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Concurrent Estates in Real Property II

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TENANCIES BY THE ENTIRETIES

A TENANCY BY THE ENTIRETIES is an estate held by husband and wife arising out of the common law fiction that husband and wife are one person. If the grantees are not husband and wife such a tenancy cannot be created, even though the instrument expressly states that they are to hold by the entireties. This is the reason why a divorce will change a tenancy by the entireties into a tenancy in common or a joint tenancy depending upon the view of the particular state. It is at least questionable whether, under the common law, a conveyance to husband and wife necessarily created a tenancy by the entireties because the conveyance ran, according to the fiction, to one person. But there appears to be no doubt that a conveyance to husband and wife running to the grantees as "joint tenants" or as "tenants in common" was construed by the courts as creating a tenancy by the entireties. Today, this estate arises only when intended by the grantor or testator. Husband and wife may take as tenants in common or as joint tenants if the conveyance so indicates. However, if the instrument is silent as to how the husband and wife are to take there is a presumption that they take by the entireties.[1]

If the deed runs to a husband and wife and others, the husband and wife together count as one person. For example, in a deed to husband and wife and A and B, the husband and wife become as between themselves tenants by the

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[1] 2 AMERICAN LAW OF PROPERTY §6.7 (Casner ed. 1952).

entireties as to one third; yet they will hold, as tenants in common with A and B who each receive a one-third interest in the property.[2]

Since a tenancy by the entireties is essentially a joint tenancy modified by the fictitious doctrine that husband and wife are one person, the "four unities" rule is as applicable to the creation of a tenancy by the entireties as it is in the creation of a joint tenancy. Therefore, in some jurisdictions, a conveyance by a husband to himself and his wife, as tenants by the entireties, does not create this tenancy for the same reason that the same courts would not recognize the creation of a joint tenancy in a similar situation: the purported conveyance violates the unity of time and of title. A further reason is also given: the conveyance by the husband to himself violates the common law rule that a person cannot be a grantor and a grantee. This problem will be further pursued, *infra*, in the section on the "four unities."[3]

The chief characteristic of the tenancy by the entireties is the right of the survivor of the marriage to take the whole estate. In this respect the joint tenancy and the tenancy by the entireties are similar. However, they are dissimilar in this important respect: while joint tenants have individual interests which they can convey and which their individual creditors can reach, tenants by the entireties, holding as they do "*per tout et non per my*," have no individual interests which either can convey or which the individual creditors can reach during the marriage so as to defeat the right of survivorship of the other. The control over the property is in the husband, as is the right to possession and to the income and profits. These rights could be reached by the husband's creditors and could be conveyed by the husband, subject to the right of the wife to the entire property should she survive her husband. Should the husband survive, however, then his grantee or creditor would take the entire estate in fee.[4]

Statutes Preferring Tenancies in Common

Decisions under statutes reversing the common law preference for joint tenancies and providing for their creation only by express words are practically unanimous that such statutes do not apply to conveyances to husband and wife. Some of these statutes expressly include husband and wife. For example, the Code of the District of Columbia provides that "[e]very estate granted or devised to two or more persons in their own right, including estates granted to husband and wife, shall be a tenancy in common, unless expressly declared to be a joint tenancy. . . ."[5]

Settle v. Settle[6] construed this provision and applied it to two deeds con-

[2] 2 WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY 28-29 (1947).
[3] 2 TIFFANY, REAL PROPERTY §§431-32 (3rd ed. 1939).
[4] 2 AMERICAN LAW OF PROPERTY, *supra* note 1, §6.6.
[5] *D.C. Code Ann.* §45-816 (1961).
[6] 8 F. 2d 911 (D.C. Cir. 1926).

veying certain property to husband and wife. The first deed granted a part of the property to the husband and wife "and the survivor of them, as joint tenants, in fee simple interests, in equal shares in said land"; and the second deed granted the remainder of the property to them "as joint tenants, in fee simple titles of equal interest therein." The court held that the code provision did not abolish tenancies by the entireties. It further held that the provision merely provides that express language in the instrument is necessary in order to create a joint tenancy rather than a tenancy in common, whether in conveyances to strangers or to husband and wife, but it did not attempt to define or change the incidents or effects of either of these kinds of tenancies.

What estate is created under such provisions if the grant is to husband and wife, followed by these or similar words: "as joint tenants in joint tenancy, and to the survivor of them and their and such survivors' heirs and assigns, to their own use and behoof forever?" Does this deed create a tenancy in common, a joint tenancy, or a tenancy by the entireties? *Hoag v. Hoag*[7] construed such an instrument. The court held that a tenancy by the entireties had been created. It observed that the language used is almost like the language of the statute and plainly indicates that a tenancy in common was not intended but

> the statute goes no further. It has performed its function. In going further and determining what kind of estate the grantees took, we can get no help from it, but must be guided by the common law principles of construction applicable to such matter. There can be no doubt that the language used in the habendum is such as would create a joint tenancy between grantees other than husband and wife.[8]

The court recognized the conflict of authority on the question as to whether husband and wife can hold land granted to them jointly during marriage in simple joint tenancy as distinguished from an estate by the entireties. In holding that the parties held as tenants by the entireties the court applied "one of the principle common law rules of construction upon this subject . . ." which is that ". . . the same words of conveyance which would make other grantees joint tenants would make a husband and wife tenants by entirety. . . . Such is presumed to be the intention."[9]

A case illustrating the contrary position is *Thornburg v. Wiggins*,[10] where the question was whether a conveyance to husband and wife "in joint tenancy" made them joint tenants or tenants by the entireties. The court held that the husband and wife were joint tenants and refused to apply the rule

[7] 213 Mass. 50, 99 N.E. 521 (1912).
[8] *Id.* at 53, 99 N.E. at 522.
[9] *Id.* at 53, 99 N.E. at 523.
[10] 135 Ind. 179, 34 N.E. 999 (1893). See cases collected in Annot., 161 A.L.R. 457, 470-73 (1946).

of the *Hoag* case, pointing out that the logical result of applying it would be that husband and wife could never be made joint tenants.

"Four Unities" Rule

In the creation of a joint tenancy or a tenancy by the entireties it was necessary to comply with what Professor Powell calls the "older rule"[11] which required that a conveyance must possess, and the parties maintain at all times, the "four unities" of time, title, interest, and possession.[12] Cases involving the application or even the existence of this rule still arise and the decisions are divergent. The factual situations of many cases arise out of conveyances by the owner-grantor to himself and another—his wife in many cases, of the entire property or, in some cases, an undivided interest, with the added language expressing an intent to create a joint tenancy or a tenancy by the entireties, as the case may be. Tied to the "four unities" rule is the rule that a man cannot convey to himself,[13] and the doctrine that a husband cannot convey to his wife.[14] Problems growing out of these restrictions may be avoided by resorting to the "straw man" technique of conveying the property to a third party who, in turn, conveys to the intended cotenants.

The common law rule that neither spouse can convey directly to the other is still the law in many states. It has been abrogated in others, either wholly or partially by express legislation and, in still others, the doctrine has been discarded as the result of statutes which have removed the reasons behind it. Where the doctrine exists, the "straw man" technique should be utilized.[15]

But the obstacle of the doctrine that a man cannot convey to himself is still a formidable one. A few American courts hold that a grantor may, without the aid of statute, create a joint tenancy in himself and another by a direct conveyance, a position inconsistent with the "four unities" rule in that all of the grantors did not acquire their interests simultaneously and from the same instrument.[16] The decisions holding that the intent to create a survivorship interest will be given effect will be discussed *infra* under the section on Survivorship in Entireties Cases.

Stuehm v. Mikulski[17] illustrates the view that a direct conveyance by a grantor-owner to himself and his wife "as joint tenants and not as tenants in common" is ineffective to accomplish the desired purpose. The court without

[11] POWELL, REAL PROPERTY §616 (1954).

[12] For a discussion of this rule see text accompanying note 3, *supra*.

[13] Hicks v. Sprankle, 149 Tenn. 310, 257 S.W. 1044 (1944). See also 2 COKE ON LITTLETON §112a (19th ed. 1932).

[14] Ames v. Chandler, 265 Mass. 428, 164 N.E. 616 (1929).

[15] 4 AMERICAN LAW OF PROPERTY §18.43 (Casner ed. 1952).

[16] Note, 45 MICH. L. REV. 638 (1947). See also Annot., 44 A.L.R. 2d 595 (1955) on character of tenancy created by owner's conveyance to himself and another, or to another alone, of an undivided interest.

[17] 139 Neb. 374, 297 N.W. 595 (1941).

the slightest equivocation held that the "four unities" rule being, like the Rule against Perpetuities, a rule of law, must be complied with, despite the clearly expressed intent of the parties. And *Therrien v. Therrien*[18] just as unequivocably moves towards the complete abolition of this rule and the need for use of the "straw man" technique, a position the court said was in line with the prevailing trend in such cases. In this case a wife conveyed property to her husband and the pertinent part of the granting clause reads: "To be held by him with this grantor in joint tenancy with full rights of ownership vesting in the survivor"; the pertinent part of the habendum clause ran "to him the said grantee as joint tenant." In reaching its decision that court relied upon the constructional rule that "... the expressed intention of the grantor will override, whenever possible, purely formalistic objections to real estate conveyancing based on shadowy, subtle and arbitrary distinctions and the niceties of the feudal common law"[19]; it disposed of the "straw man" technique in the following language: "the necessity of requiring an extra deed makes a fetish out of form and compels the parties to the instrument to employ an indirect manoeuvre of the 18th century merely to satisfy the outmoded unities rule."[20]

The New York approach to this problem in the entireties cases is to consider the conveyance as being made to an entity made up of husband and wife,[21] and "the modern view taken by the New York cases has spread rapidly to other jurisdictions."[22] It would seem that if joint tenants likewise hold as a fictitious entity, the same approach should be taken in the joint tenancy cases. The trend against the need for the "straw man" technique is being aided by legislation.[23]

Survivorship in Entireties Cases

In the United States there is an increasingly strong trend of decisions recognizing survivorship interests. The decisions are conflicting and the usual areas of contest involve the "four unities" rule and conveyances by a husband to himself and his wife as tenants by the entireties; the effect to be given to a conveyance to two persons, as tenants by the entireties, who are not husband and wife; and conveyances to husband and wife as tenants by the entireties of land located in a jurisdiction which does not recognize such tenancies or their incident, the right of survivorship.

[18] 94 N.H. 66, 46 A. 2d 538 (1946).
[19] *Id.* at 68, 46 A. 2d at 538.
[20] *Id.* at 68, 46 A. 2d at 539.
[21] In re Klatzel's Estate, 216 N.Y. 83, 110 N.E. 181 (1915).
[22] Ebrite v. Brookhyser, 219 Ark. 676, 680, 244 S.W. 2d 625, 628 (1951).
[23] See 2 American Law of Property, *supra* note 1, §6.1 n. 10 (Supp. 1958). See also United Loan & Ins. Co. v. Nunez, 225 Ark. 362, 282 S.W. 2d 595 (1955), where the court held that a pre-existing lien against a "straw man" could not be asserted.

The "common judicial salvaging device is to find that the language of the instrument created a 'right of survivorship' although no tenancy by the entirety was possible."[24] The construction that has been given to such conveyances is based upon the express intent of the conveyor, though often the courts endeavor to give effect to the conveyor's manifest desire to invoke a right of survivorship. The opinion of Mr. Justice Reed of the United States Supreme Court, sitting by designation on the United States Court of Appeals, District of Columbia Circuit, in *Coleman v. Jackson*,[25] as well as the discussion of the cases cited in the opinion, sufficiently illustrates the trend of judicial thinking on these questions. The discussions in the sections on the "Four Unities" and conveyances to persons "and the survivor of them" are pertinent to the matter discussed in this section.

The conveyance in the *Coleman* case ran to "Thomas H. Jackson and wife, Alice R. Jackson . . . as Tenants by the Entirety." The grantees were not legally married. The court held that a joint tenancy and not a tenancy in common had been created. It reached this conclusion by holding that the statute preferring a tenancy in common over a joint tenancy had been overcome, since it was impossible to say that, because a tenancy by the entireties was barred by the lack of a valid marriage, the parties intended a tenancy in common; that the words as "tenants by the entireties" expresses an intent that the court cannot ignore; that the intent of the parties is clear from the words of the conveyance; that no contrary evidence of intent exists; that the words "tenants by the entireties" show the desire of the parties for inalienability and the wish that the survivor take the whole property; that it does not follow that parties deprived of an estate which is inalienable, should also be denied the right of survivorship; that survivorship is the most important feature of both tenancies; and that, although there are differences between them, the similarities between the two forms of cotenancy cannot be ignored. The court concluded that the intention of survivorship manifested in the deed can best be effected by declaring the cotenants in this case to have been joint tenants. It refused to accept the reasoning of *Perrin v. Harrington*,[26] which held that a similar conveyance created a tenancy in common between the unmarried grantees. The court in *Coleman* referred to *Teacher v. Kijurina*,[27] a Pennsylvania case involving a conveyance that ran to "Nick Kijurina and Sarah, his wife." There were no words indicating how they were to hold the property. The Pennsylvania Supreme Court unanimously held that a tenancy in common had been created in the unmarried grantees and that it made no difference whether the grantees knew they were married or not. Since no lan-

[24] 4 POWELL, *op. cit. supra* note 11, §622 at 658-59. See generally: Annot., 1 A.L.R. 2d 247 (1948); Annot., 44 A.L.R. 2d 595, 598-605 (1955).
[25] 286 F. 2d 98 (D.C. Cir. 1961).
[26] 146 App. Div. 292, 130 N.Y.S. 944 (1911).
[27] 365 Pa. 480, 76 A. 2d 197 (1950).

guage of survivorship appeared in the deed the court denied the right of survivorship.

Not all survivorship deeds create a joint tenancy or a tenancy by the entireties as "the intention may be to create a true future interest by way of remainder or executory interest."[28] As was indicated *supra* in the section on Conveyances to Persons "and to the Survivor of Them," the problems as to the destructibility of these survivorship interests and the rights of creditors belong to an area in which judicial thinking should be developed.[29]

Married Women's Property Acts

During the 19th century substantial changes affecting tenancies by the entireties were brought about as a result of the demands of creditors and of those who believed that the estate had outlived its usefulness.[30]

Tenancies by the entireties rejected

In the United States three states had rejected this estate because repugnant to their institutions and to a sense of justice to the heirs; other states, by statutes, abolished either the joint tenancy or its chief characteristic, the right of survivorship, or raised a rebuttable presumption of a tenancy in common as to concurrent estates and their courts have held that these statutes applied to tenancies by the entireties.[31] But the most significant changes were the result of the married women's acts.

Impact of the Married Women's Acts

In general, the purpose of the married women's acts with respect to married women's property was to remove a married woman's coverture disabilities, to abrogate or diminish the husband's control over and his rights in his wife's property, and to insure to a married woman a "statutory separate estate" at law, just as the equity chancellors had already insured to her an "equitable separate estate" in equity. The legislatures made legal what the Chancellors had already made equitable. The basic decision for the courts under such legislation was whether the dominance and control of the husband and the incompetence of his wife with respect to property held by the entireties had been incidents of the cotenancy or of the marriage status.[32] The varied conclusions of the several states on the impact of these acts may be gathered into three groups.

[28] 2 American Law of Property, *supra* note 1, §613 at 14.
[29] Burns v. Nolette, 83 N.H. 489, 496, 144 A. 848, 852 (1929). This case is pertinent though it involves personal property. Anson v. Murphy, 149 Neb. 716, 720, 32 N.W. 2d 271, 273 (1948).
[30] 4 Powell, *op. cit. supra* note 11, §§620, 623.
[31] *Id.* §621.
[32] Phipps, *Tenancy by Entireties*, 25 Temp. L. Q. 24, 24-28 (1951).

Tenancies by the entireties abolished

In the first group are the courts which have held that such legislation abolished the estate by the entireties because its sustaining principle was abandoned: the fictitious merger of the husband and wife into one person. A new principle was substituted recognizing a married woman as a distinct person capable of taking, holding and controlling her own property separate from her husband. Therefore, reasoned these courts, a conveyance to a husband and his wife is now, in fact, a conveyance "to two persons, each of whom is capable of taking separate estates [it being] impossible that they should take by the entireties, as if they constituted a single person."[33] This view is the basis of the relevant law of at least nine states.

Tenancies by the entireties unaffected: Massachusetts, Michigan and North Carolina

The second group concluded that tenancies by the entireties remained unaffected by the married women's acts or any other legislation dealing with marital relationships, chiefly because they were not expressly mentioned in the statutes. Three states make up this group: Massachusetts, Michigan and North Carolina. Massachusetts not only saved the estate itself but it also confined its incidents to what they were at common law by refusing to increase the wife's prerogatives or to decrease the husband's dominance."[34] It reconciled this position with the destruction of the *jure uxoris* with respect to separate property by holding that the husband's right to possession, income and control was derived from the tenancy itself and not from the *jure uxoris*; abolishing this estate, therefore, had no effect on the estate held by the entireties.

In theory at least, ownership of the entireties was in the two spouses. But under traditional law the right to the possession, enjoyment, and control of the property was lodged in the husband, subject to the surviving wife's only substantial interest, the right of survivorship. This interest of the husband could be conveyed or leased by him; it was subject to his separate creditor's judgment lien; and would be conveyed to a purchaser after a sheriff's sale pursuant to execution upon a lien whose title would become complete should the husband survive his wife. If the wife survived, she acquired the entire ownership freed from the lien of her husband's creditors or any unilateral conveyance made by him before his death. During the marriage however, a purchaser at an execution sale of the husband's interest would acquire the right to immediate possession of the premises, which right ceased if the hus-

[33] Walthall v. Goree, 36 Ala. 728, 735 (1860). See generally Annot., 141 A.L.R. 179, 181-87 (1942).

[34] Phipps, *op. cit. supra* note 32, at 29-31. See also: Note, 58 MICH. L. REV. 601 (1959); Note, 37 HARV. L. REV. 616 (1923).

band predeceased his wife.[35] These rights of the husband at common law in an estate by the entireties were considered in a recent New Jersey case, *King v. Greene*,[36] and were there enclosed within the limits of a defeasible fee simple which terminated on his death before his wife.

Since the estate by the entireties remained as it was before the married women's act, the interest of the wife in this estate must be measured by the standard of the common law. Under the common law a wife could not validly convey her own property without the written consent of her husband. Since a creditor could not do that which the debtor-spouse could not do, the property held by the entireties was not available to the wife's creditors. Therefore the wife could not, during the marriage, convey or mortgage any interest to a stranger nor could she give a valid release of a mortgage held by herself and her husband as tenants by the entireties.[37] On the other hand, a Massachusetts court recently held,[38] under a statute permitting conveyances between spouses, that the interest of the wife was of sufficient substance to be conveyed by deed to her husband during the marriage, a transaction which terminated the tenancy.

The position of the courts of this group has been criticized as being inconsistent with the broad purpose of the married women's acts which were, in general, designed to remove the marital incapacities of the wife.[39]

Michigan and North Carolina followed Massachusetts but not to the extent of allowing the husband's creditors to levy or attach income or profit during the marriage.[40]

In these three states in litigation involving the wife's right of survivorship, notice to her is necessary to effect jurisdiction, though it is not necessary if the litigation is limited to the interest of the husband in the estate during the marriage.[41]

Tenancies by Entireties Affected

In the third group, the courts hold that the estate by the entireties still exists, but without the common law incidents. These courts are of the opinion that these incidents were peculiar to the marital status and not to the tenancy. They reasoned that before the married women's acts, the husband's beneficial interest and the wife's incompetence were the chief incidents of the estate; that, under the acts, these incidents were modified so as to make the husband and wife equal with respect to all aspects of the estate.[42]

[35] 4 POWELL, *op. cit. supra* note 11, §623; 2 AMERICAN LAW OF PROPERTY, *supra* note 1, §6.6.
[36] 30 N.J. 395, 153 A. 2d 49 (1959).
[37] Licker v. Gluskin, 265 Mass. 403, 164 N.E. 613 (1929).
[38] Hale v. Hale, 332 Mass. 329, 125 N.E. 2d 142 (1955).
[39] Note, 37 HARV. L. REV. 616 (1923).
[40] Phipps, *op. cit. supra* note 32, at 33-34.
[41] *Id.* at 40.
[42] Hiles v. Fisher, 144 N.Y. 306, 39 N.E. 337 (1895).

Four states of this group—Arkansas, Ohio, New Jersey and New York—found that the purpose of the married women's acts was to save the wife's interest in the estate from the operations of the common law rule that during their joint lives the entire estate was subject to execution for the husband's debts, and to extinguish the "right which the husband has at common law to appropriate to his own use, during the life of the wife, her estate in lands . . . and to enable her to possess and enjoy it as fully as if she were a single woman."[43] The courts reached the desired equality by giving a wife rights, powers and interests in the estate equal to those possessed by her husband, producing, in effect, a tenancy in common or a joint tenancy during their joint lives, but with an indestructible right of survivorship as at common law. Neither could, by unilateral action, sever the tenancy so as to defeat the other's right of survivorship, and, during the marriage the rules applicable to tenancies in common would apply in determining the extent of the spouses' interest available for the individual creditors.[44] Either spouse can alienate both the life estate in one half use of the property, being one half of the income and profit during the marriage and the contingent right of survivorship. The present interest may be levied upon and sold by separate creditors and the purchaser, at the execution sale, becomes a tenant in common for life with the non-debtor spouse.[45] A sheriff's deed to the husband's creditors, pursuant to execution on a judgment against the husband, of the husband's estate, right, title, and interest in the property, entitles the purchaser to move in and share the home with the wife but it does not entitle him to eject her or to force her to rent the property.[46]

It was chiefly in the alienability of the survivorship interest—voluntarily, by private sale, or involuntarily, pursuant to a separate creditor's judgment lien—that distinguishes these four states from the position taken by most of the states of this group on this matter.

It was not until 1959, however, that New Jersey's position on this question was brought into accord with that of the other three states. By this date it had been settled in New Jersey that each spouse could alienate his or her interest in one half of the rents and profits during the marriage; that this interest could be reached by separate creditors; and that the purchaser at an execution sale could procure partition of such interest. But the problem as to the alienability of the right of survivorship, especially by way of execution and sale for the satisfaction of one spouse's debts remained unsettled. In *King v. Greene*[47] the New Jersey Court decided that the husband's right of survivorship was alienable at common law; that the married woman's act made the

[43] Phipps, *op cit. supra* note 32, at 27-32; Note, 58 MICH. L. REV. 601 (1959).
[44] Buttlar v. Rosenblath, 42 N.J. Eq. 651, 9 A. 695, 698 (1887).
[45] Phipps, *op. cit. supra* note 32, at 34; Note, 58 MICH. L. REV. 601 (1959).
[46] Finnegan v. Humes, 252 App. Div. 385, 299 N.Y.S. 501 (1937).
[47] *Supra* note 36.

husband's and the wife's interest in an estate by the entireties equal, and that therefore her right of survivorship was alienable.

The anomalies inherent in the application of the tenancy in common formula to estates by the entireties is pictured more vividly when focused upon the protection given to the common use of a home by the non-debtor spouse and a stranger who purchased the debtor-spouse's interest at a sheriff's sale.[48]

The interest of each spouse is so separate that it might be affected only upon notice to each separately.[49]

In most of the states of the third group, the husband and wife have equal rights with respect to an estate by the entireties. This position of equality was reached by decreasing the husband's prerogatives until the husband and wife had equal interests and rights.[50] In *Fairclaw v. Forrest*[51] the court analyzed and carefully stated the position of this group of jurisdictions. After pointing out that the husband's "right was not derived from the nature of the estate but from the general principle of common-law vesting of the wife's property in the husband"[52] it considered the effect of the married woman's property statutes on the estate by the entireties and said:

> Although it is said that no technical changes have been made in the estate by entirety, the results are different. Now each is entitled to the enjoyment and benefit of the whole and neither has a separate interest estate therein which may be subjected to a conveyance or execution . . . and the rights of each spouse are regarded as equal to the other's and superior to the rights of persons who claim through the other spouse . . . and the limitations on alienation and encumbrance are imposed in order to protect the rights of the other spouse.[53]

During the marriage joint action is necessary to alienate or affect the property or its income and only joint creditors may reach the property or its income. The right of survivorship may not be reached by separate creditors because of the adverse effect a different position might have on the other spouse's interest.[54] In *Ward Terry and Company v. Hensen*,[55] the Wyoming court considered and discussed cases showing the position of the various groups with respect to the impact of the married women's acts and came to the conclusion that the position of the courts of the jurisdictions being presently discussed herein is the more logical one. The court found it difficult "to

[48] Note, 58 MICH. L. REV. 601 (1959).
[49] Phipps, *op. cit. supra* note 32, at 40.
[50] *Id.* at 31-32.
[51] 130 F. 2d 829 (D.C. Cir. 1942).
[52] *Id.* at 832.
[53] *Id.* at 833.
[54] 4 POWELL, *op. cit. supra* note 11, §623 at 663-65; Phipps, *op. cit. supra* note 32, at 34; Annot., 166 A.L.R. 969, 983-98 (1947).
[55] 75 Wyo. 444, 297 P. 2d 213 (1956).

perceive how an integral, indivisible part of an estate by the entirety, can without the consent of the husband and wife, be converted into an estate of cotenancy as held in New York and some other states. If this holding interferes too much with the rights of creditors as held in some of the cases, the remedy should be provided by the legislature. We should not be asked to lay down a rule which appears to us to be illogical."[56] This "indivisibility" that the court refers to extends to every part of the estate including the rents, income and profits thereof.

In the jurisdictions of the third group, a creditor of a spouse cannot reach the spouses' interest in the estate by the entireties during the joint lives of the spouses and, if the debtor spouse dies first, the survivor takes the whole property free from the debts of the deceased spouse.

Vasilon v. Vasilon[57] states the present position of most courts of this third group with respect to a conveyance by the spouses and the rights of creditors. A husband and wife had owned property as tenants by the entireties and on August 17, 1949, pursuant to statutory authority, they conveyed this property to the wife alone. In November 1949 the father of the husband secured a judgment against his son for the balance due him on a loan made to the son while the son and his wife held the property as tenants by the entireties. The bill in chancery alleged that the property was conveyed to the wife with the intent to defraud the father. The court in deciding against the father held that since tenants by the entireties could convey the property by a joint conveyance free from liens and claims of creditors to third parties there was no reason why it could not be so conveyed by the husband and wife to himself or herself. The court said that no question of fraud could be involved as the property is insulated against the claims of creditors of the individual spouse.

In these jurisdictions, the spouse's interest does not pass to his or her trustee in bankruptcy; is not subject to mechanics' liens or tax liens; and it cannot be mortgaged by an individual spouse.[58] In North Carolina, however, the courts seem to permit a husband to mortgage his interest in the estate because he is entitled to control and possession of entirety property during the marriage.[59]

In Pennsylvania, divergent views appear to have been taken upon the question of a lien attaching to one spouse's interest. Some of the courts hold that an enforceable lien does not attach while others take the position that a creditor of an individual spouse can obtain an inchoate or potential lien which takes precedence over liens subsequently created by the joint action of the spouses in the event the non-debtor spouse dies first.[60]

[56] *Id.* at 461, 297 P. 2d at 220.
[57] 192 Va. 735, 66 S.E. 2d 599 (1951).
[58] See generally, Annot., 75 A.L.R. 2d 1172, 1175-78, 1190-98 (1961).
[59] First National Bank of Durham v. Hall, 201 N.C. 787, 161 S.E. 484 (1931).
[60] Annot., *supra* note 58, at 1178-83.

United States v. American National Bank[61] is another case illustrating the inability of creditors to reach entireties property as well as indicating the order of priority between a joint mortgage and a previously filed federal tax lien against the husband. Under Florida law, the survivor of an estate held by the entireties acquires the whole property and during the joint lives of the cotenants it is not subject to execution to satisfy the individual debts of either of the spouses. In applying this law, the court held that the husband during the life of his wife did not own any interest in the property to which a lien for federal taxes owed by him could attach and that the lien only attached to the property as of the time of the wife's death; consequently the mortgage had priority over the tax lien.

Contribution

Whether the survivor of cotenants, who held property as tenants by the entireties, is entitled to contribution from the deceased tenant's estate for one half of a joint mortgage debt upon the entireties property paid by the survivor is a question upon which there is a sharp conflict of views. That the survivor is entitled to contribution was decided in *In re Keil's Estate*.[62] In that case the proceeds of a loan were used to improve the mortgaged property. The view taken by the court allows contribution, and is based on the theory that a benefit was derived by the decedent's estate by the payment, the mortgage being a claim against this estate. Emphasis placed on the joint debt aspect of the transaction, *i.e.*, the right of contribution as flowing from the debt and not from the mortgage lien. The incidental existence of collateral in the hands of the creditor is regarded as immaterial in enforcing his rights.[63] The other view emphasizes the mortgage lien aspect of the transaction; therefore contribution should be denied as the debt is to be treated as a mere incident to the lien which no longer affects the deceased tenant's estate as the entire property passed to the survivor. According to this latter view, the land is the principal fund for payment, and the surviving spouse possesses the property to which is attached the entire burden of payment. The majority of the court held that the payment benefited the deceased tenant's estate by the fact that it was discharged from the primary liability on the past debt, a sufficient basis upon which to base the equitable principle of contribution.[64]

Divorce

The fictitious unity of husband and wife is severed by a divorce as is the estate by the entireties held by the parties and usually they become tenants in com-

[61] 255 F. 2d 504 (5th Cir. 1958), *cert. denied* 358 U.S. 835 (1958), *reh. denied* 359 U.S. 1006 (1959).
[62] 145 A. 2d 563 (Del. 1958).
[63] *Id.* at 565.
[64] See Note, 73 HARV. L. REV. 425 (1959); Note, 58 MICH. L. REV. 137 (1959).

mon even though one of them had paid the full purchase price. Pennsylvania and Arkansas by recent statutes reach the same result. If a foreign divorce is entitled to full faith and credit it has the same effect as a local divorce.[65]

One aspect of this problem involves the power of the court to award the interest of one spouse to the innocent other spouse. In *Oxley v. Oxley*[66] the court awarded the whole property that had been held by the entireties to the husband on two grounds: the wife had furnished no part of the original purchase price and had violated her marriage vows. The court pointed out that joining with her husband in assuming the payment of a first trust indebtedness and in executing the note did not amount to furnishing of consideration, and said that a conveyance under such circumstances placed "an implied covenant in the deed, and a subsequent wrongful breach of the vows causes a failure of the continuing consideration, and works a forfeiture of the property right conferred on her by the deed."[67]

Most courts, however, "deny the innocent spouse more than his one half share, and this course of action seems the sounder one both legally and practically."[68]

Another aspect of the divorce problem recently litigated involves the question of whether the right of survivorship is within the "divisible divorce doctrine" enunciated by the Supreme Court of the United States in *Estin v. Estin*[69] and *Vanderbilt v. Vanderbilt*,[70] which is to the effect that the property rights of the defendant spouse may not be foreclosed by a foreign ex parte divorce where the New York policy is to continue support. In *Huber v. Huber*,[71] a wife had obtained an ex parte Florida divorce. Later in New York she brought a partition suit involving property which she and her former husband had held by the entireties. The court held that a valid ex parte foreign divorce decree will not convert a tenancy by the entireties into a tenancy in common in New York. This decision extends the "divisible divorce doctrine" as it applies to support, to the "right of survivorship" in a tenancy by the entireties. The court held that due process will not permit the tenancy by the entireties in New York real property to be affected by a divorce decree entered without personal jurisdiction over the defendant. One New York court,[72] and courts of other states[73] reached conclusions contrary to *Huber*. The *Huber* court discussed these cases and distinguished them chiefly because

[65] 4 POWELL, *op. cit. supra* note 11, §624.
[66] 159 F. 2d 10 (D.C. Cir. 1946).
[67] *Id.* at 11-12.
[68] 4 POWELL, *op. cit. supra* note 11, §624 at 671.
[69] 334 U.S. 541 (1948).
[70] 1 N.Y. 2d 342, 135 N.E. 2d 553 (1956), *aff'd* 354 U.S. 416 (1957).
[71] 26 Misc. 2d 539, 209 N.Y.S. 2d 637 (1960).
[72] Grigoleit v. Grigoleit, 205 Misc. 904, 133 N.Y.S. 2d 442 (1954).
[73] Millar v. Millar, 200 Md. 14, 87 A. 2d 838 (1952); Eberle v. Somonek, 24 N.J. Super. 366, 94 A. 2d 535 (1953), *aff'd* 27 N.J. Super. 279, 99 A. 2d 377 (1953).

those courts did not consider the right of survivorship as an absolute property right. Nor did they consider the problem of the jurisdiction of the foreign court over property held as tenants by the entireties in another state. By basing the decision upon the implications of due process it would seem that, unless overruled or reversed. New York's law prevents the partitioning of property upon the basis of a domestic ex parte divorce decree.[74]

Should Tenancies by the Entireties be Abolished?

In 1944 a report was made by the Committee on Changes in Substantive Real Property Principles after its study of the tenancy by the entireties.[75] It recommended that this tenancy be abolished for the reason, among others, that it is unsuited to modern conditions and that it affords opportunity for frustrating the rights of creditors of one spouse. The Report points out that the joint tenancy has the right of survivorship without the inequities of the tenancy by the entireties; further it suggests that the tenancy in common for life with remainder to the survivor in fee has the principal advantages of tenancy by the entireties without its disadvantages.

The saving in taxes is now largely illusory, and the worthy desire to protect a surviving spouse from becoming improvident can be achieved by the homestead laws of today. But the tenancy by the entireties is of sturdy stuff. Where still recognized, it remains, in most respects, just as it was after the impact of the Married Women's Property Acts.[76]

[74] See Note, 28 BROOKLYN L. REV. 142 (1961).

[75] Am. Bar Assn., "Report of the Committee on Changes in Substantive Real Property Principles", *Proceedings, Real Property, Probate and Trust Law Section*, 82-84 (1944).

[76] See Note, 73 HARV. L. REV. 792 (1959); Note, 58 MICH. L. REV. 601 (1960).