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Joint Tenancy: Some Thoughts on Creditor's Rights

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JOINT TENANCY: SOME THOUGHTS ON CREDITOR'S RIGHTS

INTRODUCTION

It appears that the popularity of the joint tenancy, especially between husband and wife, for the ownership of real property persists.[1] Notwithstanding the tax advantages,[2] many persons apparently feel that the advantages of survivorship which the joint tenancy provides makes it a useful estate. They see the joint tenancy as a "poor man's will" and thus as a means to transfer property at death without the necessity of a will or the expense and inconvenience of probate.[3] One individual, however, who may not feel so well disposed nor so happily view these apparent advantages is the creditor of a deceased joint tenant.

The State Bar Association of North Dakota was contemplating proposing to the State Legislature an enactment having as its purpose protection of the rights of creditors of a deceased joint tenant.[4]

The committee[5] that studied the proposal considered two possibilities. One would have been to impose liability for indebtedness of the deceased joint tenant upon the surviving joint tenant. The alternative was to cast such indebtedness as a lien or charge upon the property interest of the deceased joint tenant. A tentative indication favored making the indebtedness a lien or charge upon the property rather than a personal obligation on the surviving joint tenant.

Subsequent to considering the proposal the committee determined that no recommendation for change would be submitted.[6] The reasoning being that creditors have methods by which they are able to protect themselves from such contingencies and that the common law conception of joint tenancy should be preserved.

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1. Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy,* 51 IOWA L. REV. 582, 623 (1965).
2. For discussion of tax problems see Worthy, *Problems of Jointly Owned Property,* 22 THE TAX LAWYER 601 (No. 3 1969); Mann, *Joint Tenancies Today,* UNIV. ILL. L. F. 48, 59-63 (1956).
3. Mann, *Joint Tenancies Today,* UNIV. ILL. L. F. 48, 48-50 (1956).
4. Report of the Title Standards Committee, 46 N.D. L. REV. 152 (1969).
5. Title Standards Committee.
6. Telephone conversation with Clinton Ottmar, Attorney from Jamestown and committee member, on October 7, 1970.

The purpose of this note is to present and analyze some of the problems that may arise between creditors and deceased (and surviving) joint tenants; their solution today, and recommendations for the future.

HISTORY

A joint tenancy exists when the four unities, as espoused by Blackstone, exist:

> . . . the unity of interest, the unity of title, the unity of time and the unity of possession; or in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.[7]

Joint tenancies, which have existed at least as early as Bracton's time, were favored at common law.[8] This favored position is thought to have stemmed from the desire on the part of the feudal lords to avoid separating the collection of incidents of tenure.[9]

In 1304, in order to protect the rights of feudal lords, the right of survivorship was held to be terminated by partition.[10] This "plugged the hole" whereby cotenants would mutuallly effect a partition and then remain on the land. By holding that a partition did terminate the right of survivorship that portion held by the deceased tenant would escheat to the chief lord rather than "survive" to the remaining tenant. Further protection for the lord was afforded by the rule that the widow of a deceased joint tenant did not have dower rights.[11]

With the political abolition of tenures the reason no longer existed for favoring joint tenancies; therefore courts of equity commenced construing conveyances as tenancies in common in the absence of a clearly expressed intention to the contrary. In America, this construction favoring a tenancy in common has been followed.[12] The theory behind such a favoring is that ultimate ownership of property should not depend upon an accident of survivorship.[13]

Further in-roads against the original concept of joint tenancy can be illustrated. At common law a grantor was not allowed to convey to himself and another as joint tenants.[14] This has been

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7. 2 BLACKSTONE, COMMENTARIES 180 (1897).
8. W. WALSH, A HISTORY OF ANGLO-AMERICAN LAW at 211 (2d ed. 1932). 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW (3rd ed. 1923).
9. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 217 (1962).
10. 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 127 (3rd ed. 1923).
11. Ducan v. Forrer, 6 Binuey 192 (Pa. 1813). C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 219 (1962).
12. Noble v. Teeple, 58 Kan. 398, 49 P. 598 (1897).
13. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 217-18 (1962).
14. *Id.* at 219.

abrogated by statute in some American jurisdictions.[15] It would appear that permitting such a conveyance is a substitute for a devise by will. In 1539 a writ of partition was made available as a remedy whereby an aggrieved joint tenant could compel a partition of land held in joint tenancy.[16]

The question of whether or not a mortgage executed by one joint tenant severs the tenancy was faced in 1709.[17] At common law a mortgage constituted a conveyance, so the court stated, therefore, a mortgage executed by one of three joint tenants severed the joint tenancy.[18] The reasoning offered was that it would work as a disadvantage to the mortgagor if the joint tenancy continued because if the mortgagee happened to die before his cotenants, all of his estate and interest would go from his representative to the survivor(s). This holding protected the creditor, however, subsequent cases[19] in the United States appear to protect the surviving joint tenant although a minority of the jurisdictions[20] have opted in favor of the creditor of a deceased joint tenant.

In property theory a survivor's share (of joint tenancy) is not subject to death taxes because no estate passes at death but is the survivor's from inception.[21] However, such a tax savings device was long ago nullified.[22]

JOINT TENANCIES—SEVERANCE AND ENCUMBRANCE

The main advantage of a joint tenancy would appear to be its right of survivorship feature. What actions joint tenants may take which constitute encumbrances that will sever the unities and thereby dissolve the joint tenancy into a tenancy in common vary from jurisdiction to jurisdiction.[23] With regard to mortgages, much depends upon whether the jurisdiction is a title or lien state. From dicta (mortgages were not in issue) in *Hammond v. McArthur* it was stated that:

> In jurisdictions where a mortgage ordinarily operates to transfer the legal title, a mortgage by a joint tenant causes a severance of the joint tenancy . . . Also, in some states where a mortgage is regarded as mere security, a mortgage by a joint tenant brings the tenancy to an end. However, that conclusion is not in accord with the common-law authorities to the effect that the creation by a joint tenant of a

15. *See* N.D. CENT. CODE § 47-10-23 (1960).
16. W. WALSH, A HISTORY OF ANGLO-AMERICAN LAW 211 (2d ed. 1932).
17. *Id.* at 213. York v. Stone, 1 Salk 158, 91 Eng. Reprint 146 (1709).
18. *Id.*
19. *See* People v. Nogarr, 164 Cal. App.2d 591, 330 P.2d 858, 860 (1958).
20. *See* S.D. COMP. LAWS Ch. 30-21A-1 (Supp. 1970).
21. J. CRIBBETT, PRINCIPLES OF THE LAW OF PROPERTY 97 (1962).
22. *See* United States v. Jacobs, 306 U.S. 363 (1939).
23. *See generally* Swenson and Degnan, *Severance of Joint Tenancies*, 38 MINN. L. REV. 466-505 (1953).

> mere charge upon the land is a nullity as against the right of survivorship of the other joint tenant . . .[24]

As to liens, leases, easements and other encumbrances, it appears that the results also vary from jurisdiction to jurisdiction depending upon the statutes involved and case law interpretation.[25]

In the discussion below regarding mortgages we are emphasizing those cases which arose in the lien theory jurisdictions because North Dakota is such a jurisdiction.[26] As to our examples of other encumbrances which have been held not to constitute a severance, we have pointed out those cases in which we feel an unjust decision was reached. By this material, which is not meant to be inclusive of all possible encumbrances, we hope to support the contention that North Dakota needs legislation in this area.

As previously stated, at common law a mortgage acted as a conveyance thereby changing a joint tenancy into a tenancy in common if executed by one of the tenants. However, the general rule today appears to be that a mortgage upon realty executed by one of two joint tenants albeit without the knowledge or consent of the other is merely a lien or charge on such joint tenants' interest and terminates upon his death, therefore a cause of action by the mortgagee does not survive the mortgagor's death.[27]

In *People v. Nogarr*[28] the husband and wife held property as joint tenants. Subsequently they separated, after which the husband executed a mortgage on the property without the knowledge or consent of the wife. The husband then died prior to condemnation proceedings. The court held that the condemnation moneys went to the wife and not the mortgagee. The rule was stated that a mortgage (upon real property) executed by one of two joint tenants is not enforceable after the death of that joint tenant. The execution of a mortgage does not operate to terminate joint tenancy but is merely a charge or a lien upon interest as a joint tenant only. Therefore, death terminates the interest of the deceased joint tenant and, of course, it follows that the mortgage is thereby terminated. The wife then held the property as exclusive owner and the land was free from any mortgage, lien or otherwise against it.

In California a mortgage is a hypothecation of property mortgaged.[29] This means that a mortgage is merely a charge or lien without the necessity of change in possession and no right of possession is in the mortgagee. According to the California Civil Code, § 2920, a mortgage does not pass legal title to a mortgagee; there-

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24. 30 Cal.2d 512, 515, 183 P.2d 1, 3 (1947).
25. *See* Mann, *supra* note 3, at 65-73; Swenson and Degnan, *supra* note 23, at 466-488.
26. *See* N.D .CENT. CODE §§ 35-03-01.1, 35-03-01.2 (Supp. 1969).
27. *See* 67 A.L.R.2d 992 Anno. at 999.
28. People v. Nogarr, 164 Cal. App.2d 591, 330 P.2d 858 (1958).
29. *Id.* at 860.

fore none of the unities were destroyed. The husband's interest ceased at his death, therefore the lien of mortgage expired with the husband. It is interesting to note in this case the court's reasoning that the note was payable on demand and therefore the mortgagee could have enforced the lien and mortgage by a foreclosure prior to the death of the mortgagor and thus severed the joint tenancy. The fact that he chose to await the contingency of which joint tenant died first was done at his (mortgagee's) peril. If the mortgagor had survived, the security of the mortgagee's lien would have been doubled. The court felt that this was unjust because one joint tenant could execute a mortgage and receive the value of his undivided one-half interest while still retaining the right to the entire property if he should survive the other joint tenant. Whereas, if the other joint tenant were to survive the mortgagor, then he would take only his undivided one-half interest because the mortgagor's undivided one-half interest would go to the mortgagee by default.

A recent case in Florida[30] involved the deceased and grantee becoming joint tenants by a conveyance from the deceased as grantor. Subsequent to the recording of the deed the deceased executed a mortgage on the property without the knowledge of the grantee joint tenant. The mortgagee filed suit to foreclose the mortgage prior to the mortgagor's demise. The question for the court was whether or not the lien of the mortgage executed by the deceased was enforceable, after said deceased's death, against the undivided one-half interest in the property held by the deceased prior to her death. The court answered in the negative, notwithstanding the fact that the mortgagee had filed suit to foreclose the mortgage some five months prior to the demise of the mortgagor-joint tenant.

In Nebraska the giving of a mortgage by one cotenant acts to sever the unity of interests and such joint tenancy then becomes a tenancy in common. However, tenants in common are not bound by the unauthorized acts of their cotenant. The case in point involves the purchase of an automobile by husband and wife with full rights of survivorship.[31] Subsequently a chattel mortgage on the car was taken but signed by the husband only. The money which was borrowed by the husband from the plaintiff was then deposited in a bank on which the wife also had a right to draw checks. The issue presented was could a mortgagee of one cotenant maintain an action in replevin against the other undivided one-half interest holder of a single article by its nature not subject to division between the co-owners? The court held in the negative.

30. D.A.D., Inc. v. Moring, 218 So.2d 451 (Fla. 1969).
31. First National Bank in Ord v. Morgan, 172 Neb. 849, 112 N.W.2d 26 (1961).

The reason being that the wife did not mislead the plaintiff. It was not shown that the wife ever actually drew checks on the said bank account. Also, it was not proven that the wife knew of the mortgage at the time it was executed.

California[32] and Wisconsin[33] hold that a judgment lien does not sever a joint tenancy but merely gives the holder a right to levy on the interest. If the joint tenant debtor dies prior to the levy having been executed the surviving joint tenant will take free of such liens. The indication is that a creditor holding a judgment lien against a joint tenant will not be permitted to gamble that his debtor will survive the other joint tenant(s) and therefore possess greater security because of the survivorship feature. The following quotation summarizes the point:

> When a creditor has a judgment lien against the interest of one joint tenant he can immediately execute and sell the interest of his judgment debtor, and thus sever the joint tenancy, or he can keep his lien alive and wait until the joint tenancy is terminated by the death of one of the joint tenants. If the judgment debtor survives, the judgment lien immediately attaches to the entire property. If the judgment debtor is the first to die, the lien is lost. If the creditor sits back to await this contingency . . . he assumes the risk of losing his lien.[34]

A common attitude in the judicial community is illustrated by a Nebraska case[35] involving a conveyance by the grantor to herself and her sister as joint tenants. Debts were incurred by one of the sisters and after her death her creditors brought an action against the property previously held in joint tenancy because the deceased's estate did not possess sufficient amount to meet the obligations. The court, in holding for the surviving joint tenant, stated that the mere incurring of debts by one of two joint tenants does not effect a severance. It was stated that joint tenancies are not favored but can be created by contract.[36] If a joint tenant divests himself of the estate the severance creates a tenancy in common which is subject to the debts of the deceased co-owner. The opinion leaves any needed adjustments to the legislature:

> If there is to be any further or additional relief for creditors from the legal effect of joint tenancies by those dealing with persons who hold their property in joint tenancy with right of survivorship than what has already been enacted

32. Anderson v. Southern Pac. Co., 70 Cal. Rptr. 389 (1968).
33. Musa v. Segelke & Kohlhaus Co., 224 Wis. 432, 272 N.W. 657 (1937).
34. Zeigler v. Bonnell, 52 Cal. App.2d 217, 219, 126 P.2d 118, 120-21 (1942).
35. De Forge v. Patrick, 162 Neb. 568, 76 N.W.2d 733 (1956).
36. 76 N.W.2d at 736.

by the Legislature we think it should come from the same source.[37]

The question arises: at what point in the judgment proceeding is a joint tenancy severed? A perusal of some cases in Illinois offer an interesting answer. In 1927 the Supreme Court of Illinois[38] held that the entry of a judgment against one joint tenant does not effect a severance. This was followed by a case where judgment was entered against a debtor joint tenant followed by execution and levy.[39] Subsequent to this the debtor died and predictably the same court held that a severance had not occured, therefore the surviving joint tenant's interest was held by him free from any encumbrances. The climax to this excerpt is where a joint tenant debtor suffered judgment and execution sale prior to his demise; the court held that the joint tenancy had not been severed because the sheriff's deed had not as yet issued.[40] Therefore, the surviving joint tenant held the property free from the judgment creditor. This jurisdiction has held that a severance is effected when judgment has been entered followed by a levy, execution sale, and sheriff's deed transfering the judgment debtor's interest at the conclusion of the redemption period.[41]

There is a split of authority on whether a contract of sale made by both or all joint tenants will operate as a severance.[42] At least two states[43] in the Eighth Circuit have held that a severance would result from a contract for sale. However, since it appears that the North Dakota Supreme Court has not had an opportunity to rule on this issue, it would be sheer speculation to try to second guess what their decision would be. Should they hold that it would not sever the tenancy, there is always the possibility that, after the contract of sale is entered into but before executed, one or more of the joint tenants could die. Without severance, the surviving joint tenant(s) would acquire possession of the joint tenancy and therefore the right to the payment price agreed upon under the contract of sale. As the deceased tenant's estate would get nothing from the joint tenancy, his creditor in turn, who may

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37. 76 N.W.2d at 738.
38. Peoples Trust and Savings Bank v. Haas, 328 Ill. 468, 160 N.E. 85 (1927).
39. Van Antwerp v. Horan, 390 Ill. 449, 61 N.E.2d 358 (1945).
40. Jackson v. Lacey, 408 Ill. 530, 97 N.E.2d 839, 840 (1951).
41. Johnson v. Muntz, 364 Ill. 482, 4 N.E.2d 826, 830 (1936). *See also,* Mann, *Joint Tenancies Today,* UNIV. OF ILL. LAW FORUM 48, 71-72 (1956).
43. *See In Re* Baker's Estate, 247 Iowa 1380, 78 N.W.2d 863 (1956); Buford v. Dahlke, 23, at 469-485. For case annotations see 4 G. THOMPSON, THOMPSON ON REAL PROPERTY § 1780 at 7-11 (Supp. 1970).
43. *See In Re* Baker's Estate, 247 Iowa 1380, 78 N.W.2d 863 (1956); Buford v. Dahlke, 158 Neb. 39, 62 N.W.2d 252 (1954). In both these cases the joint tenants as vendors had retained legal title. In both of these cases when the husband died his estate received one-half of the subsequent payments of the purchase price. For *contra* on almost idntical factual situation see Hewitt v. Biege, 183 Kan. 352, 327 P.2d 872 (1958).

have had a lien on the joint tenancy property, would be left out in the cold.

The effect upon a joint tenancy of a lease, is another question the North Dakota Supreme Court has apparently not passed upon. "The English view was that where joint tenants in fee all joined in a lease for years or for some lesser term, reserving rent jointly, no severance resulted."[44] There is also American case law for this proposition.[45]

However, a more difficult problem arises where less than all the joint tenants execute a lease. It has been pointed out that:

> Even the English view here appears to have been uncertain. It seems to have been agreed by the English authorities that where one of two joint tenants in fee made a lease for years of his share, that lease would (so far as the lessor's share was concerned) be binding upon the other joint tenant in case of the death of the lessor. But it was not clear whether the lease suspended the joint tenancy so as to destroy the right of survivorship during the term.[46]

There is a scarcity of case law on this issue. However, two California cases[47] indicate that a lease by less than all joint tenants would not effect a complete severance of the tenancy.

Tiffaney has stated that:

> If one of two joint tenants in fee simple makes a lease for years for his share, the lease is no doubt binding upon the other joint tenant in case of the death of the lessor, *but whether it effects a severance, as does the conveyance of a life estate, . . . does not clearly appear.* . . . that, if one of two joint tenants for years makes a lease for a less term of years, there is a complete severance so long as the lease endures, defeating the right of survivorship in case of death. . . .[48] (Emphasis added)

In the Illinois case of *Tindall v. Yeats*[49] there is dicta to the effect that at least where the joint tenants agreed by contract to allow one of the joint tenants to rent and lease out the joint tenancy and retain the rents and profits, no severance would occur.

It appears inconsistent with the theory of joint tenancy ownership "per my et per tout"[50] to hold that one joint tenant could lease the land without the consent or with the non-acquiescence

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44. Mann, *supra* note 3, at 68-69 *citing* Palmer v. Rich, [1897] 1 ch. 134, 142 (1896).
45. *See* Gillette v. Nicolls, 121 Cal. App.2d 185, 262 P.2d 856 (1953).
46. Mann, *supra* note 3, at 69, *citing* 2 H. TIFFANY, REAL PROPERTY § 425 (3rd ed. 1939).
47. *See* Swartzbaugh v. Sampson, 54 P.2d 73 (1936); *and* Hammond v. McArthur, 30 Cal.2d 512, 183 P.2d 1, (1947).
48. 2 H. TIFFANY, REAL PROPERTY § 425 at 210 (3rd ed. 1939).
49. Tindall v. Yeats, 392 Ill. 502, 64 N.E.2d 903 (1946).
50. *See* BLACK'S LAW DICTIONARY 1293 (rev. 4th ed. 1968).

of the other joint tenant(s) without effecting a severance. A recent Minnesota case[51] may have opened the door for a solution to the non-acquiescent joint tenant by upholding a Unilateral Declaration of Election to Sever Survivorship of joint tenancy thus creating a tenancy in common. The Minnesota court points out that this is merely eliminating the common law conveyance to a strawman which would accomplish the same purpose.

The extent to which a lease would be held to effect creditor's rights would depend upon whether or not such lease would constitute a severance. If a severance would occur, it is possible that a creditor, who had a lien proportional to the total value of the joint tenancy property, would lose his advantage with a severance.

The effect of the murder of one joint tenant by the other upon the latter's rights as survivor has led to diversity of opinion.[52] The Colorado court has held[53] that where the husband and wife owned property in joint tenancy and the husband killed both his wife and adopted daughter and later committed suicide, the joint tenancy property went to his estate.

Under a similar set of circumstances, the Wisconsin Court held[54] that when the wife died:

> her status as joint tenant continued in her administrator [personal property] and heirs-at-law [real property]; and when her husband died and his life interest in the property ended, her joint tenancy became her estate of inheritance in the entire property.[55]

Courts holding this way appear to do so under a constructive trust theory. Under this theory, legal title passes to the murderer but equity will treat him as a constructive trustee because of his unconscionable acquisition of the property. He will then be compelled to convey it to whomever it has been devised or bequeathed by his victim. In the absence of a will the property will pass to the victim's heirs or next of kin exclusive of the murderer.[56]

There have, however, been recent decisions to the effect that in the case where death of the joint tenants is declared to be simultaneous[57] (even though there was evidence that the husband had killed his wife and then committee suicide) and where it has been determined that the husband was insane before killing

51. Hendrickson v. Minneapolis Federal Sav. & L. Ass'n., 281 Minn. 462, 161 N.W.2d 688 (1968).

52. *See generally* 32 A.L.R.2d 1107, 1108 (1953).

53. Smith v. Greenburg, 121 Col. 417, 218 P.2d 514 (1950).

54. *Re* King's Estate, 261 Wis. 266, 52 N.W.2d 885 (1952).

55. 52 N.W.2d at 889.

56. *See* Neiman v. Hurff, 11 N.J. 55, 93 A.2d 345, 347 (1952).

57. *See* Matter of Bobula, 19 N.Y.2d 818, 280 N.Y.S.2d 152, 227 N.E.2d 49 (1967).

his wife;[58] each of the estates share equally in the joint tenancy property.

Several jurisdictions have held that one who murders his joint tenant is entitled to nothing and sacrifices his prior interest in the joint tenancy.[59]

The extent to which a jurisdiction holds that murder will sever a joint tenancy could have an effect upon the creditor's rights. Although it does seem fair that one should not be enriched by his own wrongdoing, it may not necessarily follow that his creditors should lose their rights to liens on the same property.

North Dakota follows the common law in its treatment of joint tenancies in several aspects. *Hagen v. Schluchter*[60] involved a husband and his wife, who held their real and personal property as joint tenants, executing separate mutual wills which provided for disposition of their property inconsistent with the concept of joint tenancy. The husband died after which his widow executed a contract for deed containing an agreement to sell the land previously held by them as joint tenants. The court in holding that the deceased's will was ineffective, thereby preserving the widow's right to the property stated:

> The joint tenant who survives does not take the moiety of the other tenant from him or as his successor, but takes it by right under the conveyance or instrument by which the joint tenancy was created.[61]

Co-owned savings bonds, which were payable to either party without the signature of the other, were held to vest with the survivor upon the death of the co-owner. The vesting of title in the survivor was *not* taking by moiety but by right under the conveyance creating the joint tenancy. The effect of this holding was to deprive decedent's estate of the bonds notwithstanding the fact that a will had been executed.[62] *Seaborn v. Kaiser*[63] protected the survivor's interest in a joint bank account which resulted in defeating the deceased's sister's claim to his estate regarding said account.

The North Dakota Supreme Court has held that a joint tenancy is not destroyed because of an oral agreement, among the joint owners, which provided the deceased tenant with income from the prop-

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58. *See In Re* Estate of Lupka, 56 Misc.2d 677, 289 N.Y.S.2d 705 (1968).

59. *See* Spicer v. New York L. Ins. Co., 268 F. 500 (5th Cir. 1920); Merrity v. Prudential Ins. Co., 110 N.J.L. 414, 166 A. 335 (1933); Bierbrauer v. Moran, 244 App. Div. 87, 279 N.Y.S. 176 (1935).

60. Hagen v. Schluchter, 126 N.W.2d 899 (N.D. 1964).

61. *Id.* at 901.

62. *In Re* Kasparis' Estate, 71 N.W.2d 558 (N.D. 1955). *See also In Re* Berzel's Estate, 101 N.W.2d 557 (N.D. 1960).

63. Seaborn v. Kaiser, 117 N.W.2d 863 (N.D. 1962).

erty while he lived.[64] North Dakota has made it clear that one joint tenant may not convey the interest of his cotenant without written authority from such tenant.[65] Just as clear is the permission granted a joint tenant to transfer his own interest. In the subject case[66] a husband and wife owned land as joint tenants and the husband, by oral agreement, permitted a builder to encroach upon the property. The court stated that this agreement, in addition to a statute of frauds issue, was not binding upon the wife. An estoppel theory prevented the wife from being successful in an action against the builder because the wife had waited for a period of eleven years before asserting her rights.

A North Dakota case[67] involved two brothers as defendants, one of whom executed an oral contract with the plaintiff. The plaintiff was to furnish defendant with labor and materials for repairs to a potato warehouse on property belonging to the defendants. The defendant who did the contracting with the plaintiff was to repay the plaintiff a certain amount of money which he failed to do. Plaintiff then filed a mechanic's lien on the property. Judgment by default was entered but then it was discovered the property had been disposed of by the defendants prior to the filing of the plaintiff's lien. The judgment was amended to personal judgments against the defendants and the defendants appealed. The court held that one defendant was not liable because he had no knowledge that his "cotenant" had contracted with the plaintiff to improve the property. It was not shown that a partnership or an agency existed between the defendants. The nature of the interest in the property by the defendants was not alleged. This is unfortunate because if the brothers had been found to hold the property as joint tenants the court could have been faced with the situation of a "wronged" creditor against an "innocent" cotenant. If one cared to hypothetically extend the facts, the amount of the mechanics lien could have exceeded the value of the debtor's interest in the property and if the debtor died insolvent prior to the lien holder being satisfied, the situation would be presented four-square of whether the creditor has performed his contractual duties for nothing thereby unjustly enriching the surviving tenant.

Dicta in the case suggested that tenants in common and joint tenants can deal with strangers as freely as owners of property held individually, but one such co-tenant cannot, as a general rule, bind his cotenant for his interest in the property by his sole contract.

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64. State Tax Comm'r. v. Tuchscherer, 130 N.W.2d 608 (N.D. 1964). *See also* N.D. CENT. CODE § 57-37-06 (Supp. 1969).

65. Brandhagen v. Burt, 117 N.W.2d 696 (N.D. 1962).

66. *Id.*

67. Adamsen Const. Co. v. Altendorf, 152 N.W.2d 576 (N.D. 1967).

CONCLUSION AND RECOMMENDATIONS

As has been pointed out by this note, the rights and subsequent remedies of a creditor of a deceased joint tenant depend upon each jurisdiction's acceptance or modification of the common law doctrine of joint tenancy.

There has been a growing attitude over the years which leads to a presumption in favor of tenancies in common.[68] However, as Powell has pointed out, if this is merely a judicial attitude and the language is so specific as to leave no doubt that a joint tenancy has been created, courts will usually so hold.[69] In jurisdictions where this presumption is favored by statute which has abolished either the joint tenancy estate or eliminated the survivorship aspect,[70] the language has been construed to create a tenancy in common for life with a contingent remainder in fee in favor of the survivor.[71] Powell[72] states that this differs from a joint tenancy in that:

1) The right of survivorship in one tenant is not destructible by the act of the other tenant.[73]
2) The creditors of one tenant have less which they can reach for the payment of their claims.[74]
3) The estate created is not subject to partition.[75]

North Dakota has in essence adopted by statute the common law.[76] This implies that without severance a surviving joint tenant(s) will take the property free and clear of any claims of the deceased joint tenant's creditors. This suggests a disadvantage to creditors.

The lack of case law in North Dakota as to what constitutes severance of a joint tenancy and what effect this has on a creditor's rights in regard to the debts of a deceased joint tenant allows several assumptions:

1) The problems have not arisen; or
2) The problems, if arisen, have not been adjudicated; or
3) If adjudicated, an appeal has not been successfully carried to the North Dakota Supreme Court.

However, regardless of which of the above assumptions is most accurate, the question remains as to whether North Dakota should make legislative changes in an attempt to minimize potential problems.

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68. 4 R. POWELL, POWELL ON REAL PROPERTY § 616 at 664-65 (1970).
69. *Id.* at 666, 667.
70. *See, e.g.*, TENN. CODE ANN. § 64-107 (1955); GEN. STAT. N.C. § 41-2 (Supp. 1966); CODE OF VIR. 1950 § 55-20 (Supp. 1969); CODE OF S.C. § 19-55 (1962).
71. 4 R. POWELL, *supra* note 68, at 668.
72. *Id.* at 669.
73. Papke v. Pearson, 203 Minn. 130, 280 N.W. 183 (1938).
74. King v. King, 107 Cal. App.2d 257, 236 P.2d 912 (1951).
75. Johnson v. Woodard, 356 S.W.2d 526 (Mo. 1962).
76. *See* N.D. CENT. CODE § 47-02-06 (1960).

It is suggested that perhaps the most equitable solution would be one which would allow an estate of joint tenancy with its advantages of the right of survivorship while at the same time afford creditors certain protection. A few states have attempted to accomplish this by legislative enactments.[77] A main thrust of this legislation is that encumbrances not amounting to a severance placed upon a joint tenancy by less than all joint tenants shall continue to encumber the interest accruing to the surviving joint tenant(s).

However, the extent to which the surviving joint tenant is held liable varies from state to state. The statutes of Connecticut,[78] for example, appear to hold the surviving joint tenants liable for the entire encumbrance; whereas the South Dakota statute[79] declares that "[t]he surviving joint owner shall be liable . . . only to an amount equal to the value of the amount contributed to the jointly owned property by the deceased joint owner determined at the time of his death. . . ."[80]

Since joint tenants place encumbrances upon the joint tenancy without the knowledge, consent or approval of the other joint tenant(s), it would be unfair to hold an "innocent" surviving joint tenant liable up to 100 per cent of the value of the joint tenancy as Connecticut appears to do. On the other hand, although South Dakota may have a better idea in trying to limit the liability, they may have some trouble in evaluating *the value of the amount contributed.* For instance, if a husband and wife purchase property in joint tenancy, it may be difficult in many instances to determine what would be the value of the wife's contribution.

A solution would be to draft a statute such that at the death of a joint tenant, who had encumbered the property in question without the consent of the other joint tenant(s), the value of the contributions would be determined as a matter of law. One means would be to establish the value, as of the date of the joint tenant's death, proportional to the total number of joint tenants. The survivors would take the property in question by survivorship encumbered, however, by a liability equal to the determined value of contribution of the dedeceased joint tenant. Thus, for example; A, B and C own property in joint tenancy, and C obtains a loan by a lien on the joint tenancy without the knowledge of A and B; and then C dies. A and B will take the property in question by survivorship subject to an encumbrance of up to 1/3 of the value of the property in question (as there were three joint tenants, C's value would be 1/3 of the value of the joint tenancy regardless of C's actual contribution).

77. *See* CONN. GEN. STAT. ANN. §§ 47-14A to -14K (1960); S.D. COMP. LAWS §§ 30-21A-1 to -5 (Supp. 1970); WIS. STAT. ANN. §§ 230.45-.48 (West 1957).
78. *See* CONN. GEN. STAT. ANN. §§ 47-14A to -14K (1960).
79. *See* S.D. COMP. LAWS § 30-21A-4 (Supp. 1970).
80. *Id.*

Notwithstanding our above recommendation, we would suggest that the North Dakota legislature study the legislation of those states which have attempted to give creditor's some protection while at the same time preserving the joint tenancy estate. The statutes of each of these states, as mentioned, has a slightly different approach, and a combination or modification of any or all of these statutes may be necessary to best serve North Dakota's needs.

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