property passes automatically to the other joint tenants. This is called the right of survivorship. No interest passes to the estate of the deceased joint tenant.

“There is here no equality except, perhaps, an equality of chance”: Snell’s Principles of Equity, 30th ed., para.3-21

“Any attempt to dispose by will of property in which the legal and beneficial interests subsist in joint tenancy is wholly ineffectual”: *Panton v. Roulstone* (1976) 24 W.I.R. 462, 465.

Methods of Creation

A joint tenancy is created where land is conveyed to two or more persons unless:-

(a) There are words of severance - *Christian v. Mitchell-Lee* (1969) 13 W.I.R 394

(b) One of the four unities is missing

(c) Where equity presumes a tenancy in common.

Re Myers Cooper (1992) 2 Stephen's R. 2203-04

But see *Singh v. Mortimer* (1966) 10 W.I.R. 65 (Guyana). From this case it seems that the courts in the W.I. (or possibly only in Guyana) are more likely to hold that a tenancy in common exists on the ground that (1) this was the intention of the parties because people believe that all co-ownership is tenancy in common (*per* Persaud, J.) or (2) Roman-Dutch law applies in Guyana on this point, which recognized only tenancy in common (*per* Cummins J.A.).

Presumption of tenancy in common in equity

1. *Purchase in unequal shares*

Panton v. Roulstone (1976) 24 W.I.R. 462, 469

2. *Loan on mortgage*

If two people join in lending money upon mortgages, equity says it could not be the intention that the interest in that should survive. Though they take a joint security each means to lend his own and take back his own.” *Morley v. Bird* (1798) 3 Ves. 628, 631.

3. *Partnership Assets*

“It is when the joint tenants engage in trade or business such as the buying and selling of lands for profit or the farming of lands acquired for the purpose, or the business activity other than the mere purchasing and accumulation of land, that equity will presume a tenancy in common of the beneficial interest” *Panton v. Roulstone* (1976) 24 W.I.R. 462, 469, *per* Robinson P.

4. *Assets acquired for individual business purposes of the purchasers*

Malayan Credit Ltd. v. Jack Chia-MPH Ltd [1986] 1 All E.R. 711, 714

Presumption of tenancy in common in Antigua and Dominica

In Antigua, Real Property Act, 1992, Cap. 366 (**Antigua**) s. 15, and Dominica, Real Property Act, 1991, Chap. 54:02 (**Dominica**) s. 14, it is provided that “when any land shall be conveyed, transferred, or devised to two or more persons in their own right, such persons shall be deemed and taken to be tenants in common, unless expressly declared to be joint tenants: provided that all land conveyed, transferred or devised to executors or trustees, as such, shall be held by them as joint tenants”.

Determination of Joint tenancy

(i) Severance

“The duration of all lives being uncertain, if either party has an ill opinion of his own life, he may sever the joint tenancy by deed granting over a moiety [half] in trust for himself; so that survivorship can be no hardship, where either side may at pleasure prevent it.”: **Cray v. Wills** (1729) 2 P. Wms. 529, *per* Jekyll M.R.

Page Wood V-C. in **Williams v. Hensman** (1861) 70 E.R. 862, 867:

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

(ii) Alienation *inter vivos*

(iii) Alienation in equity

- *Gamble v. Hanke* (1990) 27 J.L.R. 115.

(iv) Course of conduct

- *Seunath v. Seunath* (1990) 1 T.T.L.R. 437
- *Jackson v. Jackson* (1804) 9 Ves. 591.
- *Leak v. Macdowall* 32 Beav. 28

(v) Mutual agreement

- *Gould v. Kemp* (1834) 2 My. & K. 304.

Brougham L.C. observed:

“This shows that the bare agreement has the force of actual severance and that the severance is held to be executed though there exists only an agreement which is yet unperformed: *Gould v. Kemp* (1834) 2 My. & K. 304.

The question was posed in *Frewen v. Rolfe* (1787) 2 Bro. L.L. 220.

“And if in fact they were joint tenants, could their having joined in an answer that it was a tenancy in common have the operation of a severance?”

To this rhetorical question, Thurlow L.C. answered:

“A note certainly would do it, because the joint tenancy may be severed by any contract; and if they said in their answer that they agreed so to do, I should construe them to have done a sufficient act to sever”: (1787) 2 Bro. L.L. 220, 225.

Unilateral Declaration

Lord Hardwicke said:

“If no agreement, then there must be an actual alienation to make it amount to a severance; the declaration of one of the parties that it should be severed, is not sufficient, unless it amounts to an actual agreement”: *Partriche v. Powlet* (1740) 2 Atk. 54.

Lord Thurlow in *Perkins v. Baynton* said: “I do not know that a demand will sever a joint tenancy.”¹⁰³

Re Wilks, Child v. Bulmer [1891] 3 Ch. 59.

Nielson-Jones v. Fedden [1974] 3 All E.R. 38.

Walton J. restated the old law thus:

“In order to effect a severance before the 1925 legislation came into force, it was essential to destroy one of the three unities . . . An agreement, or conduct amounting to an agreement for severance, clearly destroys the unity of interest and so does the acquisition of another estate which is capable of merging; and an actual alienation also clearly destroys the unity of title quoad the assignee”

Walton J. said:

“The question then is, can such a declaration – a unilateral declaration ever be effective to sever a beneficial joint tenancy? It appears to me that in principle there is no conceivable ground for saying that it can. So far as I can see, such a mere unilateral declaration does not in any way shatter any one of the essential unities”.

Hawkesley v. May [1956] 1 Q.B. 304.
Re Draper's Conveyance [1969] 1 Ch. 486.
Burgess v. Rawnsley [1975] 1 Ch. 429.

Megarry and Wade's view, Law of Real Property, *op. cit.*, at pp. 493, para. 9–039 and 495, Lord Denning observed:

"It is sufficient if there is a course of dealing in which one party makes clear to the other that he desires that their shares should no longer be held jointly but be held in common. I emphasize that it must be made clear to the other party". [1976] C.L.J. 20, 23 (D.J. Hayton).

Sir John Pennycuik categorically stated: "a mere verbal notice by one party to another clearly cannot operate as a severance": *Burgess v. Rawnsley* [1975] Ch. 429, 446.

Thus, to Sir John Pennycuik, rule 3 of Page-Wood V.-C.'s statement can only apply where "negotiations which, although not otherwise resulting in any agreement, indicate a common intention that the joint tenancy should be regarded as severed": *Burgess v. Rawnsley* [1975] Ch. 429, 447.

Explaining the third rule, Page-Wood V.-C. said:

"When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested"
- *Williams v. Hensman* (1861) 1 J. & H. 546, 557.

Lord Denning pointed out - "[the] 'course of dealing' need not amount to an agreement, expressed or implied, for severance": *Burgess v. Rawnsley* [1975] Ch. 429, 439.

Severance by written notice: Barbados, Belize and Trinidad and Tobago:

Property Act, 1979, Cap.236 (**Barbados**), s. 43; Law of Property Act, 2000, Cap.190 (**Belize**), s. 38(2); Land Law and Conveyancing Act, 1981, No. 20 (**Trinidad and Tobago** – proposed legislation), s. 50(3); see re 88 Berkeley Rd. [1971] 1 Ch. 648.

The summons in *Re Draper's Conveyance* [1969] 1 Ch. 486, 489 was supported by an affidavit which sought a court order in these terms:

"In the premises I humbly ask that the said property may be sold and that the proceeds of sale thereof may be distributed equally; alternatively that the

respondent pays me one half of the value of the said property with vacant possession”.

In *Harris v. Goddard* [1983] 1 W.L.R. 1203, 1209, the petition was in these terms:

“That such order may be made by way of transfer of property and/or settlement of property and/or variation of settlement in respect of the former matrimonial home at 95, The Street, Fetcham aforesaid and otherwise as may be just”

The court in said in *Stuart v. Kirton* (1994) 30 Barb. L.R. 405

“Counsel for the defendant submitted “The letter of October 24, 1991 from the attorney for the plaintiff to the defendant, in my view, effectively severed the joint tenancy. The plaintiff was excluded from the house. She demanded keys to the premises. She did not get access. She did not get the keys. She filed a writ. Her conduct was sufficient to effect a severance.” I agree with counsel and hold that there has been a severance of the joint tenancy brought about by the actions of the defendant and by the conduct of the plaintiff in filing the writ and asking the court for an order that the property be sold and the proceeds shared equally”.

See also the case of *Hammersmith and Fulham London Borough Council v. Monk* [1991] 3 W.L.R. 1144

Note that joint tenancy of the **Legal** estate cannot be converted into tenancy in common in Belize. However, the tenancy may be severed in equity.

NO SEVERANCE

- *Jackson v. Jackson* (1804) 9 Ves. Jun.591
- *Re Myers Cooper* (1976) 24 W.I.R. 462, 465

PARTITION

Partition Acts of 1539 and 1540

Partition Act, 1992, Cap. 305 (**Antigua**), s. 4; Partition Act, 2000, Ch. 153 (**Bahamas**), s. 7; Property Act, 1979, Cap 236 (**Barbados**), s. 45; Partition Act, 1855, No. 11 (**Bermuda**), s. 2; Partition Act, 1991., Cap. 226 (**British Virgin Islands**), s. 4; Partition Act, 1990., Cap. 54:09 (**Dominica**), s. 4; Partition Act, 1990, Cap.225 (Grenada) s. 3; District Lands Partition and Re-allotment Act, 1973, Cap.60:03 (**Guyana**), s. 3; Partition Act, 1973, Cap.279 (**Jamaica**), s. 3; Partition Act, 1962, Cap.275 (**Montserrat**), s. 4; Partition Act, 1961, Cap.275 (**St. Christopher**

[**St. Kitts and Nevis**], s. 4; Partition Act, 1990, Cap. 245 (**St. Vincent**), s. 7; Partition Act, 1950, Ch. 27, No. 14 (**Trinidad and Tobago**), s. 8 or Land Law and Conveyancing Act, 1981 (**Trinidad and Tobago**); s. 48.

Li v. Walker (1968) 12 W.I.R. 195.

SALE

The court in *Seunath v. Seunath* (1990) 1 T.T.L.R. 437, 448 said:

“turn now to the question of whether or not I should order that the parcel of land in question should be partitioned in accordance with the respective parties’ share or whether I should order sale in lieu thereof and the proceeds distributed accordingly. This would depend upon whether partition, in the physical sense would be very inconvenient or difficult to operate in a manner fair to all the interested parties and whether sale would be more beneficial for the parties than a division of the land physically because of all the circumstances of the case, in particular the nature of the land and the number of persons interested”: *per* Copeesingh J.

Hatherley L.C. outlined the circumstances for the exercise of the court’s discretion in ordering a sale of co-owned property as follows:

1. “The Court is at liberty, at the request of a person holding one-tenth, and against the wish of the persons holding the other nine-tenths, to order a sale, if from the nature of the property, or from the number of the persons interested, the Court thinks it right and reasonable to do so.
2. If the Court finds that the parties entitled to a moiety or upwards desire a sale, the Court must order it, unless some good reason is shewn to the contrary, or
3. unless the persons objecting to a sale offer to purchase the shares of the parties desiring it, in which case the Court has a discretion to authorize them to do so”:

Pemberton v. Barnes (1870-71) L.R. 6 Ch. App. 685, 693-694

CONCURRENT INTERESTS WHERE ENGLISH L.P.A. 1925 HAS BEEN ADOPTED

(a) Tenancy in common can no longer exist in a legal form - It exists only as equitable Interest.

(b) Land held by co-owners is automatically subject to a trust for sale. See *Maudesley and Burn*, from p.203.

Therefore where the 1925 legislation has been adopted the co-owners must always be joint tenants of the legal estate even though there are, for example, words of severance.

N.B. Legal joint tenancy cannot be severed.

Equitable joint tenancy and tenancy in common subject to all rights and liabilities etc. as under common law.

Trust for sale:

- *Re Citro (a bankrupt)* [1991] Ch. 142, [1990] 3 All E.R. 952
- *City of London B.S. v. Flegg* [1988] A.C. 54, [1987] 3 All E.R. 435
- *Re Evers* [1980] 3 All E.R. 399, [1980] Fam. Law 245
- *Chhokar v. Chhokar* [1984] F.L.R. 313
- *Williams & Glyn's Bank v. Boland* [1981] A.C. 487, [1980] 2 All E.R. 480
- *Perry v. Phoenix Assurance Plc.* [1988] 3 All E.R. 60, [1988] 1 W.L.R. 940
- *Bull v. Bull* [1955] 1 Q.B. 234, [1955] 1 All E.R. 253
- *Harpum* [1990] C.L.J. 277
- Law Commission Report Nos. 158, 181, 188

Some other West Indian Cases on Co-ownership

- *Singh v. Mortimer* (1967) 10 W.I.R. 65
- *De Clou v. Demerara Bauxite Co. Ltd.* (1967) 11 W.I.R.127
- *Dennis Li v. Lucy Walker* (1968) 12 W.I.R. 195
- *Joseph v. Joseph* (1961) 3 W.I.R. 78
- *Mahabir v. Mahabir* (1964) 7 W.I.R. 131
- *Stanford Nation v. Alwyn Brodie* (1963) G.L.R. 329
- *Christian v. Baboonee et al* (1971) 18 W.I.R. 392
- *Dookharana v. Dorothy Soulstone* (1976) W.I.R. 462; (1976) 14 J.L.R. 279
- *Forbes v. Bonnick* (1968) 11 J.L.R. 67

Read the following Statutory Provisions

Belize L.P.O. Cap. 193 s.36-39

Barbados Property Act 1979 S. 43-46

Antigua Cap.289, s. 15

TUTORIAL QUESTIONS

Dec 2013, q 3

Answer both (a) and (b)

a) In what circumstances will Equity construe a transaction which creates a joint tenancy to be a tenancy in common?

b) In 2000, Alex and Betty each contributed equally towards the purchase of 20 Heaven Avenue, a large detached house, which was duly conveyed to them.

In 2012, Betty instituted legal proceedings for a declaration as to whether their title to 20 Heaven Avenue was held under tenancy in common or joint tenancy.

In January 2013, Alex offered by telephone to sell his interest in 20 Heaven Avenue to their friend Charles, who jumped at the offer, and sent a cheque for the purchase price to Alex the next day.

Alex died a day after receiving Charles' cheque for the purchase price, leaving all his real property to Dora.

Advise Betty, Dora and the personal representative of Alex.