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# Creation of Joint Tenancy by Conveyance of Tenants in Common to Themselves

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## CREATION OF JOINT TENANCY BY CONVEYANCE OF TENANTS IN COMMON TO THEMSELVES

In the recent Kentucky case of *Haynes v Barker*,<sup>1</sup> *G* conveyed to husband and wife as tenants in common, but with the intention to create in them a joint tenancy with survivorship. To correct the error caused by the form of the conveyance *H* and *W* simply conveyed the real estate to themselves to be held jointly with right of survivorship. The Court of Appeals of Kentucky held that a joint tenancy was thereby created.

Apparently a case precisely like the instant case has never been decided previously by any court, but there are many similar cases where one spouse has conveyed to himself and the other spouse, or one owner to himself and another. The principal question in all these cases is: What type of estate was created by the conveyance?

The courts have differed considerably as to the effect of the type of conveyance under consideration, and an analysis of the cases indicates that the principal point upon which they differ is the effect of such conveyance upon the requisite unities of the joint tenancy or tenancy by the entirety.<sup>2</sup>

"The *properties* of a joint estate are derived from its unity, which is fourfold; 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."<sup>3</sup>

"A tenancy by the entirety is essentially a form of joint tenancy, modified by the common-law theory that husband and wife are one person."<sup>4</sup>

In some cases the unities of time and title are held to be lacking, and hence a tenancy in common results,<sup>5</sup> the only unity necessary to

<sup>1</sup> 239 S.W. 2d 996 (Ky. 1951).

A joint tenancy and a tenancy by the entirety are both forms of co-ownership in which the tenants own undivided shares in the land with right of survivorship. The practical difference is that in the joint tenancy either tenant may sever the tenancy and thereby destroy the survivorship feature; while in the tenancy by the entirety neither tenant can sever the tenancy so as to destroy the right of survivorship. This is due to the fact that each joint tenant is seized *per my et per tout*, while tenants by the entirety are seized *per tout et non per my*. This in turn is due to the additional unity of the tenancy by the entirety pointed out above. A tenancy in common is a third form of co-ownership in which the tenants own undivided shares, but in this there is no right of survivorship.

<sup>2</sup> BLACKSTONE'S COMMENTARIES 180 (1777).

<sup>3</sup> 2 TIFFANY, REAL PROPERTY 217 (3d ed. 1939).

<sup>4</sup> *Prewitt v. Prewitt*, 397 Ill. 178, 73 N.E. 2d 312 (1947); *Porter v. Porter*, 381 Ill. 322, 45 N.E. 2d 635 (1942); *Stuehm v. Mikulski*, 139 Neb. 374, 297 N.W. 595 (1941); *Price v. National Union Fire Ins. Co.*, 294 Mich. 289, 293 N.W. 652 (1940); *Deslauners v. Senesac*, 331 Ill. 437, 163 N.E. 327 (1928); *Brietenback v. Schoen*, 183 Wis. 589, 198 N.W. 622 (1924); *Michigan State Bank of Eaton Rapids v. Kern*, 189 Mich. 467, 155 N.W. 502 (1915).

the tenancy in common being the unity of possession. The unities are lacking, it is said, because one cannot be both grantor and grantee, which really means, as was pointed out in the frequently cited case of *Deslauriers v Senesac*,<sup>6</sup> that: "A person cannot convey or deliver to himself that which he already possesses." In other words the grantor in an attempt to make such a conveyance merely divests herself of an undivided one-half interest, since it "is manifest from the deed that she did not intend to convey the whole and entire interest to her husband, for she retained an equal share or interest." The court in this landmark case purported to follow *Green v Cannady*,<sup>7</sup> but the court in that case actually adhered to the view laid down in *Shepherd's Touchstone*:<sup>8</sup>

"If a deed be made to one that is incapable, and to others that are capable, in this case it shall enure only to him that is capable. And if they were to be joint-tenants, the person who is capable shall take the whole. But if they were to be tenants in common, he shall have only his particular share."

If the doctrine that one cannot be both grantor and grantee were applied to the principle set out in the *Green* case, the *Deslauriers* case would have held that a fee simple was conveyed to the grantee husband. This would seem to be sounder reasoning in view of technical historical principles. The difference in the two cases is that the court in the *Deslauriers* case refuses to allow the other grantee to take the whole, it being "manifest that she did not *intend* to convey the whole." (Writer's italics) But if the court is to give partial effect to the grantor's intention (rather than historical logic) in order to prevent injustice, why does the court not go further and allow the intent of the grantor to prevail throughout, thereby permitting the creation of a joint tenancy? As to this the court says:

"It was not for failure to ascertain the intention of the grantors that the grantees did not take title in a joint tenancy, but because, under the law, a joint tenancy could not be created in the manner which was here attempted. The operation of a deed on the legal title is not controlled by the intention of the parties, but is governed by law."<sup>9</sup>

In one instance the court applies technical historical doctrines without regard for consequences. In the other, though purporting to apply those doctrines, the court does so only to the extent that such application does not compel a result unconscionable with the purpose of the grantor. There are other cases adhering to the more logical of the two

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<sup>6</sup> 331 Ill. 437, 163 N.E. 327 (1928).

<sup>7</sup> 77 S. C. 193, 57 S.E. 832 (1907).

<sup>8</sup> Volume I at 82 (1820).

<sup>9</sup> *Supra*, note 6 at 329.

rules, that the conveyance passes the whole interest to the other grantee.<sup>10</sup> Still others, like the *Deslauriers* case, purport to follow the *Green* case, but actually refuse to reach the inevitable though unjust result required by the application of its principles.<sup>11</sup>

There seem to be no cases in which a conveyance of the property of one spouse directly to both spouses as joint tenants or as tenants by the entirety has been held to create such tenancy without the court's basing its decision, in some part at least, upon a married woman's statute. Thus, in *Boehringer v Schmid*,<sup>12</sup> the court held that such a conveyance created an estate by the entirety on the ground that title devolves upon husband and wife as one person at the same time by virtue of the deed. As the court explained:

"The reason for intervention of a trustee lay in the common-law theory that a wife had no legal existence apart from her husband. That theory has been overthrown by statute and the opposite theory substituted, so that there is no longer any necessity for a trustee."<sup>13</sup>

This case purports to follow *In re Klatzl's Estate*,<sup>14</sup> but it can hardly be said that the *Klatzl* case actually held that an estate by the entirety was created by such a conveyance, although it must be admitted that the New York Court's decision has been the source of considerable controversy.<sup>15</sup> Three judges were of the opinion that a tenancy by the entirety was created. In their view the rule that a conveyance to husband and wife necessarily creates a tenancy by the entirety is based on the doctrine of unity of person created by marriage. They said that the almost unanimous American judicial opinion indicates the rule is not abrogated by married women's statutes, for these statutes only remove disabilities and restraints of the wife *incidental* to the unity of person without disrupting the unity created by marriage. In other words: "If the statute which authorized the conveyance did not sunder the unity, the conveyance it authorized did not." The husband conveyed, not "to himself, but to a legal unity or entity which was the consolidation of himself and another."

Three other judges were of the opinion that a tenancy in common was created. They relied on *Saxon v Saxon*,<sup>16</sup> where the court said:

<sup>10</sup> *Hicks v. Sprinkle*, 149 Tenn. 310, 257 S.W. 1044 (1924).

<sup>11</sup> *Wright v. Knapp*, 183 Mich. 656, 150 N.W. 315 (1915).

<sup>12</sup> 232 N. Y. S. 360 (1928). *Accord: In re Vandergriff's Estate*, 105 Pa. Super. Ct. 293, 161 A. 898 (1932); *Lang v. Wilmer*, 131 Md. 215, 101 A. 706 (1917).

<sup>13</sup> 232 N. Y. S. 360, 362 (1928).

<sup>14</sup> 216 N. Y. 83, 110 N.E. 181 (1915).

<sup>15</sup> In *In re Vogelsang*, 122 Misc. 599, 203 N.Y. Supp. 364 (1924), both parties cited *In re Klatzl's Estate* as sustaining their opposing views as to the effect of such a conveyance. But the court itself in *In re Vogelsang* held that a tenancy by the entirety was created and also that *In re Klatzl's Estate* so held.

<sup>16</sup> 46 Misc. 202, 93 N. Y. S. 191 (1905).

"At the common law a conveyance to husband and wife necessarily and unavoidably made them tenants by the entirety. But that rule cannot apply to a conveyance made *under the statute* enabling a husband and wife to convey to each other, for it abrogates the rule of unity *in respect of such conveyance.*" (Writer's Italics)

Each line of reasoning is persuasive, but it appears that the reasoning in the *Saxon* case is somewhat illusory. It is true that the statute would seem to abrogate the rule in respect of such conveyances, but it is submitted that it does so only insofar as the ability to *convey* is concerned, and not as to the ability to *take and to hold as one*.<sup>17</sup> In a few cases one spouse has conveyed to the other an undivided one-half interest with a clearly stated intent to create in the husband and wife a tenancy by the entirety. In such a case it would seem clear that the necessary unities of time and title are lacking and that only a tenancy in common is created. It has been so held.<sup>18</sup> But a contrary conclusion was reached in *In re Farrand*,<sup>19</sup> the court saying that "since the decision in the *Klatzl* case in 1915 the more recent trend of judicial opinion appears to be toward holding such a deed to have created a tenancy by the entirety." Analogy between the *Klatzl* and *Farrand* cases is obviously wanting.

There are cases where the problem has been approached from a different angle. Although admitting that no technical joint tenancy or tenancy by the entirety was created by the owner's conveying to another a one-half undivided interest, since the requisite unities did not exist, they nevertheless uphold the right of survivorship characteristic

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<sup>17</sup> It should be noted that in the *Saxon* case, although the court said that a tenancy by the entirety was not created, it held that the husband was able to convey an estate in joint tenancy to his wife and that such an estate was created. But the court gave no reason for so holding. How it could hold thus without even mentioning the problem of unities of time and title is rather puzzling. But the case is very similar to that of *Ames v. Chandler*, 265 Mass. 428, 164 N.E. 616 (1929), where husband conveyed to himself and wife "as joint tenants and not tenants in common." The court said that a tenancy by the entirety could not be created under the statute permitting conveyances between husband and wife to the same extent as if they were sole, since an estate by the entirety exists only on the basic idea that husband and wife are not sole, but one; nor could such tenancy be created under a statute allowing transfers by a person to himself jointly with another, since in an estate by the entirety the wife is not *another* person. But under the latter statute a joint tenancy was held to have been created. However, in a later Massachusetts case, *Edge v. Barrow*, 316 Mass. 104, 55 N.E. 2d 5 (1944), the court hinted that the *Chandler* case might be wrong in holding that a tenancy by the entirety could not be created by a deed from husband to himself and wife. But if that holding was right, said the court, the deed in this case running from husband to himself and wife creates a joint tenancy, the kind of tenancy with survivorship that it could create.

<sup>18</sup> *In re Walker's Estate*, 340 Pa. 13, 16 A. 2d 28 (1940); *Dressler v. Mulhern*, 77 Misc. 476, 136 N. Y. S. 1049 (1912); *Pegg v. Pegg*, 165 Mich. 223, 130 N.W. 617 (1911).

<sup>19</sup> 126 Misc. 590, 214 N. Y. S. 793 (1926).

of the joint tenancy as annexed to a tenancy in common.<sup>20</sup> Courts applying this principle reason that the description in the deed of the estate as one by the entirety or in joint tenancy clearly manifests an intention to secure the right of survivorship, and since an estate in common is created, it is one with right of survivorship annexed to it. It should be noted that in most of the cases previously considered "the courts apparently presuppose that the right of survivorship invariably depends upon the existence of a technical common-law estate by the entireties or joint tenancy, and that the possibility of creating a right of survivorship not incident to such an estate or tenancy was not discussed."<sup>21</sup> In those jurisdictions where it is conceived that the right of survivorship is not necessarily dependent on the existence of a technical joint tenancy, the grantor's intent is given effect only as to survivorship and not as to the estate created; but since survivorship is the real issue involved, these courts are, for all practical purposes, carrying out the grantor's intention.

Although the court in *Mitchell v. Frederick*<sup>22</sup> held that a tenancy in common with right of survivorship had been created, the court also said: "The lawful intention of the parties is to be carried out, and they are not to be deprived of freedom to convey whatever they wish, in order to conform to one of the more usual forms and classifications of ownership." Apparently the Maryland court is not too concerned with what the estate is called. Indeed, some cases expressly state that if the intent to create a right of survivorship is evident, the intent will be given effect regardless of the legal nomenclature employed in the instrument.<sup>23</sup>

Notwithstanding the absence of the common-law unities, a few courts have given effect to the grantor's intention not only as to the

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<sup>20</sup> That a right of survivorship, although not incident to an estate in common, may be annexed thereto if the parties so intend, is a principle laid down in England, *Taaffe v. Conmee*, 10 H. L. Cas. 64, 11 Eng. Rep. 949 (1862); *Doe v. Abey*, 1 M. & Sel. 428, 105 Eng. Rep. 160 (1813); 168 Law Times 467 (Dec. 7, 1929); 2 JARMON WILLS, 687, 688 (6th Ed. 1893); and followed by several American cases, *Rumons v. Rumons*, 186 Tenn. 25, 207 S.W. 2d 1016 (1948); *Hass v. Hass*, 248 Wis. 212, 21 N.W. 2d 398 (1946); *Mitchell v. Frederick*, 166 Md. 42, 170 A. 733 (1934); *In re Brown*, 60 F. 2d 269 (1932); *Burns v. Nolette*, 83 N. H. 489, 144 A. 848 (1929).

<sup>21</sup> See note, 1 A.L.R. 2d 260 (1948).

<sup>22</sup> 166 Md. 42, 170 A. 733 (1934).

<sup>23</sup> *Jones v. Jones*, 185 Tenn. 586, 206 S.W. 2d 801 (1947); *State v. Gralowski*, 176 Or. 448, 159 P. 2d 211 (1945); *Beach v. Holland*, 172 Or. 396, 142 P. 2d 990 (1943); *Erickson v. Erickson*, 167 Or. 1, 115 P. 2d 172 (1941); *Johnson v. Landefeld*, 138 Fla. 511, 189 So. 666 (1939); *Papke v. Pearson*, 203 Minn. 130, 280 N.W. 183 (1938); *Dutton v. Buckley*, 116 Or. 661, 242 P. 626 (1926); *Neneman v. Rickley*, 110 Neb. 446, 194 N.W. 447 (1923); *Marble v. Treasurer*, 245 Mass. 504, 139 N.E. 442 (1923); *New Jersey Title Guaranty & Trust Co. v. Archibald*, 91 N. J. Eq. 82, 108 A. 434 (1919).

creation of a right of survivorship but also as to the creation of a particular type of estate. This has been true where one has conveyed to himself and another as joint tenants (or as tenants by the entirety)<sup>24</sup> and also where one has conveyed from himself to another a one-half undivided interest to be held by him with her "in joint tenancy with full rights of survivorship."<sup>25</sup> In these cases the courts have said that any objection based on the absence of the unities of time and title gives way to the intention of the parties, which "will override, whenever possible, purely formalistic objections to real estate conveyancing based on shadowy, subtle, and arbitrary distinctions and niceties of feudal common law"<sup>26</sup>

However, in *In re Horler's Estate*<sup>27</sup> a deed from a wife to her husband stating that the grantor's intention was to convey an undivided one-half interest to be held by grantee as joint tenant with the grantor and not as tenant in common "so that the survivor shall have and take the absolute title in fee simple" was held to create a *joint tenancy with all four unities*. As to the objection that unity of title was not created, the court said:

"But it is unity of title *in the joint tenancy* with which we are concerned. Therefore, if the wife, as holder of the fee of the entire property, could by a deed to her husband, without the intervention of a third party, create in her husband and herself a joint estate,<sup>28</sup> there would be unity of title and of time, for the estate would be created at one and the same time by one instrument."<sup>29</sup> (Writer's Italics)

The position of the court would be tenable if the wife had conveyed to herself and her husband, but under the facts the court's effort to uphold the joint tenancy as including the requisite unities is futile.

Having considered the various approaches to the solution of the problem as they are reflected in the cases, it is submitted that the following two principles emerge as those best designed to preserve the common-law doctrine and at the same time give effect to the grantor's intention insofar as possible:

- (1) A conveyance to grantor and another divests grantor of his title completely and vests it in himself and his wife *as one person* as tenants by the entirety or vests it in himself and the other grantee as joint tenants as the case may be.<sup>30</sup>

<sup>24</sup> *Switzer v. Pratt*, 237 Iowa 788, 23 N.W. 2d 837 (1946); *Edmonds v. Comm. of Internal Revenue*, 90 F. 2d 14 (1937); *Colson v. Baker*, 42 Misc. 407, 87 N. Y. S. 240 (1904).

<sup>25</sup> *Therrein v. Therrein*, 94 N. H. 66, 46 A. 2d 538 (1946).

<sup>26</sup> *Id.* at — A. 2d at 538.

<sup>27</sup> 163 N. Y. S. 221 (1917).

<sup>28</sup> She could do this under a married woman's statute.

<sup>29</sup> *Supra* note 27 at 223.

<sup>30</sup> In Kentucky by KY. REV. STAT. sec. 381.050, in all cases where an estate by the entirety is intended, the right of survivorship will probably have to be expressly provided for in specific terms.

- (2) A conveyance of an undivided one-half interest<sup>31</sup> to be held as joint tenants or tenants by the entirety, as the case may be, creates a tenancy in common with right of survivorship annexed.<sup>32</sup>

In (1) it might be objected that the conveyance actually effects no more than a diminution in the grantor's interest. The answer is that there is a new and unique title, a new and unique possession, a new and unique interest passing at one time to form a new and unique estate.

In none of the situations presented should the grantor's intention be given effect irrespective of and in complete disregard of common-law principles and legal nomenclature. Admittedly, the rationale may be somewhat fictional, but so are the common-law concepts; and it is urged that if the grantor's intent can be given effect without serious or irreconcilable departure from common-law principles, it should be but not otherwise.<sup>33</sup>

The Kentucky court in the *Haynes* case approached the problem in an unusual way. As to one of the fundamental objections in these cases, viz., that there must be both grantor and grantee, the court merely said: "Obviously we have both grantor and grantee." The court did not directly mention the underlying proposition that the same person cannot be both grantor and grantee. In fact, the court considered the husband as conveying his undivided one-half interest to his wife, and the wife as conveying hers to her husband. Obviously in such a case we do have both grantor and grantee. It is equally obvious that such grantor-grantee relationship is not applicable to a joint tenancy. The conveyance by one tenant in common of his undivided one-half interest to the other tenant in common, and a simultaneous conveyance by the other, could do no more in changing the nature of the estate than such a conveyance by either tenant in common to a third person. And yet the Kentucky court in conceiving the conveyance to be of such nature satisfies itself by drawing a distinction between the principal case and those cases where one spouse

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<sup>31</sup> Or it could be another interest should the grantor include more than two in the co-tenancy.

<sup>32</sup> This principle cannot be applied in (1), for to do so would require a holding that in those situations one-half undivided interest passed and that a like interest remained in the grantor in contravention of the principle that those who are capable grantees shall take the whole, and those who are incapable shall take nothing.

<sup>33</sup> "It may be argued that antiquated ideas should yield to the unmistakable intent of the parties unless logic stands in the way. The answer to this is that most of our rules and notions concerning real property rest on historical ground rather than on any other, and to ignore them by judicial decision rather than by legislative enactments, leads to confusion ultimately more injurious than the isolated instances of injustice inflicted by adherence to form." 6 B. U. L. Rev. 72, 74 (1926).



owned the whole and conveyed to himself and the other. The court simply considered the former case a stronger one for holding that the four unities do exist. But it seems obvious that it is not a stronger case if it is conceived as one of simultaneous cross conveyances.

As to the objection that clear intention to create a joint tenancy with survivorship does not govern the legal operation of the deed, the court said that "there appears to be a trend away from strict adherence to common law technicalities." And the court went on to say:

"The modern view appears to be the more sensible and logical: that is where the intention is clear and unequivocal, permit to be done directly, that which could be done indirectly. This would make effectual the interest which the parties by their conveyance intended to create, without regard to those technicalities descending from the feudal period."<sup>34</sup>

This is the real basis for the court's decision and the only one on which it can stand, since the attempt to reconcile the case with the common-law principles is futile.

It is reiterated that the court's desire to give effect to the grantor's intention is commendable, but if a serious contravention of common-law rules is thereby entailed, the advantage would be outweighed by the disadvantages. However, a just result can be attained in the case without violating doctrines of the common law by applying principle (1) above: the undivided half interest of each devolves upon both *as* joint tenants at one and the same time. This justly disposes of the problem without severe violence to common-law principles, and at the same time gives effect to the intention of the grantor.

WILLIAM RICE

## RESPONDEAT SUPERIOR. THE "NO RIDERS" PROBLEM

A master is usually held liable for the injuries caused to others by the tortious conduct of his servants when they are acting within the scope of their employment.<sup>1</sup> This doctrine of respondeat superior, which originated about the beginning of the eighteenth century<sup>2</sup> is one of the few relics remaining from the earliest rule governing tortious conduct, which imposed on a man absolute liability for all injuries caused by himself, his family, his servants or even his inanimate prop-

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<sup>34</sup> *Supra*, note 1 at 997.

<sup>1</sup> RESTATEMENT, AGENCY sec. 219 (1) (1933).

<sup>2</sup> TIFFANY, AGENCY 99 (2d ed. 1924).