

Montana Law Review

Volume 25
Issue 2 *Spring 1964*

Article 7

January 1964

Clark v. Clark, 387 P.2d 907 (Mont. 1963)

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Recommended Citation

Fred Rathert, *Clark v. Clark*, 387 P.2d 907 (Mont. 1963), 25 Mont. L. Rev. (1963).

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THE ESTATE OF TENANCY BY THE ENTIRETY IS NOT A RECOGNIZED MODE OF OWNERSHIP IN MONTANA.—A husband and his wife were conveyed real property “as joint tenants with the right of survivorship and not as tenants in common.” Subsequently, they were divorced. Two years after the divorce, the husband died. He was survived by his wife and various brothers and sisters. The latter, the appellants, brought the action to quiet title, contending that the deed created a tenancy by the entirety and that when the grantees were divorced, the tenancy was, by operation of law, converted into a tenancy in common. The trial court held that a joint tenancy was created and that the wife took by right of survivorship. On appeal, *held*, affirmed. The Montana Supreme Court stated that the tenancy by the entirety is not recognized in Montana. Thus, the deed could create but one type of estate, a joint tenancy. *Clark v. Clark*, 387 P.2d 907 (Mont. 1963).

Beginning in the 14th or 15th century in England, two or more persons were able to own concurrent interests in the same estate in land. Three types of these interests form the basis for the modern law of co-ownership of real property.

Tenancy in Common. In this co-ownership, there is but one unity, that of possession. The right to possession of the whole of the estate belongs to all of the cotenants, yet, each cotenant has a separate and distinct interest in the property. The interest of one tenant may either be unequal to that of the others, acquired at a different time and by a different instrument, or conveyed by one tenant without the consent of the others. Unlike the other two concurrent interests to be considered, the right of survivorship is not an incident to a tenancy in common. On the death of one of the cotenants his interest passes to his heirs.¹

Joint Tenancy. The creation of a joint tenancy requires four unities, that of time, title, interest and possession. There must be but one interest created by one instrument. The interest of all of the cotenants must commence at the same time and be held under one possession. If one of the four unities is lacking, the result is a tenancy in common. Thus, joint tenants are seized of a share and also of the whole. The right of survivorship is the most important aspect of the joint tenancy. When one of the tenants dies, the entire estate remains in the survivors. Neither the widow or heirs of the deceased tenant nor his creditors have any claim against the enlarged interest of the surviving tenants. One joint tenant, without the consent of the other tenants, may alienate his interest. This transfer severs the interest conveyed from the joint tenancy. The transferee holds as a tenant in common with the remaining joint tenants.²

¹MOYNIHAN, INTRODUCTION TO REAL PROPERTY 224-225 (1962); 2 AMERICAN LAW OF PROPERTY § 6.5 (Casner ed. 1952).

²MOYNIHAN, *supra* at 216-223; 2 AMERICAN LAW OF PROPERTY, *supra* §§ 6.1 — 6.4. Under the common law theory of the “title mortgage” where title to the property is transferred to the mortgagee, the execution of the mortgage severs the joint tenancy. A conflict has arisen as to the effect of a “lien mortgage” executed upon a joint estate. California has taken the position that the execution of a “lien mort-

Tenancy by the Entirety. The common law developed a type of cotenancy peculiar to the marital relationship. This was the estate of a tenancy by the entirety. In addition to the four unities requisite to the joint tenancy, the unity of husband and wife was necessary to the creation of the estate. The common law considered the husband and wife as but one person for legal purposes. Thus, while the marital state existed, both and each were seized of the whole of any transfer of real property made to them as man and wife. The husband was given complete control of the use, rents, profits and possession of the property. These rights were subject to execution and seizure by his creditors and could be voluntarily conveyed by him without his wife's consent. The ability of the husband to convey the interests in the estate during the joint lives of the spouses arose from his position under the common law as guardian of the wife and was not an incident of the estate. Thus, the husband could not voluntarily or involuntarily destroy his wife's right of survivorship.³

The tenancy in common, and, for all purposes with which this article is concerned, the joint tenancy, exist today unchanged from their common law form.⁴ The position of the tenancy by the entirety in modern law is confused. Three states will be considered: New Jersey, because of its modification of the estate; Wyoming, because of its recognition of it; and Montana, because of its refusal to recognize the estate. The first concern will be a discussion of the purpose of the Married Women's Act in each state, and second, the effect of the Act upon the estate by the entireties.

gage" on the property does not destroy or sever the joint tenancy. The California court stated that there was no transfer of title, nor was the mortgagee entitled to possession. The mortgage attached only to the mortgagor's interest and when he died the mortgage terminated. *People v. Nogarr*, 164 Cal. App. 2d 591, 330 P.2d 858 (1958). This position of the California court is not technically correct. The execution of the "lien mortgage" would destroy the unity of interest of the joint tenants, creating an interest in the mortgagee and thus sever the tenancy. See 2 AMERICAN LAW OF PROPERTY, *supra* § 6.2.

Under the traditional common law, a conveyance to two or more persons presumably created a joint tenancy. Generally this is not true today. Courts and statutes now require an express intention to create rather than not to create. MOYNIHAN, *supra* at 218. Montana has a statute requiring an express intention to create a joint interest. REVISED CODES OF MONTANA, 1947, § 67-313. (Hereinafter REVISED CODES OF MONTANA are cited R.C.M.) However, the Montana Supreme Court has stated that the words "joint tenants" are sufficient to establish the requisite intention. *Hennigh v. Hennigh*, 131 Mont. 372, 309 P.2d 1022 (1957).

³2 AMERICAN LAW OF PROPERTY, *supra* note 1 § 6.6; MOYNIHAN, *supra* note 1 at 229-335. Professor Moynihan states that ". . . tenants by the entirety were seized of the whole and not of a share . . . As in the case of a joint tenancy, the incident of survivorship attached to a tenancy by the entirety but it was an indestructible right of survivorship. Both spouses could join in a conveyance of the property to a third person but neither alone could create a severance of the tenancy or by any act defeat the right of survivorship of the other spouse. No right of partition existed." MOYNIHAN, INTRODUCTION TO REAL PROPERTY, *supra* at 229-230.

⁴MOYNIHAN, *supra* at 216-223; 2 AMERICAN LAW OF PROPERTY, *supra* §§ 6.1—6.4. For Montana's position see *Hennigh v. Hennigh*, *supra* note 2. Modern courts tend to look with disfavor on the estate of joint tenancy. At present, fifteen states have either abolished or modified the estate and the right of survivorship as an incident to it. See *Witzel v. Witzel*, 368 P.2d 103 (Wyo. 1963).

During the middle of the nineteenth century, the concepts of female emancipation began to destroy the feudal idea of the unity of husband and wife. As a result Married Women's Acts were enacted, the general purpose of which was to place the wife on a plane of equality with her husband in property matters. The husband's right to the control of the use, rents, profits and possession of the property of the wife was taken away. The wife was given independent control of her property with the right to contract and to sue or be sued without the consent of her husband.⁵ However, in elevating the wife to a position of equality with the husband, the Acts did not purport to deprive the wife of the interests which she held under the common law. Thus, in comparison of the above states, a distinction must be made between the right given to the husband under the common law by reason of his position as guardian of the wife, and the incidents of the tenancy by the entirety which arose out of the unity concept.⁶

In New Jersey the application of the Married Women's Act⁷ to the estate by the entireties has produced the unique property interest of a tenancy in common with the right of survivorship.⁸ The New Jersey court in *King v. Green*, held that the purpose of the New Jersey Married Women's Act was not only to put the wife on a plane of equality with the husband but to endow her with the capacity to hold property interests separately and independently. The court also stated that there was nothing in their statutes indicating a legislative intent to wholly prohibit the estate. By an analysis of the Married Women's Act and prior New Jersey cases, the court felt compelled to create the new type of co-

⁵Conley v. Conley, 92 Mont. 425, 15 P.2d 922 (1932); *King v. Green*, 30 N.J. 395, 153 A.2d 49 (1959).

⁶MOYNIHAN, *supra* note 1 at 230. The rights of the spouses were not equal during coverture. "The husband alone was entitled to possession, use and enjoyment of the property. This superior right of the husband, however, would seem not to be a peculiar attribute of the tenancy by the entirety but rather a consequence of the husband's position as guardian of his wife." Massachusetts takes the position that in a tenancy by the entirety, the husband has a life estate for the joint lives of the spouses and a remainder in fee should he survive the wife. *Quinlan v. Weeks*, 332 Mass. 482, 126 N.E.2d 98 (1955). This position seems to be in conflict with the general rule. "The right of survivorship was an attribute of the ownership by each spouse of the entire estate from the time it was conveyed to them; it was not a contingent future interest in the surviving spouse, superadded to a joint life estate." MOYNIHAN, INTRODUCTION TO REAL PROPERTY, *supra* at 230. See also 2 AMERICAN LAW OF PROPERTY, *supra* § 6.6, which states that the husband's right to the use, possession, rents and profits of the estate could be reached by his creditors or conveyed by him, but that the tenants did not have individual interests that they could convey and thus defeat the right of survivorship.

⁷N.J. STAT. ANN. 37:2-12 (1937). "The real and personal property of a woman which she owns at the time of her marriage, and the real and personal property, and the rents, issues and profits thereof, of a married woman, which she receives or obtains in any manner whatever after her marriage, shall be her separate property as if she were a femme sole." *Cf.*, R.C.M. 1947, § 36-111. "All the property of the wife owned before her marriage and that acquired afterwards is her separate property. The wife, may, without consent, agreement and signature of her husband, convey and transfer her separate property, real or personal, including the fee simple title to real property or execute a power of attorney for the conveyance and transfer thereof." See also *Conley v. Conley*, *supra* note 5, where the Montana Supreme Court stated that the purpose of the Married Woman's Act was to free the wife from the common law inequalities and to place her upon a plane of equality with her husband in the enjoyment, control and possession of property.

ownership.⁹ The right of survivorship is retained as it existed at the common law. It is conveyable by either spouse but neither can defeat the interest of the other. Thus, a conveyance by the husband of his interests, or the attachment thereof by his creditors, creates in the transferee a life estate with the possibility of a fee simple. Should the husband predecease the wife, she is entitled to the whole of the estate including any interests which the husband had conveyed.¹⁰

To accept the New Jersey position it is necessary to assume that the estate by the entirety as it existed at the common law gave to the husband the right to the use, control, profits and rents of the estate. However, this right of the husbands was *not* an incident of the estate, but was an incident of his position as the *guardian of his wife*. Under the common law, the tenancy by the entirety created in the spouses an indivisible interest in the entirety of the estate, which indivisibility was defeated by the husband's guardianship. It was this incident of the marital relationship which the Married Women's Acts were enacted to correct. They were not enacted to deprive the wife of her use and enjoyment in the whole.¹¹

Wyoming, on the other hand, has kept the estate of tenancy by the entirety.¹² The Wyoming court has stated that the purpose of its Married Women's Act¹³ was to sweep away the wife's disabilities as they had existed at the common law. However, the act did not purport to destroy the right of the spouses to the use and enjoyment of the whole of the estate during their joint lives. To place the wife on a plane of equality with her husband and yet hold that she could be deprived of the use and enjoyment of one-half of the estate would be an "empty privilege."¹⁴

'[F]or if the wife has the right to use and enjoy the whole, and that right is protected by statutes which allow her complete

⁹*King v. Green*, *supra* note 5. The New Jersey court found itself bound by prior decisions which had allowed the husband to convey his interest during the joint lives of the spouses. By adding the conclusion that the right of survivorship of the individual spouse was conveyable and that the estate by the entirety was not abolished by the legislature the court was forced to create the tenancy in common with the right of survivorship.

¹⁰*King v. Green*, *supra* note 5.

¹¹*Ward Terry & Co. v. Hensen*, 72 Wyo. 444, 297 P.2d 213 (1956).

¹²*Ward Terry & Co. v. Hensen*, *supra* note 11.

¹³WYO. STAT. ANN. § 20-22 (1957): "All the property, both real and personal, belonging to any married woman as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman during coverture acquires in good faith from any person whomsoever, or by descent or otherwise, together with all rents, issues, increase and profits thereof, shall, notwithstanding her marriage, be and remain during coverture her sole and separate property under her sole control and be held, owned, possessed and enjoyed by her the same as though she were sole and unmarried, and shall not be subject to the disposal, control or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband; provided, that the same shall not have been conveyed to her by her husband in fraud of his creditors; and that the necessary expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately; provided, further, that the personal expenses of the husband be not chargeable to the wife's separate estate." *Cf.*, New Jersey and Montana statutes, *supra* note 7.

freedom in the use, possession, and ownership of her property, the wife and the wife alone should have the power to say whether she will exchange the right of enjoying and using the whole property jointly with her husband, or a part of the property exclusively.¹⁵

Under the Wyoming position, the right of survivorship is indivisible and indestructible. Neither party can convey any interest in the estate without the consent of the other spouse and the interests of the individual spouses are not subject to attachment by their creditors. Thus, Wyoming has elevated the wife to a position of equality and yet has retained the estate by the entirety.

In the instant case, the Montana Supreme Court held that the tenancy by the entirety was repugnant to and inconsistent with the laws of the State.¹⁶ The court based its determination upon the premise that the Married Women's Act destroyed the fiction upon which the estate was founded, the unity of husband and wife. The basis for the estate having been destroyed, the court said, there can be no place for the tenancy by the entirety in the law of Montana. It is important to note that in reaching this conclusion, the court refused to inquire into various policy considerations to determine whether the estate was otherwise desirable.¹⁷ Because of this refusal, the court has left unanswered questions as to the effectiveness of an attempted conveyance of an estate by the entirety, and has failed to recognize the real purpose behind the Married Women's Act.¹⁸

¹⁵*Ward Terry & Co. v. Hensen*, *supra* note 11 at 218.

¹⁶A limited Married Women's Act was enacted in Montana in 1865. Bannack Statutes, § 1, p. 369 (1865); Allen v. Rousil, 15 Mont. 446, 39 Pac. 459 (1895). Since that time the Act has been broadened and the wife now maintains a complete separate legal identity from the husband. The Bannack enactment is still in effect, except that the right of curtesy in the husband no longer exists. See R.C.M. 1947, §§ 36-118, 36-131. Today the wife may contract or sue without the consent of her husband. (R.C.M. 1947, §§ 36-105, 36-110, 36-130); she may hold property as a tenant in common or as a joint tenant. (R.C.M. 1947, § 36-108). Except for the necessities of the family, the wife is not liable for the debts of her husband. (R.C.M. 1947, §§ 36-109, 36-114). The property which she had prior to her marriage, or acquired by her subsequent thereto, is her separate property. (R.C.M. 1947, § 36-111). See also Shaw v. Shaw, 122 Mont. 593, 208 P.2d 514 (1949); *In re Maharray's Estate*, 79 Mont. 10, 254 Pac. 875 (1927). Although the tenancy in common has always been a legally recognized means of co-ownership in Montana, the joint tenancy has not. *Hennigh v. Hennigh*, 131 Mont. 372, 309 P.2d 1022 (1957). For a discussion of the *Hennigh* case, see 19 MONT. L. REV. 69 (1957). Since 1885, however, only the tenancy by the entirety has been open to question although various decisions in the past indicated that the estate was not prohibited. *Hennigh v. Hennigh*, *supra*; *In re Marsh's Estate*, 125 Mont. 239, 234 P.2d 459 (1951). See MOYNIHAN, *supra* note 1 at 231 n.1, where Montana is cited as recognizing the estate. The Revised Codes of Montana, 1947, do not expressly recognize the estate, but they do not expressly prohibit it either. The Revised Codes do state that the common law shall be the law in Montana unless it is repugnant to the Constitution of the United States or the Constitution or laws of Montana. (R.C.M. 1947, § 12-103). In the instant case, the Montana Supreme Court held that the tenancy by the entirety was inconsistent with the laws of Montana.

¹⁷Instant case at 911.

¹⁸The problem before the Montana court was: what type of estate did the language "as joint tenants with the right of survivorship and not as tenant in common" create? In the *Hennigh* case, *supra* note 16, the Montana court stated that such language created a joint tenancy. In the instant case, however, the court refused to construe the language. Instead, it reviewed the various statutes and reasoned; the basis for the tenancy by the entirety having been destroyed, and it therefore not being a recognizable form of ownership in Montana, the only type of estate that

The jurisdictions which refuse to recognize the estate by the entirety or which in some way have modified it, as did New Jersey, have set forth three arguments. *First*, the common law inability of the wife to hold property no longer exists. The wife has been placed on a plane of equality with her husband and is entitled to hold property independently and separately.¹⁹ *Second*, there is an uncertainty as to the language necessary to create the estate. The presumption that a conveyance to husband and wife created a tenancy by the entirety no longer exists. It has been modified by statutes and by court decisions.²⁰ *Third*, the estate is commercially undesirable. It serves to frustrate the creditors of the spouses and allows one spouse to use the other as a means of avoiding commercial obligations.²¹

These arguments warrant consideration, but they should not be blindly accepted. Worthy arguments on the other side can be found. *First*, while the husband's right of control over the property of the wife no longer exists, the wife should be entitled to the use and enjoyment of the whole estate owned jointly by her and her husband during their joint lives. This is true despite the destruction of the common law concept of husband and wife as one legal person.²² *Second*, regardless of the uncertainty of creating the estate, careful drafting combined with detailed consideration by the courts would effectively counter it. *Third*, creditors only have the rights given to them by the law. The law provides for the recording of all real property conveyances to give notice of the holder's interest to prospective creditors and buyers. The law does not give creditors the right to take the property of the wife for the debts of her husband.²³

In the instant case, the Montana Supreme Court stated that the tenancy by the entirety was not a permissible mode of ownership in Montana. In making this bold flat statement, the court left unanswered important questions. *First*, did the court mean that tenancy by the entirety as it existed at the common law was not a recognizable form of co-ownership in Montana? This proposition is doubtful. If the court had taken the suggested position, it would still have had to construe the language of the instrument under consideration to determine whether the modern

could have been created was the joint tenancy. Dictum is often defined as answering a question or making a determination not actually before the court. BLACK'S LAW DICTIONARY (4th ed. 1951). The determination by the court in the instant case fits this definition.

¹⁹Hiles v. Fisher, 144 N.Y. 306, 39 N.E. 337 (1895); Whyman v. Johnston, 62 Colo. 461, 163 Pac. 76 (1917); Douds v. Fresen, 392 Ill. 477, 64 N.E.2d 729 (1946).

²⁰Collins v. Morris, 314 Mich. 145, 22 N.W.2d 249 (1946). In Montana, a joint interest must be expressly declared. *In re Marsh's Estate*, 125 Mont. 239, 234 P.2d 459 (1951); R.C.M. 1947, § 67-313.

²¹Farrell v. Paulis, 309 Mich. 441, 15 N.W.2d 700 (1944).

²²" . . . The right of the wife to the joint enjoyment of the estate, during the marriage, is as valuable and sacred as the right of taking the entire estate by survivorship upon the death of her husband There is an equity in equality, but there is a gross inequity and injustice in permitting the husband to deprive the wife of the use and enjoyment of an estate that does not belong to either, but to both, and which belongs as much to the wife as to the husband." *Ward Terry & Co. v. Hansen*, *supra* note 11, quoting from an early Indiana case, *Chandler v. Cheney*, 37 Ind. 391, 408-409 (1871).

²³*Ward Terry & Co. v. Hansen*, *supra* note 11, R.C.M. 1947, § 36-109.

form of the estate had been created. The court did not so approach the question.

Second, assuming that no form of the tenancy by the entirety is recognized by Montana law, what is to happen to a conveyance which attempts to create such? The answer to this question was not considered by the Montana court. Three possibilities exist.

The court, refusing to recognize the estate, may hold that an attempt to create it would be void. To accept such a proposition would create confusion and would impose an undue hardship upon transferees and transferees. Many persons relying upon a deed containing language creating the estate would find themselves claiming title based on a void conveyance.

An attempt to create the estate could result in a joint tenancy. This proposition is probably but not desirable. It is probable because of the similarity between the tenancy by the entirety and the joint tenancy and because of language in various Montana decisions.²⁴ The proposition is undesirable because the right of survivorship in a joint tenancy is destructible by the unilateral action of one tenant. To construe an attempt to create a tenancy by the entirety as producing a joint tenancy would allow the husband to destroy the wife's right of survivorship. To do so would deprive the wife of the primary incident of the tenancy by the entirety as it existed at the common law, the right to the use and enjoyment of the whole. It is submitted that this was not the purpose of the Married Women's Act.

The position taken in New Jersey could be adopted. If accepted, the right of survivorship would be retained as indestructible, yet either party could convey his or her interests during the joint lives of the spouses. This is a desirable proposition although such is founded upon fallacious reasoning; namely, that the purpose of the Married Women's Act was to deprive the wife of the use and enjoyment of the whole of the estate during the life of her husband.²⁵

The tenancy in common with the right of survivorship is a form of co-ownership unknown to the common law. However, such an estate is possible in Montana due to the Montana Supreme Court's construction of three statutes, R.C.M. 1947, §§ 67-308, 67-310 and 67-312. In considering section 67-310, the court said, "[t]he legal effect of this enactment was to provide that the right of survivorship exists in those classes of conveyances covered by it, whether made to joint tenants or to tenants in estate of entirety, but does not purport to exclude the right of survivorship in other types of conveyances."²⁶ In considering section 67-308, the

²⁴R.C.M. 1947, § 67-310, provides: "In all conveyances of real property made in joint tenancy or to tenants in estates by entirety, where the right of survivorship is contained in the grant of such conveyance, the right of survivorship is hereby expressly declared to exist by virtue of such grant." In the instant case at 910, the court stated that the right of survivorship is recognized when such a right is contained in a conveyance creating either the estate by the entireties or the joint tenancy. Thus, it is highly probable that an attempt to create an estate by entireties would result in a joint tenancy. See also *Hennigh v. Hennigh*, *supra* note 16.

²⁵See *supra* notes 7 & 22.

²⁶*Hennigh v. Hennigh*, *supra* note 16 at 1024. See also the instant case at 910.

court stated that the right of survivorship was not limited to the estate of joint tenancy,²⁷ and in considering section 67-312, the court stated that a tenancy in common was created by a conveyance to two or more persons which conveyance did not expressly state that the interest created was other than a tenancy in common.²⁸

It is submitted that the Montana Supreme Court must define its position on the right of the spouses to the use and enjoyment of the whole of property conveyed to both of them, on the complexity of creating the estate by the entirety, and on the rights of creditors. Until the court so defines its position, the question as to what type of estate is created by language which ordinarily would create the tenancy by the entirety will remain unanswered and lawyers and clients will be forced into litigation to determine their rights.

FRED RATHERT.

FEDERAL COURTS HAVE THE POWER TO GRANT A WRIT OF HABEAS CORPUS IF THE STATE COURT HAS DEPRIVED PETITIONER OF A CONSTITUTIONAL RIGHT. — The defendant was convicted of burglary and sentenced to twenty years imprisonment. No appeal was taken within the statutory period. Applications were made to the Montana Supreme Court for writs of certiorari and habeas corpus. Each application alleged that evidence used against the defendant was obtained by illegal search and seizure, and that he was not represented by competent counsel. All applications were denied. The defendant then applied to the federal district court for a writ of habeas corpus. That court, finding the allegations to be true, *held*: granted. Petitioner's conviction and present confinement are illegal and in violation of his rights under the Fourth, Sixth and Fourteenth Amendments to the Constitution of the United States, and that the conviction should be put aside and he should be released from confinement.¹ *Application of Tomich*, 221 F. Supp. 500 (Dist. Ct. Mont. 1963).

Long before an established system of law was brought to the United States, habeas corpus was considered "[T]he most celebrated writ in the English law."² Although it was permanently secured for the American people by the Constitution,³ its use is largely governed by statute. In 1789, Congress specifically stated that all federal courts, and judges therein should have the power to issue writs of habeas corpus.⁴

²⁷Instant case at 910.

²⁸*Ivins v. Hardy*, 120 Mont. 35, 179 P.2d 745 (1947). In consideration of this problem, it is necessary to note also, R.C.M. 1947, § 67-313, and the Montana cases of *Shaw v. Shaw*, *supra* note 16, and *Emery v. Emery*, 122 Mont. 201, 200 P.2d 251 (1948).

¹Because the First Ten Amendments as a whole do not apply to the states, it is believed the court here meant that the accused had been deprived of rights under the Fourth and Sixth Amendments, as applied to the states *through* the Fourteenth.

²3 BLACKSTONE COMMENTARIES 129, as cited in *Fay v. Noia*, 372 U.S. 391, 400 (1963).

³"The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion, the Public Safety may require it." U.S. CONST. art. I, § 9.

⁴1 Stat. 81-2 (1789).