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Joint Tenancy in California Revisted: A Doctrine of Partial Severance

Charles H. Matthews Jr.

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JOINT TENANCY IN CALIFORNIA REVISITED:
A DOCTRINE OF PARTIAL SEVERANCE

California law on severance of joint tenancies is still uncertain in at least two situations involving the partial alienation of one joint tenant's interest: the conveyance of a life estate by one joint tenant in fee, and the conveyance of a leasehold for a term of years by one joint tenant in fee. The question which has not been clearly answered is: when a joint tenant in fee conveys less than his entire interest, does a joint tenancy subsist in the reversionary interest, or is the original joint tenancy completely and finally severed?¹

Despite this uncertainty, California courts have been increasingly reluctant to find the complete destruction of a joint tenancy where certain interests have been reserved by the joint tenants.² This Comment will examine the legal and theoretical basis for this reluctance.

I

THE CONVEYANCE OF A LIFE ESTATE

A. The Four Unities Test

Fundamental to any discussion of joint tenancy and severance is a consideration of the four unities test. Although it has been argued that the common law four unities have become useless concepts,³ they still command a measure of validity in California.⁴ The courts

1. See H. CHALLIS, LAW OF REAL PROPERTY 367n (3d ed. 1911).
4. E.g., Hammond v. McArthur, 30 Cal. 2d 512, 183 P.2d 1 (1947); McDonald v. Morley, 15 Cal. 2d 409, 101 P.2d 690 (1940); Sibrell v. Sibrell, 214 Cal. 767, 7 P.2d 1003 (1932); DeWitt v. San Francisco, 2 Cal. 289 (1852); Clark v. Carter, 265 Cal. App. 2d 291, 70 Cal. Rptr. 923 (4th Dist. 1968); In re Estate of Casella,
frequently point to the unities test as determinative of the joint tenancy's existence or destruction.\(^5\)

Under the common law definition, four unities must be present: interest, title, time, and possession.\(^6\) The joint tenancy is held by two or more persons jointly with equal rights in the property during their lives. Each tenant holds a right of survivorship which becomes effective on the death of a co-tenant, rendering the survivor an owner of the decedent's share of the property to the exclusion of the decedent's heirs. The joint tenancy cannot be destroyed by testamentary disposition, but is subject to severance through the voluntary or involuntary destruction of any of the four unities.\(^7\)

There can be unity of interest only if the joint tenants have one and the same interest. The interest of one cannot be of a different duration or quantity from that of another.\(^8\) For unity of title, the estate of each joint tenant must be created by one and the same act.\(^9\) For unity of time, the interest of each joint tenant must be vested at one and the same period, as well as by one and the same title.\(^10\) And for unity of possession, each joint tenant must possess the whole of the property.\(^11\)

It has been firmly established under the four unities test, both at common law and in California, that if one joint tenant conveys his entire interest in the estate to an outsider, a complete and final severance of the joint tenancy between the grantor and his co-tenants occurs, and the grantee becomes a tenant in common with the remaining joint tenants.\(^12\) Likewise, when one joint tenant conveys his entire interest to one of his co-tenants, the grantee and the remaining joint tenants become tenants in common.\(^13\) In both cases there is a complete suspension of one or more of the unities.


5. See note 4 supra.


8. 2 W. BLACKSTONE, COMMENTARIES *181.

9. Id.

10. Id.

11. Id., at *182.


13. In re Estate of Harris, 9 Cal. 2d 649, 72 P.2d 873 (1937); Clark v. Carter,
However, a different common law rule applies to the conveyance of a life estate by one joint tenant in fee.

B. The Doctrine of Conditional Severance

Under the doctrine of conditional severance, if one joint tenant in fee conveys a life estate to an outsider for the grantee's life, the joint tenancy is conditionally severed, and the grantor and his co-tenants become tenants in common with respect to that portion of the estate not conveyed. Should the grantee predecease all erstwhile joint tenants, the joint tenancy revives; otherwise the tenancy in common remains.\(^\text{14}\)

This doctrine is consistent with the four unities test. The conveyance of the life estate temporarily suspends the unities of possession and interest because the grantor has only a future possessory interest in the reversion, while his co-tenants hold a present estate in fee. And a revival of the joint tenancy, \(i.e.,\) a restoration of the joint tenancy in a present estate, is conditioned on a restoration of all the unities; hence, the requirement that the life tenant predecease all the joint tenants.\(^\text{15}\)

C. The California Approach

The principal California case discussing the effect of a conveyance of a life estate by a joint tenant is *Hammond v. McArthur*.\(^\text{16}\) There a joint tenant conveyed a life estate to his co-tenant for the life of the grantee. The grantee predeceased the grantor, and the court held that the right of survivorship was not terminated even though all joint tenants were not alive at the termination of the granted estate. The case may be construed as employing the revival theory embodied by the doctrine of conditional severance, and indeed the court at one point referred

265 Cal. App. 2d 291, 70 Cal. Rptr. 923 (4th Dist. 1968); *In re Estate of Casella*, 256 Cal. App. 2d 312, 64 Cal. Rptr. 259 (1st Dist. 1967).

14. H. CHALIS, LAW OF REAL PROPERTY 367 (3d ed. 1911); 2 H. TIFFANY, THE LAW OF REAL PROPERTY § 425 (3d ed. 1939). See Swenson, supra note 3, at 492 n.137. The doctrine of conditional severance may be illustrated as follows:

1. \(A\) and \(B\) are joint tenants in fee.
2. \(A\) conveys a life estate to \(X\) for \(X\)'s life, and thereupon \(A\) and \(B\) become tenants in common for the duration of the conditional severance, \(A\) holding a reversion in fee and \(B\) holding a present estate in fee.
3. If \(X\) predeceases both \(A\) and \(B\) the joint tenancy revives, and both \(A\) and \(B\) again hold a present estate in fee.
4. If \(A\) predeceases both \(B\) and \(X\) a complete and final severance results.
5. Upon \(X\)'s death, \(A\)'s heirs, as holders of \(A\)'s reversion, become tenants in common in fee simple with \(B\).

15. See note 14 supra.

16. 30 Cal. 2d 512, 183 P.2d 1 (1947). \(A\) and \(B\) were joint tenants in fee. \(A\) conveyed a life estate to \(B\) for \(B\)'s life with the rights to all rents and profits, \(B\) predeceased \(A\), and \(B\)'s administrator sought to quiet title to an undivided one-half interest as against \(A\). The court held for \(A\) who was still a joint tenant and took the entire property by the right of survivorship.
to this theory. However, it is clear that the holding of Hammond goes beyond the accepted common law doctrine of conditional severance which requires that the unities be restored before the death of any joint tenant. In Hammond, since the grantee of the life estate was also a joint tenant, the joint tenancy could not revive prior to the death of a joint tenant, but could only revive simultaneously with such a death. The fact that the court did not even consider this time and sequence factor, so central to the doctrine of conditional severance, suggests that the doctrine cannot be used to explain Hammond. There are two additional theories which may be used to explain it.

First, the court may have found that no severance, temporary or otherwise, occurred during the life estate. Its statement that "the release of the life estate did not terminate the joint tenancy for survivorship purposes," and its citation of cases involving contracts between joint tenants may favor such a construction.

The contract cases, however, involved agreements between joint tenants giving one of them possession and rights to income from the property. No temporary severance was found because the express terms of the agreements indicated that the parties did not intend a severance. However, such intent is normally not manifested in the conveyance of a life estate; therefore the court's discussion of the four unities and the "revival" theory in the conveyance of a life estate by a joint tenant indicates that it found, at least, a temporary severance. Indeed, it would have been anomalous to have found no temporary severance when there was a suspension of the unities comparable to that in the conditional severance situation.

Second, the court in Hammond may have employed the doctrine of partial severance. Under this doctrine, a conveyance of a life estate by one joint tenant in fee to either his co-tenant or an outsider indicates that it found, at least, a temporary severance. Indeed, it would have been anomalous to have found no temporary severance when there was a suspension of the unities comparable to that in the conditional severance situation.

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17. Id. at 516, 183 P.2d at 3.
18. Id.
21. "As stated by text writers, when one of two joint tenants in fee simple makes a conveyance of his interest for life, upon the termination of the life interest, the joint tenancy, as it originally existed, renews." Hammond v. McArthur, 30 Cal. 2d 512, 516, 183 P.2d 1, 3 (1947). The court is apparently referring here to the traditional common law doctrine of conditional severance, but significantly, it did not state that all the joint tenants must survive the termination of the life interest if a complete and final severance is to be avoided. See Comment, Severance of a Joint Tenancy in California, 8 Hastings L.J. 290, 292-93 (1957).
22. See text accompanying note 14 supra.
23. The doctrine of partial severance applies to the conveyance of a life estate by a joint tenant in fee to his co-tenant as follows:
for the life of the grantee temporarily severs the joint tenancy for the

(1) A and B are joint tenants in fee.
(2) A conveys a life estate to B for B's life.
(3) There is a theoretical division of B's estate so that he now has a life estate in the entire property, and A and B hold a reversion in fee as joint tenants.
(4) If A predeceases B, then B holds A's interest in the reversion by the right of survivorship, and
(5) Simultaneously there is a merger of the life estate and reversion so that B becomes the sole owner of a present estate in fee simple.
(6) If B predeceases A, then A holds B's interest in the reversion by right of survivorship, and
(7) A thus becomes the sole owner of a present estate in fee simple.

The resultant estate in (3) cannot be justified by analogy to a conveyance of a life estate to B for his life, remainder to A and B, because such a conveyance does not create a joint tenancy in the reversion. COKE UPON LITTLETON *182b. However, it has been argued that a conveyance to A and B as joint tenants, remainder to A's heirs, does not cause a merger, because the estate is created by one and the same conveyance; hence, there are no separate interests to be merged, but only branches of one entire estate. 2 W. BLACKSTONE, COMMENTARIES *186. Similarly, under the partial severance theory, if the reversion is viewed as a distinct branch of the estate, no merger between the life estate and the reversion need be effected to prevent the subsistence of the joint tenancy in the reversion. See text accompanying notes 26-33 infra.

24. The doctrine of partial severance applies to the conveyance of a life estate by a joint tenant in fee to an outsider as follows:
(1) A and B are joint tenants in fee.
(2) A conveys a life estate to X for X's life.
(3) There is a theoretical division of B's estate so that X and B are tenants in common for their respective lives, and A and B hold a reversion in fee as joint tenants.
(4) If X predeceases both A and B, then A and B hold a present estate in fee simple as joint tenants once again.
(5) If A predeceases both X and B, then B holds A's interest in the reversion by the right of survivorship, and
(6) Either B or B's heirs will be the sole owner(s) of a present estate in fee simple on X's death.
(7) If B predeceases both X and A, then A holds B's interest in the reversion by the right of survivorship, and simultaneously there is an elimination of the theoretical division of B's estate with the termination of the life interest, so that A also holds a present estate in fee.
(8) On X's death, either A or A's heirs will be the sole owner(s) of a present estate in fee simple.

For an account of the results in (5), consult Swenson, supra note 3, at 474. The writers there state:

If X [the grantee] . . . outlives A [the grantor and joint tenant], it must be concluded either (1) that X's estate terminates upon the death of A, in which case A has merely succeeded in conveying to him a life estate pur autre vie which seems inconsistent with A's freedom of severance, or (2) that X's estate does not terminate but is good as against the survivor. The latter alternative seems inconsistent with the joint tenancy theory of survivorship.

Moreover, the former alternative may be preferable because of its analogies to the result of a conveyance of a leasehold for a term of years. See text accompanying notes 63-64 infra. However, the latter alternative is not inconsistent with the joint tenancy theory of survivorship. The right of survivorship does not include the surviving joint tenant's right to immediate possession of the premises upon the death of the other joint tenant. For example, a joint tenant in a remainder cannot enter into immediate possession upon the death of the other joint tenant if the remainder has not become a possessory estate. See notes 31-32 infra.

Notice the different consequences which would result from an application of the
duration of the life estate. The grantee and the remaining joint tenants become tenants in common for the duration of the granted estate, but the joint tenancy subsists in the reversionary interest. If any of the joint tenants die simultaneously with or prior to the termination of the life estate, the remaining joint tenant(s) take the entire reversionary interest in the property by the right of survivorship. Should all the joint tenants die prior to the termination of the granted estate, the estate passes to the heirs of the last surviving joint tenant, since he was the last to take an interest in the reversionary interest by the right of survivorship.

This doctrine is similar in result to the no temporary severance doctrine since in both cases the right of survivorship subsists. However, the partial severance doctrine is to be preferred because it, unlike the no temporary severance doctrine, clearly satisfies the four unities test. There is unity of interest after the theoretical division of the estate because each joint tenant holds an equal interest in the reversion. The fact that a joint tenant also holds a life estate is not conclusive of a complete and final severance, since it appears possible to hold a life estate as a sole tenant and concurrently hold a remainder as a joint tenant with another person.

There is unity of title because the joint tenancy in the reversionary interest is created by the same act, i.e., the conveyance of the life interest. This is comparable to an initial conveyance of a life interest with a joint tenancy in the remainder.

There is unity of time because the joint tenants are vested in interest in the reversionary joint tenancy at the same time.

Finally, there is unity of possession because the joint tenants are

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25. See notes 23-24 supra.


27. In re Estate of Galletto, 75 Cal. App. 2d 580, 171 P.2d 152 (1st Dist. 1946) held that one joint tenant may own an undivided interest in realty as his separate property and the balance with another as a joint tenant. There is authority that if one of three or more joint tenants conveys to a co-tenant, the purchaser remains a joint tenant with the others as to the original interest, and becomes a tenant in common as to the share purchased by him. 2 H. TIFFANY, THE LAW OF REAL PROPERTY § 425 (3d ed. 1939).

28. This is supported by three factors: (1) a joint tenancy may exist in a remainder, even though there is none in the life interest, see note 32 infra; (2) it is not necessary for both joint tenants to even have the potential of holding a present estate if there has been a vesting in interest of the right to present possession, see notes 30-33 infra and accompanying text; and (3) one joint tenant may own an undivided interest in realty as his separate property and the balance with another as a joint tenant. See In re Estate of Galletto, 75 Cal. App. 2d 580, 171 P.2d 152 (1st Dist. 1946).

29. See text accompanying note 9 supra.

30. See note 10 supra and accompanying text.
vested with identical rights to possession of the joint tenancy in the reversion. In the common law, present possession was not necessary in the case of future interests, and it was only necessary that the right of possession vest in interest. This has support in the fact that a joint tenancy could exist in a remainder or reversion where there was only the potential of present possession of the estate by both joint tenants, and in a remainder interest where there was virtually no possibility of present possession by both joint tenants, either simultaneously or at different times. A fortiori, if unity of possession existed in the latter case, it may also exist in a reversionary interest, notwithstanding the impossibility of present possession by the joint tenants.

Therefore, the doctrine of partial severance gives the most logical interpretation of *Hammond* because it is consistent with the court's finding of no ultimate severance and because it meets the four unities test.

**D. Partial Severance and Conveyances to an Outsider**

While the doctrine of partial severance may be employed when a joint tenant conveys a life estate either to a co-tenant or to an outsider, it has been argued that the holding in *Hammond* is limited to conveyances to co-tenants. If *Hammond* is so limited, it may be concluded that the court either applied a watered-down version of the doctrine of partial severance, or that it did not apply the doctrine at all.

The court's citation of *Tindall v. Yeats* is often cited in support of the more limited interpretation of *Hammond*. In *Tindall*, there was a written contract between two joint tenants giving one of them the rentals and possession for the term of her natural life, and containing a stipulation that the agreement was not in any way to affect the legal

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31. See Swenson, supra note 3, at 477 n.57 and accompanying text.

32. A present estate may be granted to A and B, or a remainder in fee to A and B, and in either case A and B are joint tenants of the present estate, or the vested remainder. 2 W. BLACKSTONE, COMMENTARIES *181. "[I]f the donors or lessor grant the reversion to two or more persons and their heires, they are joyntenants of the reversion. And so it is of a remainder." COKE UPON LITTLETON *183b.

33. In the common law there could be the grant of an estate to A and B and the heirs of their bodies, remainder to them and their heirs, A and B not being capable of intermarrying. Here, A and B held a joint tenancy for the life of the longest liver, with one remainder in fee tail as tenants in common, and a second remainder in fee simple as joint tenants. COKE UPON LITTLETON *183.

Note that there is no possibility under this estate that both A and B could hold a present estate in the joint tenancy remainder, either simultaneously or at different times; yet the estate appears to have been valid. If A predeceased B, B held both A's interest in the joint life estate and A's interest in the joint tenancy remainder by the right of survivorship. Upon A's death the two remainders, i.e., the remainder in fee tail and the joint tenancy remainder, became present estates such that one-half of the property was held by the heirs of A's body and the heirs of B's body, and the other half of the estate was held by A's heirs.

34. 392 Ill. 502, 64 N.E.2d 903 (1946).
status of the joint tenancy. The court held that this express intention of the parties prevented the contract from resulting in a severance. The court also stated that the contract did not destroy the unities because the possession of one co-tenant with the permission and consent of the other was actually the possession of both. Because of this citation of Tindall, it is argued that the primary test in Hammond was whether the joint tenants by their acts had manifested an intention to sever the joint tenancy, and that the four unities test was of less importance.

Since in Hammond the parties did not express an intention not to sever the joint tenancy, as in Tindall, it may be argued that the court inferred such an intention from the fact that the transaction was between the joint tenants themselves. Since the joint tenancy form is normally chosen to secure the benefits of the right of survivorship, it is reasonable that this right should not be defeated by transactions between the parties unless their agreement either indicates that such a result is clearly intended or provides for acts that are well-established as effecting a severance of the joint tenancy. And, the argument

35. Id. at 510, 64 N.E.2d at 907.
36. Tindall v. Yeats, 392 Ill. 502, 508-09, 64 N.E.2d 903, 906-07 (1946). See Note, Joint Tenancy: Effect of Conveyance of Life Estate upon Severance, 36 Calif. L. Rev. 133 (1948). The author states, "[A] theoretical division of the estate may be made in order to preserve the unity of interest of the parties in a portion of the estate which is considered to remain the subject of the joint tenancy. The unity of possession may be considered preserved by adopting the theory that possession of one joint tenant with the consent of his co-tenant is the possession of both." Id. at 135.
37. See Note, Joint Tenancy: Effect of Conveyance of Life Estate upon Severance, 36 Calif. L. Rev. 116, 133-35 (1948); Swenson, supra note 3, at 473 (citing the foregoing article). One writer has questioned the analogy between the contractual situation in Tindall and the situation in Hammond on the ground that a contract to give another exclusive possession of an estate is not equivalent to the conveyance of a freehold estate. This is based on the fact that the remedies available to one whose rights arise solely out of contract, and the remedies available to one who is the owner of a freehold estate are strikingly different. See, Note, Real Property—Joint Tenants—Conveyance by One of Life Estate to Other Does Not Work Severance, 21 S. Cal. L. Rev. 264, 297 (1948).

Moreover, while the court in Hammond may not have rested its decision on a technical preservation of the four unities, its discussion of them indicates they were not ruled out as a consideration. Hammond v. McArthur, 30 Cal. 2d 512, 183 P.2d 1, 2 (1947). See Note, Joint Tenancy: Effect of Conveyance of Life Estate Upon Severance, 36 Calif. L. Rev. 116, 133-35 (1948). See also Note, Real Property—Joint Tenants—Conveyance by One of Life Estate to Other Does Not Work Severance, 21 S. Cal. L. Rev. 264, 295-96 (1948).

38. This may be inferred from the fact that parole evidence, which the court excluded from consideration, had been received for the purpose of explaining the intention of the parties in executing the deed. Hammond v. McArthur, 30 Cal. 2d 512, 516, 183 P.2d 1, 3 (1947).
continues, since an intention not to sever the joint tenancy cannot be inferred from a conveyance by one joint tenant to an outsider, the rationale of the *Hammond* case cannot be applied to such a transaction.

There is, however, an important fallacy in this argument. While a court applying the manifest intention test perhaps should imply an intention not to sever in cases involving transactions between joint tenants, it should not necessarily imply an intent to sever completely and finally when the transaction is between a joint tenant and an outsider. A conveyance to an outsider is inconclusive of an intention to destroy the right of survivorship since the grantor has not conveyed away his entire interest. Further, it is not an act that is clearly established as effecting a severance of the joint tenancy, as evidenced by the fact that under the doctrine of conditional severance, a conveyance of a life estate to an outsider does not necessarily result in a complete and final severance.\(^\text{40}\)

So while the holding of *Hammond* is limited to its facts, *i.e.*, conveyance between joint tenants, there is nothing in the decision which prevents or even hinders application of the doctrine of partial severance to conveyance to an outsider.\(^\text{41}\)

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\(^{40}\) See text accompanying notes 14-15 *supra*. Moreover, while there appears to be technical justification for a partial severance doctrine both in the conveyance of a life estate by one joint tenant to his co-tenant, as in *Hammond*, and in the conveyance of such an interest to an outsider, a partial severance in the latter case may actually be more compelling than in the former, because in the conveyance to an outsider there is the potential of present possession by the joint tenants in the reversion as there was in the conditional severance situation. See note 13 *supra*. \*But see Swenson, *supra* note 3, at 474. The writers favor a final severance upon conveyance of a life estate, at least where the conveyance is to the outsider. They consider a partial severance theory undesirable because the question of severance cannot be determined until it is possible to ascertain the actual duration of the outsider's life and because there is a break in the unity of possession.

A further argument, in the life estate situation, might be that such a conveyance evidences an intention to sever. This is supported by statutory provisions that give the owner of the life estate the right to use the land in the same manner as the owner in fee-simple, and which specify what duties he must perform, such as the paying of taxes and keeping the property in repair. \*Cal. Civ. Code §§ 818.840 (West 1971)

It may also be argued that a temporary severance theory denies a joint tenant's right to completely sever the joint tenancy without the consent of his co-tenant. However, the practical value of a partial severance is an outweighing factor. See text accompanying notes 42-48 *infra*. Further, it would be a simple matter to indicate an intention to completely sever the joint tenancy by expressly stating this by words to that effect in the deed of conveyance or lease. This would eliminate the necessity for inquiring into the manifest intent of the parties actions where the acts do not clearly show an intention to create a complete and final severance.

\(^{41}\) See Comment, *Severance of a Joint Tenancy in California*, *supra* note 3, at 293. The writers do not discuss the partial severance theory, but the fact that the "revival" theory encountered no dissent in *Hammond* led them to the conclusion that a temporary severance theory may apply to conveyances by one joint tenant to either a stranger or a co-tenant.
E. Advantages of the Doctrine of Partial Severance

In addition to the technical justification for the doctrine of partial severance, it has decided practical value. It provides a conceptually sound basis on which to rest the disinclination of California courts to sever joint tenancies completely when certain interests have been reserved by the joint tenants. Examples are numerous.

In *Green v. Brown*, both joint tenants conveyed their fee interest to outsiders subject to the reservation of a life estate in the grantors. The court interpreted the reservation as the equivalent of a joint tenancy for the life of the longest liver. The third parties were to hold a present estate in the remainder upon the death of the surviving joint tenant.

In *County of Fresno v. Kahn*, all the joint tenants had executed a conditional sales contract to outsiders for the sale of the property, keeping the title as security for the payments. Despite the fact that the third parties had taken possession of the premises, the court found that there was no termination of the joint tenancy.

A like result occurs in cases where interests are transferred by contract between or among the joint tenants themselves. In *Cole v. Cole*, a settlement agreement between husband and wife joint tenants provided that the husband was to enjoy exclusive possession in exchange for the relinquishment of his right to convey his interest in the property. The court, relying primarily on *Hammond* and *Swartzbaugh v. Sampson*, held there was no termination of the joint tenancy.

The courts have also sustained joint tenancies in certain cases where one joint tenant conveys an interest to an outsider. In *Green v. Skinner*, although the equivalent of a remainder had been conveyed by a joint tenant to an outsider (ordinarily severing the joint tenancy), the court held that the grantor, by placing the deed in escrow to be delivered on his death, had reserved sufficient power over delivery so that when the grantor died before the grantee had learned of the deed, the right of survivorship intervened giving ownership to the surviving joint tenant rather than the grantee. The court thus prevented a severance by finding that there had been no conveyance rather than

42. 37 Cal. 2d 391, 232 P.2d 487 (1951).
47. 185 Cal. 435, 197 P. 60 (1921).
by constructing a conveyance by relation back to the time of delivery into escrow, thereby indicating a preference for the right of survivorship.

Finally, in Swartzbaugh v. Sampson, the court by way of dicta expressed doubt as to whether the conveyance by a joint tenant of a leasehold for a term of years to an outsider would create a severance, which has generally been seen as indicating there would be at most a temporary severance of the joint tenancy.

These decisions reflect the courts' unwillingness to terminate the joint tenancy when there is a partial alienation of a joint tenant's interest and a reservation, whether express or implied, of certain interests. There are sound policy reasons for this trend of decisions. In California, most joint tenancies are held by spouses, and the courts are very reluctant to jeopardize the protection afforded marital partners by the right of survivorship. Consequently, unless the intent of the parties to completely sever the joint tenancy is express or otherwise very clear, or unless the acts of the parties are well-established as effecting the severance of joint tenancies, the courts will find a way to avoid severance.

The doctrine of conditional severance provides one method of avoiding severance, but it works only in the event all the joint tenants survive the grantee of the life estate. Hence the doctrine is inapplicable when the grantee of the life estate is also a joint tenant. Such a limited doctrine is of limited value. Another method is to find no temporary severance, but such a fiction is conceptually unsound because it disregards the requirements of the four unities. The only method that provides a sufficiently broad basis to prevent severance in virtually all situations where joint tenants convey life estates, and the only method which is conceptually sound under the four unities test, is to employ the doctrine of partial severance.

II

THE CONVEYANCE OF A LEASEHOLD FOR A TERM OF YEARS

A. The Common Law and California

An analysis similar to that employed in the case of a conveyance of a life estate may be applied to the lease for a term by a joint tenant


49. See Griffith, Community Property in Joint Tenancy Form, 14 STAN. L. REV. 87, 88 (1961). The writer states that joint tenancy is the usual way of taking title in California. In 1961 it was estimated that of all deeds recorded in California, approximately 69 per cent were to husbands and wives or both, and that of these, 83 per cent were to them as joint tenants. These reasons were given for the common use of joint tenancies by spouses:

[1] In spite of all the arguments against joint tenancy, the people want it.
in fee. It may be argued: a) that there is no temporary severance; b) that there is a complete and final severance; c) that there is a conditional severance; d) that there is a partial severance.

It is generally agreed that when all the joint tenants convey a leasehold either to a co-tenant or to an outsider, there is no complete and final severance of the joint tenancy.

It has been argued that no severance at all results in such a situation. However, the better view would seem to be that there is a temporary severance because there is a temporary suspension of the unities, the co-tenants' interests having become disproportionate. This is supported by Napier v. Williams in which two joint tenants leased to a third. The court stated by way of dictum that the lease severed the joint tenancy “during the term” and that the lessee was entitled to two-thirds of the land by virtue of the lease and to the one-third seized under his fee. The case did not deal with the question of revival, possibly because all of the joint tenants were alive at the time of suit.

They want it because in most instances they want the survivor to get all the property in the event of death. It is a poor man’s will; it is faster and, in “no-tax” cases, it is cheaper. It works well in practice for people of modest means. Id. at 108.

A number of authorities have come to the conclusion that a complete and final severance is to be preferred. However, what conceptual or practical problems exist with the partial severance doctrine are outweighed by its practical value to spouses who hold joint tenancies in California. See notes 42-48 supra, and accompanying text. See also Alexander v. Boyer, 253 Md. 511, 253 A.2d 359 (1969). The court held where one joint tenant had leased her interest in real property to the husband of the other joint tenant, the nature of the lessor’s interest in the land was changed from a present interest to a reversionary interest, thereby destroying the unities of interest and possession, completely and finally severing the joint tenancy. California authority was cited. See Comment, Cotenancy: Effect of Conveyances, Leases, and Encumbrances of One Cotenant in Excess of His Interest: Joint Tenancy: Effect of Lease as to Severance: Remedies of Cotenants as Against Each Other. 25 CALIF. L. REV. 203, 208-09 (1937). The writer reaches his conclusion in the leasehold situation on the grounds that: there is hostility toward the joint tenancy in California supported by statutory language requiring express declaration to create a joint tenancy; because survivorship is a mere gamble; because of the harsh and unforeseen results emanating from the joint tenancy; and because there is a break in the unity of possession.

This theory achieves the same result as the no temporary severance theory, because the right of survivorship subsists in both cases. But as discussed earlier, the partial severance theory, unlike the no temporary severance theory, meets the four unities test. See text accompanying notes 20-21 supra.

Napier is actually on a par with Hammond because cases involving a conveyance by all the joint tenants to a co-tenant and those involving a conveyance by one of two joint tenants to a co-tenant are comparable when analyzed in view of the four unities.
Likewise, it would appear that the conveyance of a leasehold for a term by one joint tenant to a co-tenant or an outsider would not effect a complete and final severance of the joint tenancy. This has been established in California for leases to a co-tenant. In *Spahn v. Spahn*, the trial court, pursuant to agreement of the parties to a divorce action, ordered property to be held in joint tenancy. The wife was to give a lease to the husband for the life of the wife, and the husband was required to pay her a monthly rent. Against an argument that the four unities were suspended, the court held that a joint tenancy could exist.

The effect of a lease for a term by one joint tenant to an outsider is a more difficult problem. The granting joint tenant may be leasing the premises with the express or implied consent of his co-tenant(s). But if the lessor's act is without such consent, does a severance result, and if so, to what extent? Should the will of the original creator of the joint tenancy be overridden by a mere lease? The California case of *Swartzbaugh v. Sampson* raised the question whether the conveyance of a leasehold for a term of years to an outsider by one joint tenant in fee would create a complete and final severance of the joint tenancy. Although the court, in its holding, did not consider the issue of severance, it indicated in dicta what it thought to be the English doctrine, i.e., that there is a severance for the term of the lease, but doubted its application in the United States.

Although there would appear to be no complete and final severance in either the *Spahn* or *Swartzbaugh* factual situations, a temporary severance should result in view of the temporary suspension of the four unities. Given that there is a temporary severance, the question remains whether it is conditional or partial. *Hammond* may provide an answer here since the analogy between conveyances of life estates and convey-

56. See Comment, *supra* note 50, at 207.
58. *Id.* A and B, as husband and wife, were joint tenants of two tracts of land upon which was a walnut orchard. A, against the will of B, leased the entire premises to X, an outsider who knew of B's objections. X went into exclusive possession, removed certain trees, erected a boxing pavilion and made various improvements. B was not a party to the leases, and she received no rent before the trial. The court held against her in an action to cancel the lease.
59. *Id.* at 454, 54 P.2d at 75. But see *Graham v. Allen*, 11 Ariz. App. 207, 463 P.2d 102 (1970). The court held that, for welfare purposes in the determination of an applicant's resources, only half the value of the petitioner's joint tenancy would be taken into account. In so holding, the court stated in dicta that the petitioner had pointed out that the unities of a joint tenancy are not necessarily perpetuated for other purposes including the lease by one joint tenant of his proportionate interest. This might suggest the court contemplated a possible severance of, at least, a temporary duration. *See also* Alexander v. Boyer, 253 Md. 511, 253 A.2d 359 (1969).
ances of leaseholds was recognized by the Hammond court itself and by other authorities in the field. The inconsistency of the conditional severance doctrine in Hammond warrants the rejection of the doctrine here. In addition, the technical arguments regarding the four unities, and the trend of California decisions previously discussed support the conclusion that a lease for a term by a joint tenant in fee, whether to an outsider or a co-tenant, results in a partial severance.

B. Distribution of Rental Payments

Whether or not there is a severance of the joint tenancy, the conveyance of a leasehold for a term by one joint tenant merely puts the lessee into the enjoyment of a right which the lessor had, without prejudicially affecting the rights of the other co-tenants. The lease binds them only to the extent of the lessor's interest in the estate. Co-tenants out of possession are entitled to be let into possession with the lessee to enjoy their moiety.

The right to rental proceeds is an incident of ownership, but is considered severable from the reversion. The rent may be granted away, reserving the reversion, or the reversion may be granted away reserving the rent. The lessor is entitled to collect all the rent, but should the lease purport to bind more than the grantor's interest (which is often the case), the non-leasing co-tenants may compel the lessor to account for their share of the rent, and an action by them

60. 30 Cal. 2d 512, 516, 183 P.2d 1, 3 (1947).
61. See Note, Real Property—Joint Tenants—Conveyance by One of Life Estate to Other Does Not Work Severance, 21 S. Cal. L. Rev. 264, 296-97 (1948); Comment, Cotenancy: Effect of Conveyances, Leases and Encumbrances of One Cotenant in Excess of His Interest: Joint Tenancy: Effect of Lease as to Severance: Remedies of Cotenants as Against Each Other, 25 Calif. L. Rev. 203, 208 (1937).
62. See text accompanying notes 42-48 supra.
66. 31 C.J.S. Estates § 107 (1964). Cf. Hustead v. Superior Court, 2 Cal. App. 3d 780, 83 Cal. Rptr. 26 (1st Dist. 1969). The lessee of certain property had subleased the premises to a third party. In an action by the lessee's wife to recover child support, the court rejected an attempt to garnish the husband's future rents as sublessee, and stated that the question of garnishing future rents will not generally arise because the judgment creditor can seize the judgment debtor's interest in the land, and so obtain the right or value of the right to rental payments.
67. See note 66 supra.
68. Howard v. Throckmorton, 59 Cal. 79 (1881); Garibaldi v. Garibaldi, 264 Cal. App. 2d 9, 70 Cal. Rptr. 92 (5th Dist. 1968); Estate of Knox, 52 Cal. App. 2d
to recover their share acts as a ratification of the lease.69

There is uncertainty, however, as to the disposition of the share of a co-tenant who dies during the term of the lease. Does it pass to his heirs for the balance of the term, or to the remaining joint tenants by right of survivorship? In the absence of express reservation of the rent, the answer may depend on whether there is a complete and final severance, a conditional severance, or a partial severance, because apparently the rent is appurtenant to and passes with an interest in the estate. Taking into account the character of the right to rent, and applying the various theories of the effect of a lease by one joint tenant to the matter of the deceased joint tenant’s share of the rent, different results become evident.

If the theory of complete and final severance is applied, the decedent’s share of the rent would pass with his reversionary interest to his heirs. Adopting the conditional severance theory appears to lead to the same result. Since a revival of the joint tenancy is conditioned on all the joint tenants surviving the termination of the lease, a co-tenant’s death prior to the termination of the term causes the conditional severance to become complete and final. The decedent’s share of the rent, along with his interest in the estate, passes to his heirs.

The partial severance theory leads to a different result. The decedent’s share of the rent passes with his reversionary interest to the remaining joint tenants by right of survivorship. This result is similar to that reached on a theory of no temporary severance. It also raises questions of equity considerations. Should the surviving joint tenants, rather than the decedent’s heirs, be entitled to the rent when there is a partial severance? What if the decedent, as a non-leasing joint tenant, has not consented to or ratified the lease prior to his death? Should a surviving, non-leasing joint tenant be entitled to the decedent’s share of the rent if the survivor has not consented to or ratified the lease prior to the death of either the lessor or any of the non-leasing joint tenants? Should an action by non-leasing joint tenants to recover the decedent’s share of the rent imply their consent or ratification of the lease?


Another interesting problem, not specifically treated here, is whether a joint tenant-grantor must account to non-granting joint tenants for any consideration he has received for the conveyance of a life estate. It would seem initially that many of the same considerations apply here by analogy from the rent in the leasehold situation. 69. See Bessho v. General Petroleum Corp., 186 Cal. 133, 141, 199 P. 22, 25 (1921). “The proposition is clear that a lease of an entire tract made by one tenant in common is binding on the other tenants when ratified by them, and one method of ratification is the acceptance of benefits under the lease by the cotenants.” See also Atlantic Oil Co. v. County of Los Angeles, 69 Cal. 2d 585, 446 P.2d 1006, 72 Cal. Rptr. 886 (1968).
If the decedent as a non-leasing joint tenant has not consented to or ratified the lease prior to his death, it may be said that he has impliedly rejected the lease, since he had the option during his lifetime to join in the lease but did not. On the other hand, one may conclude that the decedent impliedly consented to or ratified the lease through acquiescence since he did not reject the lease and always had the option to exercise his right to a share of the rent.

Absent decedent's actual expressions of intention as to the disposition of his share, such as an express reservation of the rent (which would amount to a ratification), the better rule would seem to be that the rent passes with the decedent's ownership interest as would a general grant of the reversion.

Should a surviving, non-leasing joint tenant be entitled to the decedent's share of the rent when the survivor has not consented to or ratified the lease prior to the death of the lessor or any of the non-leasing joint tenants? One view is that since the survivor has not joined in the lease, he has impliedly rejected it. On the other hand, since the survivor is apparently still entitled to his own share of the rent, one may conclude that there is no reason the decedent's rent should not pass to the survivor along with the decedent's reversion, by right of survivorship, especially when there is ambiguity as to the decedent's desired disposition of the rent.

In sum, the lack of consent or ratification by a non-leasing joint tenant prior to the death of a co-tenant should not affect the general right of the surviving joint tenants to take the decedent's share of the rent under a partial severance, since the right to rent exists as an incident of ownership in the estate. This is especially true given the ambiguity of the decedent's intentions under a temporary severance.

Finally, there is the question of the binding effect of an action to recover the decedent's rent. If the survivor is the lessor, his collection of the rent should make the lease binding on the decedent's share either through implied ratification, since the lessor is already receiving benefits under the lease, or estoppel, if he has purported to lease the whole property.

More doubtful is the case where the survivor is a non-leasing joint tenant who has not joined in the lease prior to the death of his co-tenant. It is clear that if a non-leasing joint tenant collects his own share of the rent, this acts as a ratification and binds his own interest in the

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70. See note 69 supra.
71. See note 66 supra.
72. See note 69 supra.
property. But if he attempts to collect only the decedent's share, should the lease become binding only on the decedent's interest in addition to the lessor's interest? The better view would seem to be that such an action amounts to a ratification of the lease and binds all the interest(s) held by the survivor in the joint tenancy. This logically and equitably follows from the acceptance of the benefits of the lease, just as in an action by a non-leasing joint tenant to recover his own share of the rent.

CONCLUSION

The effect of a partial alienation by one joint tenant of his interest in a joint tenancy may cause conceptual problems, as exemplified by the situations in Hammond v. McArthur and Swartzbaugh v. Sampson.

The facts of Hammond suggest at least two constructions of the effect upon a joint tenancy of the conveyance of a life estate by one joint tenant in fee. There may be no temporary severance or a severance during the life estate with the right of survivorship in the reversionary interest, which is substantially identical in result to the first construction but conceptually different. The latter construction, the doctrine of partial severance, seems to be the most logical interpretation of the decision in light of the language used by the court and the technical requirements of the four unities test.

Despite arguments of some writers to limit the decision to the conveyance of a life estate by one joint tenant to his co-tenant primarily on the basis of a manifest intention test, an extension of the partial severance doctrine to the conveyance of a life estate by one joint tenant to an outsider is feasible and not inconsistent with Hammond.

The doctrine is additionally desirable in view of the trend of California decisions evidencing a disinclination to destroy joint tenancies when certain interests have been reserved by the joint tenants. This trend, of which Hammond and Swartzbaugh are a part, may reflect a policy of avoiding the consequences of a severance given the common use of joint tenancies by California spouses.

The conveyance of a leasehold for a term of years by one joint tenant in fee is also open to a number of possible constructions. However, given the analogy to the conveyance of a life estate, and the policy considerations discussed earlier, a partial severance theory is the most desirable construction.

Although the effect of these two partial alienations is uncertain in California, there are indicia favoring the doctrine of partial severance.

74. See note 69 supra.
75. Id.
Finding a complete and final severance of the joint tenancy in both situations, as some writers have urged, would seem a simple solution, but would most assuredly cause harsh and undesired consequences in many cases. Not only would the parties' intentions be defeated in most cases, but also the use of joint tenancies by spouses would be inhibited. This would be an undesirable result since the joint tenancy form affords a satisfactory method of providing for the surviving spouse without the necessity and expense of probate. Given that spouses are often unaware of the dangers of joint tenancy severances, the courts should not increase the number of transactions creating a complete severance of the joint tenancy when the parties' actions do not clearly indicate an intention to sever completely. It is submitted that a doctrine of partial severance is preferable to both a complete severance and a conditional severance in the case of a conveyance of a life estate by one joint tenant or in the conveyance of a lease for a term by one joint tenant in fee, either to a co-tenant or to an outsider. A partial severance eliminates the uncertainty as to the effect of those transactions, and prevents the severe and inequitable consequences of unintended severances.

Charles H. Matthews, Jr.