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The doctrine of unilateral severance and its potential development in Singapore

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THE DOCTRINE OF UNILATERAL SEVERANCE AND ITS POTENTIAL DEVELOPMENT IN SINGAPORE

Co-ownership of land is commonplace in Singapore, and the manner of holding among co-owners has important practical implications. Joint tenants are subject to the rule of survivorship, but what if a joint tenant does not wish to be locked into the survivorship wheel of fortune? A joint tenant may unilaterally sever the joint tenancy by an act operating upon his or her share of the land, but questions remain as to when that occurs and the consequent duration of severance. This article attempts to address these questions with the current alienation-based approach and suggest the possibility of an intention-based approach.

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I. Introduction

1 Co-ownership of land is a common occurrence in Singapore due to a number of socio-economic reasons:¹ “rising property prices, joint-income families, gender equality, greater longevity, tax planning and the function of a home both as a residence and an asset”² Co-ownership can take the form of either a joint tenancy or tenancy in common, and the manner of holding has important implications in the event of a co-owner’s death. Suppose *A* and *B* are joint tenants in Greenacre, and *A* subsequently dies.³ The rule of survivorship operates by vesting the entire interest in *B*. This is because, as joint tenants, *A* and *B* own the whole together and nothing severally.⁴ Conversely, if *A* and *B* are tenants in common, then they would each own a share of the interest in Greenacre. Their distinct shares remain unaffected by the death of either party. Given the differing implications, the law on severance, which lays down the mechanism for converting a joint tenancy into a tenancy in

1 *Goh Teh Lee v Lim Li Pheng Maria* [2010] 3 SLR 364 at [9].

2 *Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108 at [1].

3 *Shafeeg bin Salim Talib v Fatimah bte Abud bin Talib* [2010] 2 SLR 1123 at [43].

4 *Goh Teh Lee v Lim Li Pheng Maria* [2010] 3 SLR 364 at [11]; *Wright v Gibbons* (1949) 78 CLR 313 at 323.

common,⁵ often takes centre stage in disputes between co-owners.⁶ The finding of a severance would allow co-owners who were originally joint tenants to “defeat the operation of survivorship”.⁷

2 The law of severance, embodied in both the common law (including equity) and jurisdiction-specific statutes, recognises different modes of severance, some requiring the agreement of all joint tenants and others to be achieved by unilateral conduct alone. It is, for instance, settled law that a joint tenant may operate upon his own share by selling his or her own interest in the land, which simultaneously causes a severance.⁸ However, beyond this established category, the major common law jurisdictions do not fully agree on what other kinds of unilateral conduct would result in severance.

3 The existing literature tends to approach this issue simply by shoehorning the cases into pre-existing silos.⁹ From the existing literature, however, it is possible to discern two bases underlying the law of unilateral severance. The first is a formalistic approach which asks whether the unilateral dealing in question involves an alienation of the joint tenant’s interest in land. If it does, then the unilateral dealing results in severance. The second is an intention-based approach which asks whether the unilateral dealing in question evinces the joint tenant’s intention to sever the joint tenancy. Although the two approaches may

5 Stuart Bridge, Elizabeth Cooke & Martin Dixon, *Megarry and Wade: The Law of Real Property* (Sweet & Maxwell, 9th Ed, 2019) at para 12-036.

6 See Alvin See, Yip Man & Goh Yihan, *Property and Trust Law in Singapore* (Kluwer Law International, 2018) at pp 81–88; Tang Hang Wu & Kelvin FK Low, *Tan Sook Yee’s Principles of Singapore Land Law* (LexisNexis, 4th Ed, 2019) at pp 216–230; Brendan Edgeworth, *Butt’s Land Law* (Thomson Reuters, 7th Ed, 2017) at pp 267–285; and Stuart Bridge, Elizabeth Cooke & Martin Dixon, *Megarry and Wade: The Law of Real Property* (Sweet & Maxwell, 9th Ed, 2019) at pp 495–504.

7 Brendan Edgeworth, *Butt’s Land Law* (Thomson Reuters, 7th Ed, 2017) at para 6.490.

8 See *Gould v Kemp* 39 ER 959; (1834) 2 My & K 304; *Caldwell v Fellowes* (1869–70) LR 9 Eq 410; *Re Hewett* [1894] 1 Ch 362; *Brown v Raindle* 30 ER 998; (1796) 3 Ves Jr 256; *Goddard v Lewis* (1909) 101 LT 528. See also in Australia: *Wright v Gibbons* (1949) 78 CLR 313 at 327; *Freed v Taffel* [1984] 2 NSWLR 322 at 325; *Walton v Forsyth* (1984) NSW Conv R 55-214. See generally Brendan Edgeworth, *Butt’s Land Law* (Thomson Reuters, 7th Ed, 2017) at p 271; Stuart Bridge, Elizabeth Cooke & Martin Dixon, *Megarry and Wade: The Law of Real Property* (Sweet & Maxwell, 9th Ed, 2019) at para 12-038; Barry C Crown, “Severance of Joint Tenancy of Land by Partial Alienation” (2001) 117 LQR 477 at 482. Even the mere conclusion of a specifically-enforceable contract of sale has this effect. In Singapore, s 53(5) of the Land Titles Act 1993 (2020 Rev Ed) expressly preserves the common law and equitable modes of severance.

9 Brendan Edgeworth, *Butt’s Land Law* (Thomson Reuters, 7th Ed, 2017) at paras 6.530–6.620; Stuart Bridge, Elizabeth Cooke & Martin Dixon, *Megarry and Wade: The Law of Real Property* (Sweet & Maxwell, 9th Ed, 2019) at paras 12-038–12-041.

coincide in certain categories of cases, they may also pull in different directions, for example where the conduct in question evinces a clear intention to sever but does not involve any alienation.

4 This article summarises the application of the formalistic approach in situations where a severing joint tenant unilaterally sells, leases, or mortgages jointly owned land. Next, it puts forth the possible development of an intention-based approach, which allows for better protection of third parties who have dealt with the severing joint tenant and prevents the severing joint tenant from being locked into the survivorship wheel of fortune against his or her wishes.¹⁰ The intention-based approach also provides an escape hatch for victim-joint-tenants in domestic abuse cases. This article then suggests how the intention-based approach can be further refined to address other issues such as the secret severance problem.

II. An overview of Singapore's system of unilateral severance

5 Singapore uses the Torrens system of land registration, under which any person who wants to deal with a specific piece of land would, subject to some exceptions, expect the land register to fully reflect the existing interests in said land.¹¹ However, this does not mean that all unregistered dealings will not be recognised.¹² The Torrens system can accommodate equitable versions of such dealings and,¹³ to be more precise, the system of caveats can protect any unregistered interests involved in such dealings.¹⁴ This article thus proceeds on the basis that both registered and unregistered dealings may cause severance. In Singapore, the method of severance has been provided by s 53 of the Land Titles Act 1993:¹⁵

10 Heather Conway, "Leaving Nothing to Chance: Joint Tenancies, the Right of Survivorship, and Unilateral Severance" (2008) 8 Oxford U Commw LJ 45 at 50.

11 Alvin See, Yip Man & Goh Yihan, *Property and Trust Law in Singapore* (Kluwer Law International, 2018) at p 207; Alvin See, "The Torrens System in Singapore: 75 Years from Conception to Commencement" (2022) 62 *American Journal of Legal History* 66; Tang Hang Wu, "Beyond the Torrens Mirror: A Framework of the *In Personam* Exception to Indefeasibility" (2008) 32 *Melbourne University Law Review* 672; Kelvin Low, "The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities" (2009) 33 *Melbourne University Law Review* 205.

12 Alvin See, "Severance by Unilateral Declaration: Lessons from Singapore" [2019] Conv 138 at 143.

13 Alvin See, "Severance by Unilateral Declaration: Lessons from Singapore" [2019] Conv 138 at 143.

14 Alvin See, "Severance by Unilateral Declaration: Lessons from Singapore" [2019] Conv 138 at 143.

15 Land Titles Act 1993 (2020 Rev Ed).

(5) Without prejudice to any rule or principle of law relating to severance of a joint tenancy, any joint tenant may sever a joint tenancy of an estate or interest in registered land by an instrument of declaration in the approved form and by serving a copy of the instrument of declaration personally or by registered post on the other joint tenants.

(6) Upon the registration of the instrument of declaration which has been duly served as required by subsection (5), the respective registered estates and interests in the registered land are held by the declarant as tenant-in-common with the remaining joint tenants, and the declarant is deemed to hold a share that is equal in proportion to each of the remaining joint tenants as if each and every one of them had held the registered land as tenants-in-common in equal shares prior to the severance.

6 In other words, a joint tenant may unilaterally sever the joint tenancy by a registered declaration,¹⁶ or by “any rule or principle of law relating to severance of a joint tenancy”.¹⁷ The latter category refers to the principles set out in the decision of *William v Hensman*¹⁸ that have been endorsed by the Singapore Court of Appeal.¹⁹ Of these principles, the focus of this article would be on the principle of unilateral severance by “an act of any one of the persons interested operating upon his own share may create a severance as to that share”.²⁰

7 One might query whether a joint tenant has any share of his or her own that can be “operated on” to cause severance. It is difficult to see how this can be the case given that “[t]he interests of each joint tenant in the land held are always the same ... No distinction can be drawn between the interest of any one tenant and that of any other tenant”.²¹ Dixon J in *Wright v Gibbons* sought to address this difficulty by recognising “two not altogether compatible aspects of joint tenancy”.²² The first aspect of joint tenancy entails each joint tenant having “a right shared with his co-tenants to the whole common property, but no individual right to any undivided share in it”.²³ It follows that a joint tenant does not have his or her own share that can be the subject of a dealing. However, the second aspect of joint tenancy entails a joint tenant being “entitled to dispose of an aliquot share” for said joint tenant’s dealing.²⁴

16 Land Titles Act 1993 (2020 Rev Ed) ss 53(5)–53(6).

17 Land Titles Act 1993 (2020 Rev Ed) s 53(5).

18 *William v Hensman* (1861) 70 ER 862.

19 *Sivakolunthu Kumarasamy v Shanmugam Nagaiah* [1987] SLR(R) 702 at [11] and [14].

20 *William v Hensman* (1861) 70 ER 862 at 867.

21 *Wright v Gibbons* (1949) 78 CLR 313 at 323.

22 *Wright v Gibbons* (1949) 78 CLR 313 at 330.

23 *Wright v Gibbons* (1949) 78 CLR 313 at 329–330.

24 *Wright v Gibbons* (1949) 78 CLR 313 at 330.

8 Gray and Gray criticise Dixon J’s second aspect of joint tenancy as paradoxical, in that the dealing would be “both the source and the vehicle of the interest conveyed”.²⁵ Perhaps the way to resolve this paradox is to recognise that it is a *fiction* where the “[dealing] creates the very interest ... which was supposedly the subject-matter of the [dealing] in the first place”.²⁶ Put in another way, it is assumed that severance has occurred at the point in time when the joint tenant enters into a deal. This *simultaneously* gives rise to the joint tenant’s share which forms the subject matter of that very deal. By accepting this fiction, a joint tenant would have his or her own share to be operated on to cause severance.

9 It is uncertain if the fiction goes so far as to confer a joint tenant his or her own share *prior* to the point of the dealing. In the context of enforcing a writ of seizure and sale against a joint tenant,²⁷ it has been recognised that “a joint tenant has a real and present interest in the jointly owned property (as opposed to a future, contingent or speculative interest)”.²⁸ The joint tenant’s share is not the result of severance by a joint tenant’s unilateral dealing, but due to “the severability of the joint tenancy and the ability of a joint tenant to alienate his aliquot share (or potential aliquot share)”.²⁹ However, this position may have the effect of blurring the distinction between a joint tenant and a tenant-in-common. Unlike a tenant-in-common, a joint tenant should not have his or her own share prior to the point of the dealing (when severance occurs). It remains to be seen how Singapore’s apex court will resolve this issue when the opportunity arises.

III. When a joint tenant is operating upon his own share

10 The next question is the kind of dealings by a joint tenant that would amount to operation upon his or her own share and cause severance. We first consider the traditional position that a joint tenant operates upon his or her own share and causes severance when the

25 Kevin Gray & Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th Ed, 2008) at p 946. See also Barry C Crown, “Severance of Joint Tenancy of Land by Partial Alienation” (2001) 117 LQR 477 at 478.

26 Barry C Crown, “Severance of Joint Tenancy of Land by Partial Alienation” (2001) 117 LQR 477 at 478; Alvin See, “Reconciling Joint Tenancies with Writs of Seizure and Sale” [2021] 1 Conv 45 at 47.

27 See Tang Hang Wu, “A Trap for the Unwary: Enforcing Writs of Seizure and Sale Against Joint Tenancies” (2022) 34 SAclJ 151 for a full discussion on the conflicting High Court decisions on whether a joint tenant has an interest that is exigible to a writ of seizure and sale and the intricacies of enforcing a judgment via a writ of seizure and sale against a joint tenant.

28 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [71].

29 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [88].

joint tenant alienates his or her interest in land.³⁰ This view is one that “has been accepted for centuries and that is all that matters for practical purposes”.³¹ The Singapore Court of Appeal in *Chan Lung Kien v Chan Shwe Ching* has,³² albeit in passing, endorsed several English cases which stand for severance by alienation as well.³³ In that case, the court found that an unregistered unilateral declaration of severance by a joint tenant did not amount to severance.³⁴ The court rejected the Crown’s suggestion that an unregistered declaration amounts to an act operating on one’s own share as,³⁵ *inter alia*, it does not amount to an alienation of the joint tenant’s interest and a destruction of any of the four unities.³⁶

11 Severance by alienation is indeed premised on the idea that the unities of title, time or interest have been destroyed.³⁷ The four unities of possession, title, time and interest embody a joint tenancy, and a joint tenancy is severed if one of the unities is destroyed.³⁸ The unity of title, which “requires that all the titles are derived from the same instrument or grant”,³⁹ is destroyed as the transferee, unlike the remaining joint tenants, derives his or her title from the transferor joint tenant. The unity of time, which “requires that all the jointly owned interests be vested at the same time and by virtue of the same event”,⁴⁰ is also destroyed as the transferee obtains an interest in the land at a later point in time through a separate transaction. Finally, the unity of interest, which requires that all the interests are identical in nature, extent and duration,⁴¹ is destroyed as

30 Brendan Edgeworth, *Butt’s Land Law* (Thomson Reuters, 7th Ed, 2017) at paras 6.530–6.620; Stuart Bridge, Elizabeth Cooke & Martin Dixon, *Megarry and Wade: The Law of Real Property* (Sweet & Maxwell, 9th Ed, 2019) at paras 12-038–12-041.

31 Barry C Crown, “Severance of Joint Tenancy of Land by Partial Alienation” (2001) 117 LQR 477 at 478.

32 *Chan Lung Kien v Chan Shwe Ching* [2018] 2 SLR 84 at [31]–[36].

33 *Nielson-Jones v Fedden* [1974] 3 WLR 583; *In re Wilks* (1891) 3 Ch 59 at 62; *Patejche v Powlet* (1740) 4 West T Hard 788 at 789–790.

34 *Chan Lung Kien v Chan Shwe Ching* [2018] 2 SLR 84 at [62].

35 *Chan Lung Kien v Chan Shwe Ching* [2018] 2 SLR 84 at [62].

36 *Chan Lung Kien v Chan Shwe Ching* [2018] 2 SLR 84 at [62]. See also [23]–[43] of the judgment for the common law position that alienation is required, which the court referred to as one of the reasons for finding that there was not an act operating on one’s own share.

37 Joyce Tooher, “Testate or Intestate: Is There Anything for the Estate – Unilateral Severance of a Joint Tenancy” (1998) 24 Monash U L Rev 422 at 427.

38 Joyce Tooher, “Testate or Intestate: Is There Anything for the Estate – Unilateral Severance of a Joint Tenancy” (1998) 24 Monash U L Rev 422 at 424–425.

39 Joyce Tooher, “Testate or Intestate: Is There Anything for the Estate – Unilateral Severance of a Joint Tenancy” (1998) 24 Monash U L Rev 422 at 424.

40 Joyce Tooher, “Testate or Intestate: Is There Anything for the Estate – Unilateral Severance of a Joint Tenancy” (1998) 24 Monash U L Rev 422 at 424.

41 Joyce Tooher, “Testate or Intestate: Is There Anything for the Estate – Unilateral Severance of a Joint Tenancy” (1998) 24 Monash U L Rev 422 at 424–425.

the transferee's interest in the land is of a shorter duration than that of the remaining joint tenants.⁴² Only the unity of possession, which "entitles each co-owner concurrently with the co-owners to present possession and entitlement to the whole property",⁴³ remains as both the transferee and the remaining joint tenants would be entitled to possession of the entire premises.⁴⁴

12 We now examine the different dealings that are commonly considered to cause severance and assess whether they, in fact, cause severance by alienation of the joint tenant's interest in land.

A. *Sale and agreement to sell*

13 A sale is the clearest instance of severance by alienation of a joint tenant's interest in land. A joint tenant may alienate his or her interest in land by transferring it to another person. Under a system of registered land, a sale consists of two stages: (a) an agreement to sell the joint tenant's interest in land; and (b) a registered transfer of said interest to the purchaser.⁴⁵ Since a sale of a joint tenant's interest in land involves a transfer of said interest to the purchaser, it causes severance.⁴⁶ This may be contrasted with a joint tenant's agreement to sell his interest in land *simpliciter*. Suppose that *A* and *B* are joint tenants in Greenacre, and *B* agrees to sell his interest in Greenacre to *C*. The transfer has not been registered yet, so *A* and *B* are still reflected as joint tenants of Greenacre on the land register. Has severance occurred?

14 While a joint tenant's agreement to sell his or her interest in land is short of a registered transfer of said interest, it may cause severance by alienation of said interest in equity.⁴⁷ In *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman*,⁴⁸ the court held that "[t]he passing of the beneficial ownership to a purchaser of land is premised on the availability of specific performance".⁴⁹ If the agreement to sell is specifically enforceable, "equity

42 Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th Ed, 2017) at para 6.60.

43 Joyce Tooher, "Testate or Intestate: Is There Anything for the Estate – Unilateral Severance of a Joint Tenancy" (1998) 24 Monash U L Rev 422 at 424.

44 Barry C Crown, "Severance of Joint Tenancy of Land by Partial Alienation" (2001) 117 LQR 477 at 478 and 484; *Frieze v Unger* [1960] VR 230 at 245.

45 Land Titles Act 1993 (2020 Rev Ed) s 63.

46 Joyce Tooher, "Testate or Intestate: Is There Anything for the Estate – Unilateral Severance of a Joint Tenancy" (1998) 24 Monash U L Rev 422 at 428.

47 *Brown v Raindle* (1796) 3 Ves 256 at 257; *Re Hewett* [1894] 1 Ch 362 at 367; *Burgess v Rawnsley* [1975] Ch 429 at 443; Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th Ed, 2017) at para 6.540.

48 [1994] 1 SLR(R) 233.

49 *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [39].

looks upon as done what has been agreed to be done and the purchaser is deemed the owner in equity as at the date of contract”.⁵⁰ In other words, since the joint tenant would eventually be compelled to transfer his or her interest in land to the purchaser, equity would accelerate this process by deeming that the transfer has already occurred as at the point in time when the parties entered into the agreement.⁵¹ Thus, while the land register continues to show *A* and *B* as joint tenants of Greenacre, *B* has already transferred his beneficial interest in Greenacre to *C* and caused severance by alienation of said interest in equity, such that *A* and *C* would be tenants in common in equity.

15 However, it is important to recognise that an agreement to sell may no longer be specifically enforceable as of right.⁵² While the courts have continued to grant specific performance,⁵³ the Court of Appeal has emphasised it is a discretionary remedy.⁵⁴ It follows that an agreement to sell may not necessarily lead to a transfer of the joint tenant’s interest in land to the purchaser in equity, and there may not be severance by alienation of said interest. Whether an agreement to sell would cause severance thus depends on whether the court grants this discretionary remedy.

B. Lease and lease agreement

16 Suppose *A* and *B* are the joint tenants of Greenacre, and *B* grants *C* a lease over *B*’s interest in Greenacre. When *B* leases his interest in land, the alienation is merely partial because *B* does not give everything away;⁵⁵ *B* retains a reversionary interest, which allows *B* to regain exclusive possession once the lease ends. This is in contrast with a sale where *B* gives away everything he or she has. This raises two questions: (a) whether the partial transfer of *B*’s interest in land amounts to severance; and (b) if so, the duration of the severance.

17 There are conflicting views on whether there is severance by partial alienation of *B*’s interest. Under English law, “both principle and judicial opinion suggest that a lease ... granted by one ... of the joint

50 *Chi Liung Holdings Sdn Bhd v Attorney-General* [1994] 2 SLR(R) 314 at [32].

51 Alvin See, Yip Man & Goh Yihan, *Property and Trust Law in Singapore* (Kluwer Law International, 2018) at p 782; Tang Hang Wu & Kelvin FK Low, *Tan Sook Yee’s Principles of Singapore Land Law* (LexisNexis, 4th Ed, 2019) at pp 447–448.

52 *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2011] 2 SLR 232 at [91] and [106].

53 See for example *Goh Kar Tuck (alias Wu Jiada) v Koh Samuel* [2022] SGHC 165.

54 *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2011] 2 SLR 232 at [91].

55 Barry C Crown, “Severance of Joint Tenancy of Land by Partial Alienation” (2001) 117 LQR 477 at 484.

tenants will effect a severance of the joint tenancy”.⁵⁶ The severance would last “not just for the duration of the lease but thereafter”.⁵⁷ In other words, the lease effects a permanent severance of the joint tenancy, such that *A* and *C* would permanently hold Greenacre as tenants in common. If *B* dies at any point after he leases his interest in land, the rule of survivorship would not operate to make *A* the sole proprietor of Greenacre.

18 The position is less clear under Australian law. The more recent Australian authorities support the view that a joint tenant’s grant of a lease does not cause severance.⁵⁸ Instead, it would cause a suspension of the joint tenancy.⁵⁹ If we look past the semantics, however, we will see that the Australian courts support a finding of severance as well. Upon *B*’s grant of a lease to *C*, the joint tenancy between *A* and *B* would be “suspended”, and this could only mean that *A* and *C* are tenants in common. Suppose *B* dies during the lease. The rule of survivorship would not operate to make *A* the sole owner of Greenacre. This shows that the joint tenancy has effectively been severed upon *B*’s grant of the lease. However, unlike under English law, the severance would only last for the duration of the lease. Suppose *B* now dies after the lease has ended. *A* and *B* would have returned to being joint tenants, and the rule of survivorship would operate to make *A* the sole owner of Greenacre.

19 The Singapore High Court has, albeit in *obiter* and in the context of a writ of sale and seizure, recognised the attractiveness of the Australian position of temporary severance.⁶⁰ One might argue that the Australian position of temporary severance is indeed preferable to the English position of permanent severance. The basis for the English position is “unclear”⁶¹ and most certainly “not free from doubt”.⁶² On the other hand, the Australian position of temporary severance provides for an outcome dictated by clear principle. If an outright transfer of all the joint tenant’s interest in land leads to permanent severance, then it would be logical to

56 Stuart Bridge, Elizabeth Cooke & Martin Dixon, *Megarry and Wade: The Law of Real Property* (Sweet & Maxwell, 9th Ed, 2019) at para 12-040.

57 Stuart Bridge, Elizabeth Cooke & Martin Dixon, *Megarry and Wade: The Law of Real Property* (Sweet & Maxwell, 9th Ed, 2019) at para 12-040; *Sym’s Case* (1584) Cro Eliz 33; *Connolly v Connolly* (1866) 17 Ir Ch R 208 at 233; *Pleadal’s Case* (1579) 2 Leon 159.

58 *Halsbury’s Laws of Australia* (LexisNexis Australia, 2020) at [355-11665]; *Frieze v Unger* [1960] VR 230; *Wright v Gibbons* (1949) 78 CLR 313; *Baxter v Harrigan* [1963] NSW 432 at 434-436; *Oates v Oates* [1949] SASR 37 at 40.

59 *Wright v Gibbons* (1949) 78 CLR 313 at 330; *Frieze v Unger* [1960] VR 230 at 243.

60 *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at [103]-[104].

61 Barry C Crown, “Severance of Joint Tenancy of Land by Partial Alienation” (2001) 117 LQR 477 at 485-486.

62 Stuart Bridge, Elizabeth Cooke & Martin Dixon, *Megarry and Wade: The Law of Real Property* (Sweet & Maxwell, 9th Ed, 2019) at para 12-040.

say that a partial transfer of the interest, *ie*, for a limited duration only, should lead to temporary severance for said duration. Even if alienation is characterised by the destruction of the four unities, it can be argued that a temporary severance “is created ... precisely to the extent the lease is inconsistent with the four unities”.⁶³ Once the lease ceases and the lessee is out of the picture, the unity of title is restored as the lessor and his or her other joint tenants derive their titles from the same instrument or grant. The unity of time is also restored as the lessor and his or her other joint tenants’ interests were vested at the same time and by virtue of the same event. Lastly, the unity of interest is also restored as the lessor and his or her other joint tenants’ interests are of the same extent, nature and duration. Hence, the Australian position of temporary severance is preferable as it provides an outcome dictated by principle.

20 Just as how a specifically-enforceable agreement to sell may cause permanent severance, a specifically-enforceable lease agreement may lead to temporary severance. Even if the lease is unregistered and the purchaser is not reflected as a lessee on the land register, the purchaser is deemed in equity as the lessee as at the date of the specifically-enforceable lease agreement. This was the position taken by the Singapore Court of Appeal in *Golden Village Multiplex Pte Ltd v Marina Centre Holdings Pte Ltd*,⁶⁴ which went even further to hold that this could be the case even if the lease agreement is not specifically enforceable.⁶⁵ Thus, a lease agreement may amount to a partial transfer of a joint tenant’s interest in land to the lessee in equity and cause temporary severance.

C. *Mortgage*

21 Traditional mortgages at common law cause severance by alienation of the mortgagor’s interest in land as the mortgagor is required to transfer all of its said interest to the mortgagee.⁶⁶ Modern day mortgages lie on the other end of the spectrum as no interest in land is being transferred to the mortgagee. Under most systems of registered land, such as Singapore’s Torrens system, the grant of a registered mortgage does not “operate as a transfer of the land mortgage, but has effect as a

63 John A Sodergren, “Consequences of a Lease to a Third Party Made by One Joint Tenant” (1978) 66 *California Law Review* 69 at 91–92.

64 *Golden Village Multiplex Pte Ltd v Marina Centre Holdings Pte Ltd* [2002] 1 SLR(R) 169 at [12] and [15].

65 *Golden Village Multiplex Pte Ltd v Marina Centre Holdings Pte Ltd* [2002] 1 SLR(R) 169 at [14]–[15].

66 Barry C Crown, “Severance of Joint Tenancy of Land by Partial Alienation” (2001) 117 LQR 477 at 480.

security only”.⁶⁷ Unsurprisingly, the same goes for Australian law where the Torrens system originated.⁶⁸

22 Suppose *A* and *B* are joint tenants of Greenacre, and *B* grants a modern-day mortgage over his interest in Greenacre to *C*. Since there is no transfer of the mortgagor’s interest in land to the mortgagee, it comes as no surprise that *B*’s mortgage to *C* does not cause severance by alienation of *B*’s interest in Greenacre. This is the position taken by the Australian courts in *Lyons v Lyons*,⁶⁹ where McInerney AJ effectively confined severance by an act operating on one’s own share to an alienation of a joint tenant’s interest in land⁷⁰ and held that the grant of a mortgage does not cause severance.⁷¹ Therefore, if *B* dies while the mortgage remains undischarged, the rule of survivorship would operate such that *A* becomes the sole owner of Greenacre. Since *B*’s interest in Greenacre ceases to exist, the subject matter of *B*’s mortgage to *C* ceases to exist as well. Conversely, if *A* dies while the mortgage remains undischarged, the rule of survivorship would operate such that *B* becomes the sole owner of Greenacre, which continues to be the subject matter of *B*’s mortgage to *C*.

23 On the other hand, it comes as a surprise that, under English law, a joint tenant’s grant of a mortgage causes severance.⁷² If we are to strictly abide by the traditional principle of severance by alienation, it is difficult to see how this outcome is justified. Modern mortgages under the Law of Property Act 1925⁷³ are created “by a charge by deed expressed to be by way of legal mortgage”.⁷⁴ In other words, as with charges, there would not be a transfer of the mortgagor’s interest in land to the mortgagee.⁷⁵

67 Land Titles Act 1993 (2020 Rev Ed) s 68(3).

68 Real Property Act 1900 (NSW) s 57; Transfer of Land Act 1958 (Vic) s 74(2); Land Title Act 1994 (Qld) s 74; Real Property Act 1886 (SA) s 132; Land Titles Act 1980 (Tas) s 73; Transfer of Land Act 1893 (WA) s 106(1); Land Titles Act 1925 (ACT) s 93(1); Land Title Act 2000 (NT) s 76; *Guthrie v Australia & New Zealand Banking Group Ltd* (1991) 23 NSWLR 672.

69 *Lyons v Lyons* [1967] VR 169.

70 *Lyons v Lyons* [1967] VR 169 at 172.

71 *Lyons v Lyons* [1967] VR 169. For charges, see *Anderson Solicitors v Schigulski* (2004) 88 SASR 1.

72 Stuart Bridge, Elizabeth Cooke & Martin Dixon, *Megarry and Wade: The Law of Real Property* (Sweet & Maxwell, 9th Ed, 2019) at para 12-040; *York v Stone* (1709) 1 Salk 158; *Williams v Hensman* (1861) 1 J & H 546 at 558; *Re Pollard’s Estate* (1863) 3 De GJ 7 S 541 at 558; *Re Sharer* (1912) 57 SJ 60.

73 c 20 (UK).

74 Law of Property Act 1925 (c 20) (UK) s 86(1).

75 Stuart Bridge, Elizabeth Cooke & Martin Dixon, *Megarry and Wade: The Law of Real Property* (Sweet & Maxwell, 9th Ed, 2019) at para 23-001; *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207 at 227; *Re Cosslett (Contractors) Ltd* [1998] Ch 495 at 508.

Yet, the court in *National Securities Ltd v Hegerty*⁷⁶ found, without much substantiation, that an equitable mortgage against the husband joint tenant's share of the interest in the house would cause severance by alienation.⁷⁷

24 This leaves us to wonder if the English courts have a broader notion of operating upon one's own share, which goes beyond the concept of severance by alienation of a joint tenant's interest in land. Clearly this concept is incapable of explaining how a joint tenant's grant of a mortgage over his or her interest in land causes severance. Furthermore, it would be difficult to extend this concept to accommodate the outcome that a joint tenant's grant of a mortgage causes severance. The truth is that many cases on common law severance by alienation rely on quotations from *Coke upon Littleton*⁷⁸ published in 1628 rather than on logical deduction.⁷⁹ These quotations simply do not provide a logical basis for finding severance by alienation in a situation where there is no transfer of the joint tenant's interest in land.⁸⁰

25 Nevertheless, it is important for the courts to find severance in order to protect the interests of third parties and prevent them from obtaining a windfall. If one takes the traditional view that *B*'s mortgage does not cause severance by alienation, the subject matter of *B*'s mortgage to *C* will cease to exist if *B* dies before *A* does. *C* will thus lose its security interests if *B* dies before *A* does. In contrast, if the courts find severance, *B*'s successor will inherit *B*'s interest in Greenacre upon *B*'s death, which will remain subjected to *C*'s mortgage. This protects *C*'s security interests even if *B* dies before *A* does.⁸¹ To hold otherwise would be to work against lenders like *C*,⁸² who would potentially be "in the position

76 [1965] 1 QB 850.

77 *National Securities Ltd v Hegerty* [1965] 1 QB 850 at 854. For charges, see *Monarch Aluminium v Rickman* [1989] CLY 1526; *James F Walker v Susan Lundborg* [2008] UKPC 17; *C Putnam & Sons v Taylor* [2009] BPIR 769; *First National Bank plc v Achampong* [2004] 1 FCR 18.

78 Edward Coke, *The First Part of the Institutes of the Laws of England, Or, a Commentary upon Littleton: Not the Name of the Author Only, but of the Law Itself* (J & WT Clarke, 1823) at p ccxvi, para 606 and p iv, para 772.

79 Barry C Crown, "Severance of Joint Tenancy of Land by Partial Alienation" (2001) 117 LQR 477 at 478–479.

80 Barry C Crown, "Severance of Joint Tenancy of Land by Partial Alienation" (2001) 117 LQR 477 at 478–479.

81 *Report on Joint Tenancy* (British Columbia Law Institute, 2012) at p 28. Cf, The Law Reform Commission of Ireland, *Consultation Paper on Judgment Mortgages* (LRC CP 30 – 2004, 2004) at para 6.06.

82 Heather Conway, "Leaving Nothing to Chance: Joint Tenancies, the Right of Survivorship, and Unilateral Severance" (2008) 8 Oxford U Commw LJ 45 at 68.

of an unsecured creditor”⁸³ and discourage lending to joint tenants. At the same time, severance ensures that if *A* dies before *B* does, *B* does not obtain the whole of the interest in Greenacre such that *C* gets a windfall in terms of increased security.⁸⁴

26 We may rely on an intention-based approach to explain why a joint tenant’s grant of a mortgage amounts to operating upon his or her own share and causes severance. The courts may find that *B*’s mortgage severs the joint tenancy as it evinces *B*’s intention to sever. In particular, the courts may find that *B* intended to sever the joint tenancy to prevent the subject matter of his or her mortgage to *C* from being extinguished upon his or her death.⁸⁵ This is because *B* and *C* could not have intended for the subject matter of *C*’s security to disappear if *B* dies before *A* does.⁸⁶ This severance should only be temporary. As a matter of logic, since *B* only intended to sever the joint tenancy to give effect to the mortgage, the severance should only last for the duration which the mortgage remains undischarged. We will further explore the role of intention in the next Part.

IV. The possibility of an intention-based approach

27 The intention-based approach is, as explained in the preceding section, preferred to severance by alienation because it protects the interests of third parties and prevents them from obtaining a windfall. Additionally, allowing severance where a joint tenant intends for it would also provide an “escape hatch” for joint tenants when their relationship changes.⁸⁷ It recognises the “realities of human life and the changing nature of relationships between joint tenants as personal needs and circumstances alter with time”⁸⁸ A joint tenancy is not meant to be immutable,⁸⁹ and allowing severance in such a scenario would prevent

83 Heather Conway, “Leaving Nothing to Chance: Joint Tenancies, the Right of Survivorship, and Unilateral Severance” (2008) 8 Oxford U Commw LJ 45 at 68.

84 *Report on Joint Tenancy* (British Columbia Law Institute, 2012) at p 28. Cf, The Law Reform Commission of Ireland, *Consultation Paper on Judgment Mortgages* (LRC CP 30 – 2004, 2004) at para 6.06.

85 *Re Sharer* (1912) 57 SJ 60.

86 *Re Sharer* (1912) 57 SJ 60; “Protecting a Mortgagee’s Interest against a Surviving Joint Tenant” (1959) 11(3) *Stanford Law Review* 577; Eric Chim, “Equitable Severance of Joint Tenancy by Charging Orders: In Search of Justification” [2021] 1 Conv 55 at 62.

87 Brendan Edgeworth, *Butt’s Land Law* (Thomson Reuters, 7th Ed, 2017) at p 268; Kate Galloway & Kristy Richardson, “Severing a Joint Tenancy: A Queensland Analysis” (2009) 16 APLJ 245.

88 Heather Conway, “Leaving Nothing to Chance: Joint Tenancies, the Right of Survivorship, and Unilateral Severance” (2008) 8 Oxford U Commw LJ 45 at 51–52.

89 New South Wales Law Reform Commission, *Unilateral Severance of a Joint Tenancy* (Report 73, 1994) at para 5.3.

the severing joint tenant from being locked into “the uncertainty and potential unfairness of survivorship”⁹⁰ against his or her wishes.⁹¹ This is especially important in the case of a victim-joint-tenant who is in an abusive relationship with a perpetrator-joint-tenant. In such a case, the joint tenancy may be “used by the perpetrator to control the victim on a variety of levels”⁹² and the victim is left with a conundrum – stay trapped in the property with the abuser, face the threat of homelessness if the perpetrator serves a notice to quit the tenancy or breaches the conditions of the tenancy out of spite, or leave while remaining liable for a property he or she no longer wishes to live in.⁹³ Allowing severance would provide an escape hatch for the victim-joint-tenant and protect his or her interest in land.

28 Furthermore, the other joint tenants (the “passive joint tenants”) would not be put at a practical disadvantage *vis-à-vis* the severing joint tenant. While the passive joint tenants may perceive their share of the land to be enhanced over time by survivorship, this is “an innately speculative venture” subject to the “vagaries and uncertainties of life”.⁹⁴ There would also be a reciprocal effect on the severing joint tenant, who also loses his or her chance to win the survivorship wheel of fortune. Suppose *A* and *B*’s joint tenancy of Greenacre has been severed. While *A* no longer gets to be the sole owner of Greenacre upon *B*’s death, *B* does not get to be the sole owner of Greenacre upon *A*’s death either. Hence, allowing for severance would not prejudice the passive joint tenants.

29 Although the intention-based approach is preferred to severance by alienation, the intention-based approach has its own set of problems. Firstly, there is the practical problem of determining a joint tenant’s intention at the point of his or her dealing. Secondly, there is the problem of a joint tenant severing the joint tenancy behind the backs of the passive joint tenants. This article now sets out these problems in greater detail

90 Heather Conway, “Leaving Nothing to Chance: Joint Tenancies, the Right of Survivorship, and Unilateral Severance” (2008) 8 Oxford U Commw LJ 45 at 49.

91 Heather Conway, “Leaving Nothing to Chance: Joint Tenancies, the Right of Survivorship, and Unilateral Severance” (2008) 8 Oxford U Commw LJ 45 at 66.

92 Kelda Henderson, *The Role of Housing in a Coordinated Community Response to Domestic Abuse* at p 78 (2019) (unpublished thesis, Durham University).

93 The UK Government recognises the negative risks a joint tenancy may pose on victims of domestic abuse and have recently consulted the public on the matter. See “Consultation on the impacts of joint tenancies on victims of domestic abuse” *Department for Levelling Up, Housing & Communities* (15 February 2022) <<https://www.gov.uk/government/consultations/consultation-on-the-impacts-of-joint-tenancies-on-victims-of-domestic-abuse/consultation-on-the-impacts-of-joint-tenancies-on-victims-of-domestic-abuse#introduction>> (accessed 5 August 2022).

94 Heather Conway, “Leaving Nothing to Chance: Joint Tenancies, the Right of Survivorship, and Unilateral Severance” (2008) 8 Oxford U Commw LJ 45 at 50.

and explores how the intention-based approach may be modified to address them.

A. *Finding an intention to sever*

30 There is practical difficulty with determining the severing joint tenant's intention for a situation where one of the joint tenants dies. Most disputes involve parties who have not considered what would happen if one of them dies.⁹⁵ In such cases, the courts would be left to deduce whether there is an intention to sever from "what are very often the slenderest of indications".⁹⁶

31 Even in the case of mortgages, the issue of intention is not always clear. Suppose *A* and *B* are joint tenants of Greenacre, and *B* grants a mortgage over his or her interest in Greenacre to *C*. On the one hand, and as alluded to in Part III of this article, it may be argued that *B* (the mortgagor) intended for severance to ensure that the subject matter of the mortgage given to *C* continues to exist even upon *B*'s death. On the other hand, one may argue, as Crown does,⁹⁷ that *B* intended for the subject matter of the mortgage to be extinguished by his or her death, and *C* willingly accepted such a risk when *C* entered into the mortgage notwithstanding his or her knowledge that *B* is a joint tenant. Any conclusion on *B*'s intention about severance would thus appear to be an arbitrary one, especially since *B*'s actual intention may be more ambivalent – "he may not be concerned that the security upon which he has obtained a financial advantage will be lost should he predecease his fellow joint tenant".⁹⁸

32 Nield has suggested in passing that the intention to sever can be "express ... by the notice of one joint tenant or presumed or implied ... from the nature of a particular transaction".⁹⁹ This suggestion overcomes the practical difficulty of determining a joint tenant's precise intention as the joint tenant is required to express his or her intention to sever. Otherwise, his or her intention to sever may be presumed in limited

95 Richard H Helmholz, "Realism and Formalism in the Severance of Joint Tenancies" (1998) 77 Neb L Rev 1 at 25.

96 Richard H Helmholz, "Realism and Formalism in the Severance of Joint Tenancies" (1998) 77 Neb L Rev 1 at 25.

97 Barry C Crown, "Severance of Joint Tenancy of Land by Partial Alienation" (2001) 117 LQR 477 at 484.

98 Sarah Nield, "To Sever or Not to Sever: The Effect of a Mortgage by One Joint Tenant" [2001] Conv 462 at 466.

99 Sarah Nield, "To Sever or Not to Sever: The Effect of a Mortgage by One Joint Tenant" [2001] Conv 462 at 473–474.

situations recognised by the courts, and we do not have to deduce his or her actual intentions from the slenderest of indications.

(1) *Severance by express intention*

33 The clearest method of severance by express intention would be a registered declaration of severance, but it may not be the only way to sever a joint tenancy by express intention. In the UK, for instance, s 36(2) of the Law of Property Act 1925 allows a joint tenant to sever the joint tenancy by giving the other joint tenants “a notice in writing of such desire”.¹⁰⁰

34 It is unclear whether a notice in writing can amount to severance in Singapore. Section 53(5) of Singapore’s Land Titles Act 1993 provides that a joint tenant “may sever a joint tenancy of an estate or interest in registered land by an instrument of declaration in the approved form and by serving a copy of the instrument of declaration personally or by registered post on the other joint tenants”. Section 53(6) then provides that “[u]pon the registration of the instrument of declaration which has been duly served ... the respective ... interests in the registered land shall be held by the declarant as tenant-in-common with the remaining joint tenants”.¹⁰¹ Section 53(6) thus suggests that the joint tenancy will only be severed into a tenancy-in-common upon the registration of a statutory declaration. The Singapore Court of Appeal found in *Diaz Priscillia v Diaz Angela*¹⁰² that a joint tenant’s unregistered statutory declaration of severance would suffice to effect severance.¹⁰³ In the subsequent Court of Appeal decision of *Chan Lung Kien v Chan Shwe Ching*, however, the Court of Appeal expressed their view that “the holding in *Diaz* cannot be supported”.¹⁰⁴ It thus remains to be seen whether there can be severance by express intention when a joint tenant in Singapore serves a statutory declaration of severance on his or her other joint tenants and attempts to procure its registration.

100 See also *Burgess v Rawnsley* [1975] 3 All ER 142; *Dunbabin v Dunbabin* [2022] EWHC 241 (Ch); *Fantini v Scrutton* [2020] EWHC 1552 (Ch); *Davis v Smith* [2011] EWCA Civ 1603; *Quigley v Masterson* [2012] 1 All ER 1224.

101 Land Titles Act 1993 (2020 Rev Ed) s 53(6).

102 [1997] 3 SLR(R) 759.

103 *Diaz Priscillia v Diaz Angela* [1997] 3 SLR(R) 759 at [24]–[25].

104 [2018] 2 SLR 84 at [65]. See Alvin WL See “Severance by Unilateral Declaration: Lessons from Singapore” [2019] Conv 138 at 144–145 for a fuller discussion of this case.

(2) *Severance by presumed intention*

35 A joint tenant should only be *presumed* to have intended to sever in limited situations recognised by the courts. It has been suggested that “equity should presume an intention to sever where it is necessary to fully implement the mortgage in the form intended by the parties”.¹⁰⁵ In *Re Sharer*, for instance, the English court held that the equitable mortgage severed the joint tenancy as the mortgagor could not have intended that “the security he gave should be avoided if he chanced to predecease his co-owner”.¹⁰⁶ Likewise, Davey CJBC suggested in his dissenting judgment in *Re Young*¹⁰⁷ that “equity presumes that a joint tenant intended severance in order [to] give effect to the [charge over the judgment debtor’s interest in land]”.¹⁰⁸ Finally, Nield observes that the law presumes an intention to sever where a joint tenant grants a lease for possession of land.¹⁰⁹ These dealings can only be given effect to if the right of survivorship does not operate when the dealer joint tenant dies during the lease. Otherwise, the whole of the interest in the land would be held by the surviving joint tenant, and the subject matter of the dealing disappears. It remains to be seen if the courts would presume an intention of a joint tenant to sever the joint tenancy and, if so, when.

36 If a joint tenant’s intention to sever the joint tenancy may be presumed, there should be room for the presumed intention to be rebutted on the facts of each case. Take this for an example. Suppose Greenacre is valued at \$500,000, and C would ordinarily grant a loan of \$400,000 if it were to be taken as security. If C only approves a loan of \$250,000, it may be argued that B intended for the subject matter of the mortgage to be extinguished by his or her death, and C willingly accepted such a risk after lowering its credit exposure (the maximum potential loss to C if B defaults on payment). Thus, B’s presumed intention to sever would be rebutted. The same goes for a situation where C allows B to take up a loan of \$400,000, but additionally requires B to secure the loan through other means. If, on the other hand, C allows B to take up a loan of \$400,000 secured only by a mortgage over B’s joint tenancy in Greenacre, the

105 Sarah Nield, “To Sever or Not to Sever: The Effect of a Mortgage by One Joint Tenant” [2001] Conv 462 at 466.

106 Barry C Crown, “Severance of Joint Tenancy of Land by Partial Alienation” (2001) 117 LQR 477 at 483; *Re Sharer* (1912) 57 SJ 60.

107 [1968] BCJ No 209.

108 Sarah Nield, “To Sever or Not to Sever: The Effect of a Mortgage by One Joint Tenant” [2001] Conv 462 at 471. See also *Re Young* [1968] BCJ No 209. Cf the majority decision in *Re Young* [1968] BCJ No 209; *Anderson Solicitors v Schigulski* (2004) 88 SASR 1; *Ho Wai Kwan v Chan Hon Kuen* [2015] 2 HKC 99; and *Ego Finance Ltd v Cham Kin Man* [2018] HKDC 741.

109 Sarah Nield, “To Sever or Not to Sever: The Effect of a Mortgage by One Joint Tenant” [2001] Conv 462 at 467.

court may find that *B* intended for severance to ensure that the subject matter of the mortgage given to *C* continues to exist even upon *B*'s death. *C* is unlikely to have accepted the risk of having the subject matter of its security disappearing upon *B*'s death, as this would leave *C* in the position of an unsecured creditor. Thus, *B*'s presumed intention to sever would not be rebutted in such a situation.

B. Addressing the problem of secret severance

37 Suppose *A* and *B* are joint tenants of Greenacre, and *B* grants a mortgage to *C* without *A*'s knowledge. If *B* dies first, his successors will have the opportunity to discover the mortgage documents. They will then produce the mortgage documents to argue that the grant of the mortgage caused a severance. This allows them to claim *B*'s share of the tenancy in common. However, if *B* survives *A*, *B* would be able to hide evidence of the severance by hiding the mortgage documents, and the joint tenancy continues. *B* would then get the whole of the interest in Greenacre, while *A*'s successors get nothing. *B* thus gets to have the cake and eat it too. On the other hand, *A* stands to lose in both scenarios. Thus, allowing a joint tenant's secret dealing to result in severance would cause unfairness to the passive joint tenants. This is also known by several academics, such as Crown and Conway, as the "secret severance problem".¹¹⁰

38 The unfairness to the passive joint tenants is a policy consideration militating against a finding that there was severance upon *B*'s grant of the mortgage, and it has been judicially recognised by Australian and English courts. In *Lyons v Lyons*, where the Victorian court rejected the role of intention and found that the mortgage did not sever the joint tenancy,¹¹¹ the court was concerned about an intention "declared only behind the backs of the other persons interested".¹¹² In the seminal English case of *Williams v Hensman*, it was recognised that severance should not depend on a joint tenant's intention to sever his or her particular share, "declared only behind the backs of the other persons interested".¹¹³

110 Barry C Crown, "Severance of Joint Tenancy of Land by Partial Alienation" (2001) 117 LQR 477 at 483 and 489; Heather Conway, "Leaving Nothing to Chance: Joint Tenancies, the Right of Survivorship, and Unilateral Severance" (2008) 8 Oxford U Commw LJ 45 at 70–71.

111 *Lyons v Lyons* [1967] VR 169 at 179.

112 *Lyons v Lyons* [1967] VR 169 at 170–172; *In the Marriage of Pertsoulis* (1980) 6 Fam LR 39 at 43–47; *McNab v Earle* [1981] 2 NSWLR 673 at 675–676; *Freed v Taffel* [1984] 2 NSWLR 322 at 324–325; *Patzak v Lytton* [1984] WAR 353; *Corin v Patton* [1990] 92 ALR 1 at 5.

113 *William v Hensman* (1861) 1 J & H 546 at 557.

39 However, the protection of third-party interests is a competing policy consideration in favour of severance. If *B* and *C* intend for the mortgage to operate so long as *B*'s loan is undischarged, and *C* grants *B* the loan on this basis, it would be unfair to *C* if the mortgage ceases to exist upon *B*'s death even when the loan remains undischarged. This consideration would support the finding of severance upon *B*'s grant of the mortgage to *C*.

40 The competing interests of passive joint tenants and third parties have, as Chim points out, simply been overlooked by the technical approach of severance by alienation.¹¹⁴ This is because the only question to be had under such an approach is whether the severing joint tenant has alienated his or her interest in land. While the intention-based approach can protect third-party interests, it needs to be modified in a manner which strikes a balance between the interests of passive joint tenants and third parties. There are three possible ways to employ the intention-based approach in a manner which strikes this balance.

(1) *Requiring a registered declaration of severance*

41 A joint tenant may be required to register a statutory declaration of severance for there to be severance. This would protect third-party interests upon the joint tenant's registered declaration of severance and ensure that the other joint tenants would be informed of the severance. However, this suggestion should be treated with caution for two reasons. First, notwithstanding that a joint tenant has operated upon his or her own share, there would not be any severance if the joint tenant did not register a declaration of severance. The provision in the Singapore Land Titles Act 1993, which provides that severance by registered declaration is "without prejudice to any rule or principle of law relating to severance of a joint tenancy",¹¹⁵ would thus be rendered redundant. This contravenes the legislative intention for severance by registered declaration to be "an additional means of severing a joint tenancy"¹¹⁶ and for "[o]ther recognised methods of severing a joint tenancy ... [to] still be applicable".¹¹⁷

42 Second, a key consideration for unilateral severance is the provision of "an efficient and inexpensive mechanism to facilitate joint

114 Eric Chim, "Equitable Severance of Joint Tenancy by Charging Orders: In Search of Justification" [2021] 1 Conv 55 at 61.

115 Land Titles Act 1993 (2020 Rev Ed) s 53(5).

116 Singapore Parl Debates; vol 61; cols 475–476; [30 August 1993]. See also *Diaz Priscillia v Diaz Angela* [1997] 3 SLR(R) 759 at [21]–[23] and [27].

117 Singapore Parl Debates; vol 61; cols 475–476; [30 August 1993]. See also *Diaz Priscillia v Diaz Angela* [1997] 3 SLR(R) 759 at [21]–[23] and [27].

tenants who wish to leave their share of such property to someone else, especially in cases of imminent death”.¹¹⁸ The Singapore Parliament, for example, introduced unilateral severance by registration to recognise the situation where “a co-owner may wish to sever the joint tenancy in a simpler way”.¹¹⁹ Similarly, we should not additionally require a registered declaration of severance and impede the efficiency of severance by an act operating upon one’s own share.

(2) *Imposing a duty on the severing joint tenant*

43 Tooher proposes imposing a duty on the severing joint tenant to notify the other joint tenants of the severance within a reasonable time from the severing joint tenant’s dealing.¹²⁰ A breach of this duty “could be an offence and attract a penalty”.¹²¹ Tooher’s suggestion would reduce the incidence of secret dealing as the severing joint tenant would be encouraged to fulfil his or her duty to notify the other joint tenants of the dealing in order to avoid penalty. At the same time, there would be severance regardless of whether the other joint tenants are notified, and the efficiency of severance by an act operating upon one’s own share would not be compromised.

(3) *The doctrine of temporary severance*

44 The doctrine of temporary severance would also provide a meaningful way to strike a balance between the interests of passive joint tenants and third parties, and this serves as an additional reason for adopting the doctrine of temporary severance in the context of leases and mortgages.¹²² The doctrine of temporary severance would protect third-party interests. Suppose *A* and *B* are joint tenants of Greenacre, and *B* grants a mortgage to *C* without *A*’s knowledge. There would be temporary severance while the loan remains unpaid, and the mortgage remains undischarged. This will serve to protect *C*’s interests as a mortgagee if *B* dies before *B* discharges the loan. Upon *B*’s death, *C* can produce the mortgage documents as proof that the joint tenancy between *A* and *B* has been temporarily severed. *B*’s successors will then inherit *B*’s share of the tenancy in common, which is subject to *C*’s mortgage.

118 Heather Conway, “Leaving Nothing to Chance: Joint Tenancies, the Right of Survivorship, and Unilateral Severance” (2008) 8 Oxford U Commw LJ 45 at 70.

119 Singapore Parl Debates; vol 60; col 376; [18 January 1993].

120 Joyce Tooher, “Windfall by Wager or Will – Unilateral Severance of a Joint Tenancy” (1998) 24 Monash U L Rev 399 at 421.

121 Joyce Tooher, “Windfall by Wager or Will – Unilateral Severance of a Joint Tenancy” (1998) 24 Monash U L Rev 399 at 421.

122 The other reasons for adopting the doctrine of temporary severance in the context of leases and mortgages may be found in Parts III.B and III.C of this article.

45 At the same time, the doctrine of temporary severance would ensure that the passive joint tenants' interests are compromised only to the extent necessary to protect third-party interests. The joint tenancy would be restored once the mortgage is discharged, and *B* would no longer get to both: (a) rely on the rule of survivorship to obtain the whole interest in Greenacre if he survives *A*; and (b) avoid the rule of survivorship and pass down his or her interest in Greenacre to his or her successors upon his or her death.

V. Conclusion

46 The traditional view of an act operating upon one's own share is a dealing by a joint tenant which alienates his or her interest in land. In other words, a joint tenant's dealing will amount to an act of operating upon his or her own share and cause severance if it entails the joint tenant transferring his or her interest in land to someone else. In so far as sales and leases are concerned, this concept adequately explains why a joint tenant has operated upon his or her own share and severed the joint tenancy. However, this concept does not allow severance upon a joint tenant's grant of a modern-day mortgage, notwithstanding that it would protect the mortgagee's interests and prevent the mortgagor from being locked into the survivorship wheel of fortune against his or her wishes. The intention-based approach would, instead, help us to achieve the desirable outcome of severance upon a joint tenant's grant of a modern-day mortgage. It would also recognise the changing nature of relationships and, perhaps more importantly, provide an escape hatch for victim-joint-tenants and protect their interests in land.

47 This leaves us with two options. First, we accept alienation as the guiding principle for when a joint tenant is operating upon his or her own share, notwithstanding that it would lead to an undesirable outcome. Second, we depart from the traditional position that alienation is required and use the joint tenant's intention to sever as the guiding principle for when a joint tenant is operating upon his or her own share, at least where said intention is clearly manifested in writing. As demonstrated in Parts III and IV of this article, the second option may be preferable as it would protect third-party interests and, more importantly, prevent the severing joint tenant from being locked into the survivorship wheel of fortune against his or her wishes. Furthermore, an intention-based approach would not be entirely foreign to Singapore. After all, unilateral severance by registration was introduced into Singapore to accommodate the situation where a joint tenant does not "wish the survivor to take

the whole of the land”¹²³ Under the intention-based approach, one would ask whether the unilateral dealing in question evinces the joint tenant’s intention to sever the joint tenancy in clear writing and, if so, for how long. The joint tenancy would then be severed accordingly. If not, one would assess whether the unilateral dealing in question falls within a recognised situation, if any, where the courts would presume the joint tenant’s intention to sever the joint tenancy.

48 We must additionally address the secret severance problem, which causes unfairness to passive joint tenants. Part IV of this article has explained that the potential unfairness to passive joint tenants must be balanced against the protection of third-party interests. The doctrine of temporary severance would strike this balance by compromising the interests of passive joint tenants only to the extent necessary to protect third-party interests. Part III of this article has demonstrated how the doctrine of temporary severance can be incorporated into the intention-based approach. Singapore could, alternatively and in addition to the intention-based approach, consider exploring the possibility of imposing a duty on a severing joint tenant to notify his or her other joint tenants of the severance within a reasonable time from the act causing severance.

49 An issue which warrants further consideration beyond the scope of this article is the respective tax implications of the alienation-based approach and the intention-based approach. If the alienation-based approach is accepted, severance would be caused upon an alienation of a joint tenant’s interest in land; there would be a “conveyance, assignment or transfer on sale of any immovable property or any interest of the immovable property”¹²⁴ that is subject to stamp duty.¹²⁵ If, on the other hand, the intention-based approach is accepted, the question arises as to which dealings by a joint tenant are subject to stamp duty. Further questions also arise as to whether non-payment of stamp duty would affect severance under either approach.

123 Singapore Parl Debates; vol 60; col 376; [18 January 1993].

124 Stamp Duties Act 1929 (2020 Rev Ed) First Schedule, Art 3.

125 Stamp Duties Act 1929 (2020 Rev Ed) s 4(1).