WEEDING OUT THE TROUBLESOME PLANT OF TENANCY BY THE ENTIRETY

> The legal concept thus evoked [tenancy by the entirety] may, more or less aptly, be illustrated by the plant which is rooted in the earth by its single stem but which on breaking through the ground separates into two branches each of which, though deriving its vitality from a common source, enjoys a fruitfulness all its own.[1]

In July, 1970, the New Jersey Supreme Court took "another step away from the legal past."[2] The case was *Fort Lee Savings & Loan Ass'n v. LiButti*,[3] and the issue, further emasculation of the estate by the entireties. In recent years there has been a growing criticism of this estate, characterizing it as "anomalous,"[4] "peculiar,"[5] "a remnant of other times,"[6] and "repugnant to our institutions, and to the American sense of justice."[7] This comment will examine tenancy by the entirety as it exists in New Jersey toward the end of helping to put it permanently on exhibit in the "real property museum."[8]

WHAT IS TENANCY BY THE ENTIRETY?

Such an estate is a form of concurrent ownership of property held only by husband and wife, in which exist the four unities of joint tenancy—time, title, interest and possession[9]—and upon the death of one, the survivor takes the estate under the original conveyance.[10] It is a creature of the common law whose characteristics can be traced back to the 14th century reign of Edward III.[11] It evolved as a part of the English feu-

1 Dworan v. Miloszewski, 17 N.J. Super. 269, 276, 85 A.2d 550, 554 (Cty. Ct. 1952), *overruled*, King v. Greene, 30 N.J. 395, 153 A.2d 49 (1959).

2 *See* 217 TITLE COMMENTS 1 (N.J. Realty Group, July, 1970).

3 106 N.J. Super. 211, 254 A.2d 804 (App. Div. 1969), *rev'd*, 55 N.J. 532, 264 A.2d 33 (1970).

4 Mueller v. Mueller, 95 N.J. Super. 244, 247, 230 A.2d 534, 536 (App. Div. 1967).

5 King v. Greene, 30 N.J. 395, 417, 153 A.2d 49, 62 (1959) (Hall, J., dissenting).

6 *Id.* at 413, 153 A.2d at 60 (Weintraub, C.J., dissenting).

7 Kerner v. McDonald, 60 Neb. 663, 671, 84 N.W. 92 (1900).

8 J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 94 (1962).

9 41 AM. JUR. 2d *Husband and Wife* § 60 (1968). "'Unities' may have had value at one time but they are useless concepts today." Swenson & Degnan, *Severance of Joint Tenancies*, 38 MINN. L. REV. 466, 503 (1954).

10 Technically, *jus accrescendi* does not exist between tenants by the entireties because the survivor has no increase of estate or interest by the demise of his spouse, having previously been seized of the whole. This has long been held in New Jersey. *Den ex dem.* Hardenbergh v. Hardenbergh, 10 N.J.L. 42, 18 Am. Dec. 371 (Sup. Ct. 1828); *Tenancy by Entireties*, 7 N.J.L.J. 124 (1884).

11 Ritter, *A Criticism of the Estate by the Entirety*, 5 FLA. L. REV. 153, 154 (1952).

dal system of land tenures, the exigencies of which demanded that the ownership of land be vested in those capable of bearing arms, namely men.[12] Whatever identity a woman had at this time was deemed lost or merged with that of her husband when they were wed. Marriage at common law amounted to an absolute gift to the husband of all the wife's property that she then possessed or came to possess during coverture.[13] By the rights of *jus mariti* and *jure uxoris* the husband had the exclusive dominion, control, possession and usufruct of all property held by him and his wife by the entirety.[14] "Next to primogeniture, unity of husband and wife was perhaps the common law's most characteristic institution. Tenancy by entirety epitomized the idea."[15] And so was the seed of the legal fiction of marital unity sown amongst the common law flora.

Although this estate has been referred to as " 'the most intimate union of ownership known to the law,' "[16] it was nonetheless a fact that while the "husband and wife were one, . . . the husband was the one."[17] Perhaps it might be closer to the truth to say that the wife was really no person at all.[18] Thus protected by the panoply of marital "oneness," tenancy by the entirety burgeoned through the centuries.

At common law all that was necessary to create this tenancy was a conveyance[19] of land[20] to two persons lawfully husband and wife.[21]

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12 Phipps, *Tenancy by Entireties*, 25 TEMP. L.Q. 24 (1951).

13 J. STORY, EQUITY JURISPRUDENCE §§ 1378, 1402 (3d ed. 1843).

14 41 AM. JUR. 2d *Husband and Wife* §§ 44, 67 (1968); *cf.* 41 C.J.S. *Husband and Wife* § 34(d) (1944).

15 Fairclaw v. Forrest, 130 F.2d 829, 832 (D.C. Cir. 1942).

16 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 434 (2d ed. 1899).

17 4 R. POWELL, REAL PROPERTY 683 (rev. ed. 1970).

18 Ritter, *supra* note 11, at 157.

19 At common law a husband was unable to create a tenancy by the entirety between himself and his wife by his unilateral conveyance. He had to first convey it to a "straw-man" who would then convey it back to the husband and the wife. Annot., 44 A.L.R.2d 595 (1955). The problem has been resolved by a statute in New Jersey that provides in part:

> [A]ny conveyance heretofore or hereafter made by a married man or married woman to himself or herself and spouse of any real estate held in fee in severalty by such married man or married woman shall be construed to vest an estate by the entirety in such husband and wife, in fee.

N.J. STAT. ANN. § 37:2-18 (1968).

20 While the weight of authority in other states allows an estate by the entireties to exist in personalty, it has always been the policy in New Jersey to proscribe such a tenancy. R. POWELL, *supra* note 17, at 688-90; Annot., 64 A.L.R.2d 8, 31 (1959); Central Trust Co. v. Street, 95 N.J. Eq. 278, 127 A. 82 (Ct. Err. & App. 1923); *In re* Estate of Hamilton, 108 N.J. Super. 106, 260 A.2d 232 (App. Div. 1969); Cross v. Transfer Inheritance Tax Bureau, 105 N.J. Super. 452, 253 A.2d 172 (App. Div. 1969); Wyckoff v. YWCA, 37 N.J. Super. 274, 117 A.2d 162 (Ch. 1955). A conveyance made to a man and wife in personal

There was a weighty presumption in favor of this estate, unless the terms clearly indicated otherwise.[22] Blackstone wrote that

> if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common; for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seized of the entirety, *per tout, et non per my*: the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor.[23]

While the estate was easily enough created, it was quite another matter to terminate it; death, absolute divorce or joint conveyance being the only means.[24]

Although tenancy by the entirety and joint tenancy are similar in that both are possessed of the incident of survivorship,[25] they are clearly distinguishable in that only in a tenancy by the entireties does the title vest *per tout*, and not by undivided moieties; the latter may be vested in any number of natural persons, while the former only in married

property is deemed to create a tenancy in common. Brown v. Havens, 17 N.J. Super. 235, 85 A.2d 812 (Ch. 1952).

In 1963, the New Jersey Legislature passed a provision which allows an apartment to be held by the entirety. N.J. STAT. ANN. § 46:8A-5 (Supp. 1970).

21 For an estate by the entireties to arise, the man and woman must in fact be husband and wife. As Judge Jayne said, in another botanical analogy, "tenancy by the entirety without coverture is as unimaginable as a tree without a root." Danes v. Smith, 30 N.J. Super. 292, 305, 104 A.2d 455, 462 (App. Div. 1954). *See* Kepner, *The Effect of an Attempted Creation of an Estate by the Entirety in Unmarried Grantees*, 6 RUTGERS L. REV. 550 (1952); Annot., 83 A.L.R.2d 1051, 1053-54 (1962).

22 R. POWELL, *supra* note 17, at 685-86. In New Jersey, where a deed is made out to a husband and wife and there are no qualifying words in the instrument to the contrary, a tenancy by the entirety is created. Balazinski v. Lebid, 65 N.J. Super. 483, 168 A.2d 209 (App. Div. 1961).

23 CHASE'S BLACKSTONE 361 (4th ed. 1938).

24 Mutual separations or judicial divorces *a mensa et thoro*, not affecting the unity of person, will not destroy the estate. *See* 4 G. THOMPSON, REAL PROPERTY 109-10 (perm. ed. rev. repl. 1961); R. POWELL, *supra* note 17, at 710. Incompetency may destroy it in some states. G. THOMPSON, *supra*, at 101 n.47 (Supp. 1970); R. POWELL, *supra* note 17, at 708.

An interesting situation arises where one tenant murders the other, and "[t]he abundance of recent cases suggests the increased frequency of murdering tenants by the entireties." R. POWELL, *supra* note 17, at 707. In Neiman v. Hurff, 11 N.J. 55, 93 A.2d 345 (1952), the court found a constructive trust in favor of the wife's distributees for the value of the land diminished by the value of the murderer's estate for life in half the land's income.

25 41 AM. JUR. 2d *Husband and Wife* §§ 55, 59 (1968); Phipps, *supra* note 12, at 35. In United States v. Jacobs, 306 U.S. 363, 370 (1939), Mr. Justice Black stated that a tenancy by the entirety "'is essentially a joint tenancy, modified by the common law theory that husband and wife are one person. Only a fiction stands between the two.'"

persons; and in the joint tenancy partition is available to the tenant as well as the ability to unilaterally convey away his fee. At common law the husband could convey his estate by the entirety for the duration of their joint lives to a third party who became a tenant in common with the wife for the same term. However, this was always subject to the wife's right of survivorship. Since neither tenant had individual interests which he could convey, neither could defeat the survivorship right of his cotenant.[26]

Until the middle of the nineteenth century, when Married Women's Property Acts were nearly everywhere enacted as the denouement of the zealous reform movement directed at emancipating women, the tenancy subsisted virtually intact. These laws gave women control over their own separate property and eradicated the aforementioned husband's prerogatives.[27] New Jersey adopted such an act in 1852:

> 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 feme sole.[28]

Among the states there was a great contrariety of opinion as to how these statutes affected tenancy by the entirety.[29] Some held that the estate was instantaneously destroyed thereby;[30] others that it continued to exist exactly as it had prior to the statute;[31] and still others found that the estate remained, but in a modified form.[32] In 1887, the court of errors and appeals situated New Jersey within the last category by holding that the Act of 1852 had not destroyed the estate, but rather

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26 2 AMERICAN LAW OF PROPERTY § 6.6 (A.J. Casner ed. 1952).

27 1 J. SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS 590-91 (6th ed. 1921).

28 N.J. STAT. ANN. § 37:2-12 (1968). *See also* Law of March 25, 1852, ch. 171, § 1, N.J. Laws 407.

29 Annot., 141 A.L.R. 179 (1942).

30 These were Alabama, Colorado, Illinois, Iowa, Maine, Minnesota, New Hampshire, South Carolina, and Wisconsin. Phipps, *supra* note 12, at 29; R. POWELL, *supra* note 17, at 684 n.2.

31 Only Massachusetts, Michigan, and North Carolina so held. Phipps, *supra* note 12, at 28 n.10.

32 In seventeen jurisdictions it was held that the acts did not destroy tenancy by the entirety. In four of these states (Arkansas, New Jersey, New York and Oregon) equality of spouses was found by increasing the wife's prerogatives until they matched those of the husband. In the other thirteen (Delaware, District of Columbia, Florida, Indiana, Kentucky, Maryland, Missouri, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia and Wyoming) it was attained by decreasing the husband's prerogatives. Phipps, *supra* note 12, at 31-32.

created a parity between the spouses.[33] Although the court thus chose to retain the estate, New Jersey has nevertheless consistently been among those states which have perennially denuded the concept of its common law identity.[34] Gradually its definition has become so qualified that today it is interpreted as a tenancy in common between the spouses for their joint lives with remainder in fee to the survivor.[35]

THE ARGUMENT AGAINST TENANCY BY THE ENTIRETY

There are several reasons why this variety of co-ownership has been the subject of vehement attack.[36] The main thrust of this criticism is that it presents one of the most fertile sources of problems in the field of creditors' claims.[37] "[T]here has been little litigation between the spouses themselves and most of the cases arise when a creditor seeks to reach the interest of one of the spouses."[38] Although it does not appear on a quotidian basis, "[i]t affords too great an opportunity to frustrate the rights of the creditors of one spouse,"[39] and thereby "opens wide the door of fraud."[40] Consequently, fully half the states have seen fit to abrogate it.[41] Unfortunately, the vestiges of this anachronism, which can show no modern significance to justify their continued longevity, have not yet been eradicated in New Jersey.

To appreciate the present status of this estate in New Jersey, one must look to the leading cases of *King v. Greene*[42] and *Fort Lee Savings*

33 Buttlar v. Rosenblath, 42 N.J. Eq. 651, 9 A. 695 (Ct. Err. & App. 1887).

34 Pinsky, *Real Property*, 15 RUTGERS L. REV. 276, 282 (1961): "The transition away from the traditional form of the tenancy by the entireties has gone furthest in Arkansas, New Jersey, New York, and Oregon." R. Powell, *supra* note 17, at 703; Dorf v. Tuscarora Pipeline Co., 48 N.J. Super. 26, 33, 136 A.2d 778, 781 (App. Div. 1957).

35 King v. Greene, 30 N.J. 395, 412, 153 A.2d 49, 59 (1959); Zubler v. Porter, 98 N.J.L. 444, 446, 120 A. 194, 195-96 (Ct. Err. & App. 1923).

36 "[T]his kind of tenancy spawns numerous title problems and disputes." Mueller v. Mueller, 95 N.J. Super. 244, 248, 230 A.2d 534, 536 (App. Div. 1967). Also, "tax advantages, once inherent in estates by the entirety, are now largely ephemeral." 2 AMERICAN LAW OF PROPERTY, *supra* note 26, at 32; Rudick, *Federal Tax Problems Relating to Property Owned in Joint Tenancy and Tenancy by the Entirety*, 4 TAX L. REV. 3 (1948). *See also* Warner, *Tenancies by the Entirety—An Estate Planner's Dilemma*, 23 ARK. L. REV. 44 (1969).

37 It "naturally lends itself to abuse by persons trying to escape creditors". Comment, *Real Property—Tenancy by the Entirety in Real Property During Marriage*, 47 N.C.L. REV. 963, 970 (1969); Ritter, *supra* note 11, at 164.

38 J. CRIBBET, *supra* note 8, at 93.

39 2 AMERICAN LAW OF PROPERTY, *supra* note 26, at 32.

40 Wilkerson, *Creditors' Rights Against Tenants by the Entirety*, 11 TENN. L. REV. 139, 148 (1933).

41 R. POWELL, *supra* note 17, at 684; J. CRIBBET, *supra* note 8, at 93.

42 30 N.J. 395, 153 A.2d 49 (1959).

& Loan.[43] In 1959, when the supreme court sounded the gavel of reversal in *Greene*, its action was well noted.[44] In 1932, an execution, levy and sale was made against plaintiff Mrs. King's interest in three lots held by her and her husband by the entireties. Two years later, the purchaser at a sheriff's sale, along with plaintiff's husband, conveyed their respective rights, title and interests in the property to one Smock. In 1938, Mr. King died. In 1946, Smock conveyed his interest to defendants, Mr. and Mrs. Greene. In 1957, Mrs. King instituted an action for possession contending that she as surviving spouse was entitled to the entire fee since the sheriff's deed was only capable of conveying one half the rents, issues and profits of the property during their joint lives, and did not convey her right of survivorship.[45] Defendants argued that the sheriff's deed did in fact convey Mrs. King's right of survivorship as well as the life interest.[46] The lower court found for Mrs. King.

In trying to clarify the "considerable confusion"[47] extant at that time regarding the right to alien the survivorship right, Justice Burling penned an exhaustive opinion on the history of the estate. Before answering affirmatively the question of whether the purchaser at an execution sale under a judgment entered against a wife acquires her right of survivorship under a tenancy by the entireties, he reasoned by way of lengthy exegeses of prior case law, that a) at common law a husband could unilaterally alienate his right of survivorship, or more properly, his fee simple subject to defeasance,[48] b) by virtue of the Married Woman's Act, the wife could also alienate her survivorship since her rights and disabilities were equal to those of her husband,[49] and c) judgment creditors of either spouse may levy and execute upon their separate survivorship rights.[50] Essentially this decision holds

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43 106 N.J. Super. 211, 254 A.2d 804 (App. Div. 1969), *rev'd*, 55 N.J. 532, 264 A.2d 33 (1970).

44 5 VILL. L. REV. 154 (1959); 73 HARV. L. REV. 792 (1960); 14 RUTGERS L. REV. 457 (1960); 58 MICH. L. REV. 601 (1960).

45 30 N.J. at 398, 153 A.2d at 51.

46 *Id.*

47 *Id.* at 399, 153 A.2d at 52.

> [T]he state of the law in New Jersey on this point, prior to the instant case, was a hodgepodge of contradictory dicta and conflicting lower court decisions [as] is evidenced by the fact that Justice Burling for the majority and Justice Hall, dissenting, used the same cases in arriving at opposite conclusions.

14 RUTGERS L. REV. 457, 458 and n.14 (1960). The court found that its decision was consistent with the case law prior to the contrary holdings of Dworan v. Miloszewski, 17 N.J. Super. 269, 85 A.2d 550 (Cty. Ct. 1952) and Zanzonico v. Zanzonico, 24 N.J. Misc. 153, 46 A.2d 565 (Sup. Ct. 1946), and overturned them.

48 30 N.J. at 411, 153 A.2d at 59.

49 *Id.* at 412, 153 A.2d at 60.

50 *Id.*

that a conveyance of one tenant's interest will convey the fee to the grantee if the grantor spouse survives the other. After *Greene* all that remained of the tenancy was the incident of survivorship and its immunity from partition.

The problem posed by this estate was not reconsidered by this state's court of last resort for nearly another decade,[51] when in *Fort Lee Savings & Loan* the court reversed an appellate court for the reasons set forth in the dissenting opinion.[52] In April, 1964 Mitchell, Hutchins & Co. obtained a judgment against one Joseph LiButti which remained unsatisfied. In December, 1964 LiButti and his wife acquired real estate upon a purchase money bond and mortgage given to the Fort Lee Savings & Loan Association to secure a loan of $42,000. In time this property became encumbered by two subsequent mortgages and multiple judgments totaling over $58,000 in addition to the purchase money mortgage indebtedness. When the LiButtis defaulted in their installment payments, the mortgagees foreclosed. In July, 1967 the property was ordered sold, an excess of $18,000 remaining after satisfaction was made to the Savings & Loan Association. Mitchell, Hutchins & Co. then applied to the court for payment of its judgment out of this surplus. This application was denied in the chancery division and affirmed by the appellate division on the theory that surplus money arising from a foreclosure sale of real property held by the entirety "stands in the place of the land itself in respect to liens thereon or vested rights therein."[53] The appellate court stated that

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51 April 20, 1970. In 1968, however, the New Jersey Supreme Court unanimously affirmed an appellate court's ruling that a trustee in bankruptcy of the husband could sell his life estate for the joint lives and his right of survivorship in connection with property owned by him and his wife by the entireties, but the trustee could not have partition of the fee by sale or otherwise. The rationale was that since neither husband nor wife could have partition during coverture, a levying creditor or purchaser at sale could also not have it as he acquired no greater rights in the property than those of the debtor spouse. Judge Sullivan's opinion is quite brief and the court affirmed based solely upon it, without comment. Dvorken v. Barrett, 100 N.J. Super. 306, 241 A.2d 841 (App. Div.), *aff'd*, 53 N.J. 20, 247 A.2d 674 (1968).

52 Judge Carton felt that the doctrine kept alive by this decision was contrary to ordinary concepts of justice and ignored modern economic life. 106 N.J. Super. at 214-20, 254 A.2d at 806-09.

53 106 N.J. Super. at 213, 254 A.2d at 805. The majority based its decision on the case of Servis v. Dorn, 76 N.J. Eq. 241, 76 A. 246 (Ch. 1909), despite plaintiff's urging that the court "discard the legal doctrine encumbered with fictions which *Servis* enunciated in favor of . . . [an] economically realistic approach . . . ." Brief for Appellant at 13. Plaintiff contended that two of the three cases relied on in *Servis* held that money from a mortgage sale was personalty. *Id.* at 10-11.

The validity of *Servis* had also been questioned in the case of *In re* Ved Elva, Inc., 260 F. Supp. 978, 982-83 (D.N.J. 1966): "Since King v. Greene, . . . a half century after

> [t]he principal will be held under the control of the court to await severence of the estate by the death of Joseph or Joanne LiButti, "when it will or will not become available * * * accordingly as the judgment debtor [Joseph] survives or dies before the other tenant by the entirety [Joanne]."[54]

This exemplified par excellence what Chief Justice Weintraub described as a "gambling event" in his dissent in *Greene*.[55] Judge Carton, in his dissent at the appellate level, suggested that this consignment of the funds to a "legal limbo" to await the death of either of the LiButtis, "underscore[d] the inherent injustice and utter unreality"[56] of the court's order. He criticized the fallacious reasoning of his brothers who rested their conclusion

> upon the pure fiction that somehow the tenancy by the entirety which exists in the real property is born anew and becomes infused into the proceeds of sale and that that unique status, with all its ancient incidents, abides in the proceeds for the indefinite future.[57]

He proffered that the surplus monies were not a substituted *res,* the product of an involuntary or equitable conversion, inasmuch as

> [m]ortgagors, in executing mortgages, must certainly be held to have understood both that they must pay the amount which the mortgage secures and that their interest in the property may be cut off by foreclosure and sale of the property in the event of a default. The foreclosure and sale are steps in a process entirely consensual in its origin and nature.[58]

Consequently, if the surplus did not assume the character of real property (which it could not by reason of a voluntary conversion to personal property), it could not be held by the entirety as there is a salutary rule

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Servis, . . . it is improbable that ancient incidences and equitable fiction as imposed in *Servis* would be . . . extended."

54 106 N.J. Super. at 213-14, 254 A.2d at 805. The court so ruled, notwithstanding the knowledge that at the time of foreclosure over $8,000 in judgments were against Mr. LiButti; there also remained $48,000 in joint mortgage indebtedness. Therefore, regardless of who died first, the surplus would be exhausted, eliminating any possible reversion to either spouse. Goldsmith, *Rights Granted to Creditor in Mortgage Foreclosure Surplus Further Limits the Estate by the Entirety,* 93 N.J.L.J. 465 (1970).

55 30 N.J. at 414, 153 A.2d at 61. The Chief Justice dissented because he felt a halfway approach would prove unjust:

> If public policy demands that a creditor's interest be respected (I have no quarrel with the thought), the basis should be just to both the creditor and the debtor. It cannot be unless what is offered for sale is a non-contingent, non-speculative one-half interest which would support a partition suit.

Id. at 414-15, 153 A.2d at 61.

56 106 N.J. Super. at 215, 254 A.2d at 806.

57 *Id.* at 216, 254 A.2d at 807.

58 *Id.* at 217, 254 A.2d at 807-08.

in New Jersey that this estate may not exist in personalty.[59] To this the supreme court said "Amen" and "undermin[ed], if . . . not extinguish[ed], the distinction between voluntary and involuntary conversion as it pertains to estates by the entirety."[60]

There yet remain two areas of foreseeable application of the involuntary conversion doctrine: where money is paid on condemnation of real property held by the entireties, and where the proceeds of an insurance policy are paid upon damaged or destroyed property held by the entireties. However, *Fort Lee Savings & Loan* raised doubts as to the efficacy of the doctrine in even these areas.

> It would seem likely that . . . the New Jersey courts will permit the proceeds of an insurance policy on realty held by the entirety, arising as a result of damage or destruction to the property, to be severable as jointly held personal property upon application of a spouse or a judgment creditor of a spouse. Although the actual loss is involuntary, the involuntary conversion theory may be avoided because the proceeds arise only as a result of a personal contract of insurance and not as a matter of law.[61]

However, since the consensual basis upon which the doctrine rests is lacking in condemnation proceedings, it is likely that this single factual situation will continue to be seen as an involuntary conversion. Yet "even here the doctrine could be rejected on the basis of the strong policy expressed in Fort Lee Sav. & Loan Association v. LiButti against extending the estate by the entirety to personal property."[62]

THE ALTERNATIVES TO TENANCY BY THE ENTIRETY

Writers on the subject have habitually agreed upon abolishing the estate. Permeating their articles is the theory that the brainchild of legalistic reasoning, the fiction of a separate juristic person, no longer obtains to contemporary legal and social processes and resultantly should be nullified. Historically, the courts have fabricated fictions with the end in mind of procuring some desirable social goal. Such was the case with tenancy by the entirety. "Presumably the estate by the entirety was designed to serve a social purpose favorable to the parties to the marriage."[63] It has always had the result of preserving the property in the hands of the decedent's family. However, if protecting the home is

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59 *See* note 20 *supra*.

60 TITLE COMMENTS, *supra* note 2.

61 Goldsmith, *supra* note 54, at 473.

62 *Id.*

63 30 N.J. at 413, 153 A.2d at 60 (Weintraub, C.J., dissenting).

more important than satisfying creditors, this might be achieved more satisfactorily through the enactment of homestead laws.[64] The purpose of these laws is to "place the property designated as a homestead out of reach of creditors while it is occupied as a home . . . [and] to secure the home to the family even at the sacrifice of just demands, the preservation of the home being deemed of a paramount importance."[65] The homestead differs from a tenancy by the entirety in that it is limited in amount and value and is protected by constitutional provisions and public policy considerations. Since homestead laws are purely statutory by nature, they can give no greater right than that which the statute itself creates.[66] The legislature is therefore able to strictly prescribe their extent and use. The adoption of these statutes has been advocated in New Jersey upon the ground that "[t]enancies by the entirety are inadequate substitutes for homestead laws."[67] Textwriters have said:

> The social undesirability of the consequences attendant upon the estate by the entirety are readily apparent. Even ostensibly desirable ends, such as depriving an improvident spouse of the opportunity of dissipating the family's entire wealth or enabling a husband and wife to have the advantage of the right of survivorship, may best be achieved in other ways. Improved homestead laws . . . are . . . calculated to secure the advantages which might inhere in an estate by the entirety, without its concomitant disadvantages. It has, therefore, been proposed that the tenancy by the entirety be abolished wherever it still exists. With this proposal we agree.[68]

Another alternative has been suggested in addition to the implementation of homestead laws. It is simply to look to joint tenancy to accomplish whatever benefit an estate by the entirety accomplished.[69] In Chief Justice Weintraub's words:

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64 73 HARV. L. REV. 792, 794 (1960). *See also* Fairclaw v. Forrest, 130 F.2d 829, 833 (D.C. Cir. 1942), where the court stated that the "peculiar and justifiable function" of tenancy by the entirety was that it protects the surviving spouse from inconvenient administration of the decedent's estate and from his improvident debts, *i.e.*, the same function as homestead acts.

65 40 AM. JUR. 2d *Homesteads* § 4 (1968); *cf.* 40 C.J.S. *Homesteads* § 2 (1944).

66 40 AM. JUR. 2d *Homesteads* § 3 (1968). California revised its Homestead Act in 1970. It now allows the family head or any person over 65 years to exempt the family residence up to $20,000 in actual cash value and for any other person to exempt it up to $10,000. CAL. CIV. CODE § 1260 (West Supp. 1971).

67 Pinsky, *supra* note 34, at 287. N.J. REV. STAT. § 2:26-110 (1937) provided for a $1000 homestead exemption after the death of the householder for the benefit of his widow and family. It was repealed with the 1952 adoption of title 2A of the *N.J. Statutes.*

68 2 AMERICAN LAW OF PROPERTY, *supra* note 26, at 32.

69 Niles, *Abolish Tenancy by the Entirety*, 79 TRUSTS & ESTATES 366 (1944); Goldsmith, *supra* note 54, at 473.

> An equitable solution can be achieved only by a statute abolishing the estate by the entirety in favor of a joint tenancy, or at least entitling the purchaser at an involuntary sale to have partition.[70]

Data has been provided by a recent empirical research effort in Iowa.[71] This state uprooted tenancy by the entirety in the last century, the result being that joint tenancies have completely and comfortably supplanted it, providing an adequate alternate for the manifest demand for a survivorship tenancy between the spouses. The conclusion reached by the investigators was that

> joint tenancy today is almost exclusively a husband and wife holding. Joint tenancies between related persons other than husbands and wives are rare, survivorship arrangements between unrelated persons virtually nonexistent. Further, husband and wife joint tenancies dominate the whole area of cotenancy. If a cotenancy is created today, the chances are 9 out of 10 that it will be a marital joint tenancy.[72]

Despite the knowledge that commentators on the law from this state have, for over a decade, proclaimed that the time is "now" for abolishing the hoary estate,[73] the New Jersey Legislature has not initiated action in this direction. Albeit that the court has seen fit to prune away at the estate's tendrils, it would be best if this husbandry obligation would pass to the lawmaking body. In the words of Justice Hall, "any change should be brought about only by prospective legislation and not by retrospective judicial fiat."[74]

It is somehow ironic that England, the garden from which the

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70 30 N.J. at 415, 153 A.2d at 61. Oklahoma's statute is sui generis; it provides that an execution, levy and sale by a judgment creditor will constitute a severance of either a joint tenancy or estate by the entirety. OKLA. STAT. ANN. tit. 60, § 74 (1963).

71 Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 IOWA L. REV. 582 (1965).

72 *Id.* at 623.

73 *See* Editorial, *"Change" in Real Property Law—By Judicial Decision or by Legislation*, 82 N.J.L.J. 384 (1959): "[A] revision of the attributes of tenancies by the entirety would be well worth early consideration by the Legislature." *See also* Pinsky, *supra* note 34, at 288, where the author states:

> It is earnestly hoped that the bar of the state and the Legislature give prompt consideration to the need for changes in the tenancy by the entirety as it now exists in New Jersey. . . . The whole problem needs careful and intelligent consideration.

74 30 N.J. at 422, 153 A.2d at 65. In his dissent, Justice Hall took the position that despite his feeling that the concept seemed incomprehensible to the modern legal mind, he felt it must remain immutable until the Legislature changes it from its present form.

> I therefore do not conceive it to be a proper exercise of our function, and indeed it may be a grave disservice, to determine the question on the basis of what we think our law might well be or ought to be in the light of modern social and economic considerations . . . .

Id. at 416, 153 A.2d at 62.

estate under discussion first sprouted, has long ago repudiated it in favor of joint tenancy.[75]

> Every tenancy by entireties which was existing immediately before the commencement of the Law of Property Act, 1925, was as from such commencement converted into a joint tenancy, and it was provided that a husband and wife should for all purposes of acquisition of any interest in property, under a disposition made or coming into operation after such commencement, be treated as two persons.[76]

As long ago as 1944, a committee of the American Bar Association recognized that tenancy by the entirety had not withstood the "test of time" and recommended that it be abolished in the different states.[77] The dictates of justice and enlightened socio-economic policies, as well as plain common sense, require that the Legislature pass an act completely abrogating the doctrine of the entireties. "There is no reason at all why modern man and wife should be in a different position from that of other cotenants."[78]

In this effort to keep the law abreast of the times, we would do well to keep in mind the oft-quoted and always pertinent sentiments of Justice Holmes:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of . . . [Edward III]. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[79]

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75 Law of Property Act of 1925, 15 & 16 Geo. 5, c. 20, § 37, sched. 1.

76 32 HALSBURY STATUTES OF ENGLAND 352 (2d ed. 1960).

77 *See* REPORT OF THE COMMITTEE OF THE SECTION OF REAL PROPERTY, PROBATE AND TRUSTS, REPORT OF THE COMMITTEE ON CHANGES IN SUBSTANTIVE REAL PROPERTY PRINCIPLES, REAL PROPERTY AND TRUSTS LAW 82-84 (A.B.A. 1944).

78 Ritter, *supra* note 11, at 164.

79 Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).