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TENANCY BY THE ENTIRETIES AND CREDITORS RIGHTS IN MARYLAND

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Maryland is one of the states in the Union which has preserved and protected the common law estate of tenancy by the entireties. In *Marbury v. Cole*,[1] Judge Alvey said:

> "By the common law of England, which is the law of this State, except where it has been changed or modified by statute, a conveyance to husband and wife does not constitute them joint tenants, nor are they tenants in common. They are in the contemplation of the common law, but one person, and hence they take, not by moieties, but the entirety. They are each seised of the entirety, and the survivor takes the whole. As stated by Blackstone, '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.' 2 Bl. Com. 182."[1a]

This legal conception that husband and wife are but one person was characterized by Mr. Justice Sutherland in *Tyler v. United States*[2] as an "amiable fiction".

A prerequisite to this type of tenancy is, that the owners of the estate are husband and wife. The immunities of

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[1] 49 Md. 402 (1878).

[1a] *Ibid*, 411.

[2] 281 U. S. 497 (1930).

tenancy by the entireties can be enjoyed only by a lawfully married pair.[3]

There have been cases in Maryland where property was held by a man and woman, who purported to be husband and wife, as tenants by the entireties, but where in fact there was no valid marriage because the woman was married at the time of the second marriage ceremony, but that was unknown to the man.[4] In one of these cases, *Mitchell v. Frederick*,[5] although there was no legal relationship of husband and wife, nevertheless, the court gave the ownership of the property some of the attributes of a tenancy by the entireties in order to carry out the intention of the parties. Upon the death of the purported wife, her children by her first marriage filed a bill for the settlement of the property rights. The Court of Appeals in deciding that the deceived man was entitled to the property said:

> "The form in which it is manifested opposing no obstacle, can the impossibility of conveying the tenancies by the entireties named, with the peculiar immunities allowed to husband and wife in such tenancies, render the grants ineffectual to convey even the incidents which may be included in other tenancies or joint holdings? Not, it would seem, so long as the grants are to be given any effect at all to convey plural ownership, for if they convey it there would be no reason why they should not convey it in the form and character intended, with the same rights as between the parties themselves, but without the immunities that would be permitted to husband and wife."[6]

It probably can be assumed that in any of the cases where there was no actual relationship of husband and wife but the Court treated the property as a joint tenancy in order to carry out as far as possible the intentions of the parties as between themselves, a creditor of either the man or the woman could have reached the individual's in-

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[3] Mitchell v. Frederick, 166 Md. 42, 170 A. 733 (1934); Hutson v. Hutson, 168 Md. 182, 177 A. 177 (1935).

[4] *Supra*, n. 3. See also Brell v. Brell, 143 Md. 443, 122 A. 635 (1923).

[5] *Supra*, n. 3.

[6] *Supra*, n. 3, 51.

terest during the lifetime of both. The last clause of the above quoted statement would seem to so indicate.

Maryland follows the rule that a conveyance or devise to a husband and wife will ordinarily create a tenancy by the entireties unless there is an intention, clearly expressed in the instrument, that they shall take as tenants in common or as joint tenants.[7]

Personal property, as well as real property, may be owned by husband and wife as tenants by the entireties.[8] An equitable interest in property may be owned as tenants by the entireties.[9]

When husband and wife and a third party have an ownership in property together it is possible to have a dual situation of a tenancy by entireties and a tenancy in common present at the same time. In *Haid v. Haid*,[10] a motor boat was registered in the name of the husband and wife and also in the name of the husband's son by a former marriage. The Court said:

> "After a full and careful consideration of this evidence, it was, we think, legally sufficient to be submitted to the jury for its consideration, tending to show that the interest or estate held by her [the wife] in the property in question is that of tenant by the entireties with her husband, to the extent of an undivided one-half interest in the boat, the other undivided one-half interest being held by Robert E. Haid [the son], and, as between him and William J. Haid and wife, they were tenants in common."[11]

A creditor of one spouse only, cannot execute upon property owned by a husband and wife as tenants by the entire-

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[7] Wolf v. Johnson, 157 Md. 112, 145 A. 363 (1929) (real property); Young v. Cookman, 182 Md. 246, 34 A. (2d) 428 (1943) (shares of stock).

[8] Funds deposited in bank—Baker v. Baker, 123 Md. 32, 90 A. 776 (1914), Brewer v. Bowersox, 92 Md. 567, 48 A. 1060 (1901); motor boat—Haid v. Haid, 167 Md. 493, 175 A. 338 (1934); rent—Banking and Trust Co. v. Neilson, 164 Md. 8, 164 A. 157 (1933); leasehold—Masterman v. Masterman, 129 Md. 167, 98 A. 537 (1916), Davis v. Harris, 170 Md. 610, 185 A. 469 (1936); judgment—Clark v. Wootton, 63 Md. 113 (1885); mortgages and notes—Whitelock v. Whitelock, 156 Md. 115, 143 A. 712 (1928). See also Katzenstein, *Joint Savings Bank Accounts in Maryland* (1939) 2 Md. L. R. 109, 129.

[9] Meyers v. Loan and Sav. Assn., 139 Md. 607, 116 A. 453 (1922).

[10] *Supra*, n. 8.

[11] *Supra*, n. 8, 498. See also Tazer v. Tazer, 162 Md. 489, 160 A. 163 (1932).

ties, at least not during the lifetime of the other spouse.[12] Nor is it subject to a mechanic's lien for a debt contracted by husband alone.[13]

A creditor holding the joint obligation of a husband and wife, upon reducing his claim to judgment will have a lien on real property or certain leasehold interests held by the husband and wife as tenants by the entireties in the jurisdiction wherein the judgment was obtained.[14] By the same token, such a creditor should be able to attach or subject to execution a similar interest in personal property.

The Maryland Constitution[15] and the so-called Married Women's Property[15a] Acts have wrought changes in the common law rule that a husband by virtue of his control of the wife's property was entitled to all the income therefrom, which in turn could be made subject to the claims of his creditors.[16] The result of these Constitutional and statutory provisions is, that while they do not affect the quantity of the estate, they have progressively enlarged the dominion of the wife over her own property during her husband's life and have deprived a creditor of the husband from being able to attach income derived from property held as tenants by the entireties.[17] The earlier case of *Jordan v. Reynolds*,[18] indicated the same result. The law now exempts the husband's right to the income from attachment, for the sake of the wife, it protects him, because thereby it can most efficiently protect her.[19]

While the income from property held as tenants by the entireties is exempt from seizure by the creditor of a spouse, nevertheless, we find the Court of Appeals, as be-

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[12] Jordan v. Reynolds, 105 Md. 288, 66 A. 37 (1907); Ades v. Caplin, 132 Md. 66, 103 A. 94 (1918); Keen v. Keen, 60 A. (2d) 200 (Md. 1948).

[13] Blenard v. Blenard, 185 Md. 548, 45 A. (2d) 335 (1946).

[14] Frey v. McGaw, 127 Md. 23, 95 A. 960 (1915).

[15] MD. CONST., Art. 3, Sec. 43: "The Property of the wife shall be protected from the debts of the husband."

[15a] Md. Code (1939) Art. 45, Secs. 1, 2.

[16] Clark v. Wootton, *supra*, n. 8; Masterman v. Masterman, *supra*, n. 8; Whitelock v. Whitelock, *supra*, n. 8; Schilback v. Schilback, 171 Md. 405, 189 A. 432 (1937).

[17] Banking and Trust Co. v. Neilson, *supra*, n. 8.

[18] 105 Md. 288, 66 A. 37 (1907).

[19] Clark v. Wootton, *supra*, n. 8; Marburg v. Cole, 49 Md. 402 (1878); Masterman v. Masterman, 129 Md. 167 (1916); Whitelock v. Whitelock, *supra*, n. 8. See also 166 A. L. R. 969, *et seq.*

tween the spouses themselves, really treating this income more as a tenancy in common. In the recent case of *Elko v. Elko*,[20] where the wife was living separate from her husband, the Court held that a husband and wife are entitled equally to share the income, such as rents, from entireties property. This result was foreshadowed in *Masterson v. Masterson*.[21] With this view of the income, it could be argued that the individual creditor of one of the spouses should be able to reach his share of the income although not more than his share. Such, however, is not the law in Maryland.

In 1885, the Court of Appeals held that where husband and wife obtained a judgment against a transit company for injuries to the wife, a judgment creditor of the husband could not attach the judgment against the company. This in effect treated this judgment as if it were held by husband and wife as tenants by the entireties.[22]

When a former wife holding judgment against her ex-husband sought to execute on a motor boat, it was held that the second wife, having an interest in the boat as tenant by the entireties, had a right to intervene as a claimant of property.[23] If, however, a husband and wife own property, not as tenants by the entireties, but merely as joint tenants then the joint tenant's interest is apparently subject to execution by a creditor of one of the joint tenants.[24]

In the leading Maryland case of *Jordan v. Reynolds*,[25] the defendant had entered into a contract to purchase leasehold property from a husband and wife which they held as tenants by the entireties. Defendant refused to go through with the purchase on the ground that the contract

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[20] 49 A. (2d) 441 (1946).

[21] *Supra*, n. 8.

[22] Clark v. Wootton, *supra*, n. 8. This decision was rendered in the days when a married woman had to be joined with her husband as plaintiff to sue in tort. In this connection see Md. Code (1939) Art. 45, Sec. 5; see also Elko v. Elko, *supra*, n. 20.

[23] Haid v. Haid, *supra*, n. 8.

[24] Fladung v. Rose, 58 Md. 13 (1882); McElderry v. Flannigan, 1 H. & G. 308 (1827); Md. Code (1939) Art. 16, Secs. 159, 244.

[25] *Supra*, n. 18.

called for a merchantable title and that there was a judgment of record against the husband. Husband and wife filed a bill for specific performance. In affirming the decree granting specific performance, the Court of Appeals said:

> "The law is well settled in this State that judgments create liens only because the land is made liable by statute to be seized and sold on execution. A judgment creditor stands in the place of his debtor and he can only take the property of his debtor subject to the charges to which it was justly liable in the hands of the debtor at the time of the rendition of the judgment. *Valentine v. Seiss,* 79 Md. 187; *Morton v. Grafton,* 68 Md. 545; *Hartstock v. Russell,* 52 Md. 619.
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> "An execution is a lien on personal property only because the personal property can be sold in satisfaction of the execution. *Eschbach v. Pitts,* 6 Md. 71; *Hanson v. Barnes,* 3 G. & J. 359; *Harris v. Alcock,* 10 G. & J. 226.
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> "It seems therefore to be clear both upon reason and authority that the judgment in this case is not a lien upon the property, in the lifetime of the wife. There is nothing that can be seized and sold under execution upon the judgment. Property held by this tenure cannot be sold without the joinder of the wife, *McCubbin v. Stanford, supra,* and the judgment creditor can acquire no greater rights than those possessed by the judgment debtor. *Valentine v. Seiss, supra; Clark v. Wooten, supra; Marburg v. Cole,* 49 Md. 402; *Samarzevosky v. City Pass. Co.,* 88 Md. 479.
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> "The case of *Chandler v. Cheney,* 37 Indiana, 391, is an express decision on this point. The Court said, there can be no partition between tenants by the entireties, while such an estate exists, no interest in it can be sold on execution for the debts of the husband or wife. From the nature of the estate and the legal relation of the parties, there must be unity of estate, unity of possession, unity of control and unity in conveying or encumbering it. A mortgage upon such an estate executed by the husband alone is void. . . .
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> "The result of a decision according to the appellant's (purchaser) contention, would practically destroy the wife's estate and turn her entirety into a joint tenancy or tenancy in common with the purchaser, under either a mortgage sale, or a sale under an execution, on a judgment.

"An insuperable objection to the position urged by the appellant, here is the provision of our Constitution (sec. 43, Art. 3), which declares that the property of the wife shall be protected from the debts of the husband. If the judgment creditor possesses a lien against this property, he could collect the debt by an execution, take away the wife's property without her consent, and thereby destroy the nature of the estate as it now stands.

"To hold the judgment to be a lien at all against this property, and the right of execution suspended during the life of the wife, and to be enforced on the death of the wife, would we think likewise encumber her estate, and be in contravention of the constitutional provision heretofore mentioned, protecting the wife's property from the husband's debts.

"It is clear, we think, if the judgment here is declared a lien, but suspended during the life of the wife and not enforceable until her death, if the husband should survive the wife, it will defeat the sale here made, by the husband and wife to the purchaser, and thereby make the wife's property liable for the debts of her husband."[26]

A point to be considered is, what is the effect of a judgment standing against a husband whose wife subsequently predeceases her husband, they having owned real property as tenants by the entireties. The effect of the wife's death is to leave the husband as the sole owner of the property, free to dispose of it as he sees fit. This being so, it follows that upon the wife's death the property could be taken on execution by a judgment creditor. The language of *Jordan v. Reynolds* is: "The law is well settled in this State that judgments create liens only because the land is made liable by statute to be seized and sold on execution,"[27] and it would seem authority for this. This being so, it would appear then, that immediately upon the

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[26] *Ibid*, 294.

[27] *Ibid*, 294, 295: "To hold the judgment to be a lien at all against this property, and the right of execution suspended during the life of the wife, and to be enforced on the death of the wife, would we think likewise encumber her estate, and be in contravention of the constitutional provision heretofore mentioned, protecting the wife's property from the husband's debts."

death of the wife any judgment of record would immediately become a lien on the surviving husband's real estate. If more than one judgment of record is outstanding against the husband, the question arises whether or not these judgments should be regarded as creating liens adhering to the land simultaneously upon the wife's death so as to be treated as standing upon an equal footing as regards priority. The result then should be that the creditors should share pro rata in any proceeds from an execution sale of the property. The language in *Jordan v. Reynolds,* would seem to lend some basis to the proposition that the liens of the judgments should adhere simultaneously. However, it seems more likely that in Maryland it would be held that as between the judgment creditors themselves, the judgment first of record will be given priority over the later judgment, according to the reasoning in *Messenger v. Eckenrode.*[28] In this case, involving the question of priority of judgment liens upon after-acquired property of the judgment debtor, the Court of Appeals gave priority to the judgments in their order of time.

Another question could arise on the following hypothetical facts: H and W, own real estate as tenants by the entireties. J in 1940 obtains a judgment of record against H. In 1943, H and W execute a mortgage on the property to M to secure a loan, the mortgage to become due and payable March 1, 1948. On February 1, 1947, W dies, and at the time of her death the mortgage is not in default. Subsequently the mortgage being in default, M forecloses. Will J's judgment lien have priority over the mortgage lien? It would seem that the mortgage should have priority. To hold otherwise would interfere with the wife's estate during her lifetime. If the husband and wife can sell property which they hold as tenants by the entireties free from any possible lien which a judgment creditor of the husband alone could assert, as was held in *Jordan v. Reynolds,*[29] they should likewise be able to mortgage the property with

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[28] 162 Md. 63, 158 A. 357 (1932).

[29] *Supra,* n. 18.

equal freedom. The reasoning of *Jordan v. Reynolds,* should be decisive on this point.[30]

The effect of a divorce *a vinculo matrimonii* on property held by the spouses as tenants by the entirety is to change the estate by entireties, by operation of law, into a tenancy in common,[31] which can be partitioned. In *Reed v. Reed,*[32] which involved an absolute divorce, the Court quotes Mr. Bishop as to the effect of a divorce *a mensa:* "This divorce does not at common law and without statutory aid, change the relation of the parties as to property."[33] It would seem to follow therefore, that if there is an absolute divorce any outstanding judgment against a spouse should become a lien upon his, or her, interest as a tenant in common in real property, which prior to the decree of divorce, had been owned by them as tenants by the entireties. Likewise, such converted tenancy in common should become immediately an available asset for any creditor of the spouse.[33a] This result should not follow, however, if the divorce is merely *a mensa et thoro.*

In the event of the bankruptcy of one of the spouses, if there is a divorce *a vinculo* within six months after the filing of the petition in bankruptcy, the bankrupt spouse's interest in property held as tenants by the entireties having been converted into a tenancy in common should, under Section 70a of the Bankruptcy Act,[34] pass to the trustees

[30] It might be noted that where entireties property is subject to a mortgage executed by the husband and wife and subsequently the husband dies, the general rule as to exoneration of the mortgage debt out of the personal assets of the deceased mortgagor does not apply. However, apparently, the survivor is entitled to assert or claim for proportionate contribution against the estate of the deceased husband as co-principal. Cunningham v. Cunningham, 158 Md. 372, 148 A. 444 (1930).

[31] Reed v. Reed, 109 Md. 690, 72 A. 414 (1909); Meyers v. East End Loan and Savings Association, 139 Md. 607, 116 A. 453 (1922); Blenard v. Blenard, 185 Md. 548, 45 A. (2d) 335 (1946); Gunter v. Gunter, 49 A. (2d) 454 (Md. 1946); Keen v. Keen, *supra,* n. 12.

[32] *Supra,* n. 31.

[33] In the recent case of Keen v. Keen, *supra,* n. 12, the Court of Appeals stated: "The bill of complaint asks for a divorce *a mensa* which, if granted, would not affect the title to the property held by the parties as tenants by the entireties."

[33a] Md. Code Supp. (1947) Art. 16, Sec. 127A authorizes, when one spouse has been adjudicated a lunatic, a sale of entirety property by court order upon petition of committee or other spouse, and division of proceeds as Court may find proper. *Query:* Does this statute create a potential asset for the individual creditor of one of the spouses?

[34] 11 U. S. C. A. 110.

in bankruptcy as part of the bankrupt's estate. This section of the Bankruptcy Act provides: "All property in which the bankrupt has at the date of bankruptcy an estate or interest by the entirety and which within six months after bankruptcy becomes transferable in whole or in part solely by the bankrupt shall, to the extent it becomes so transferable, vest in the trustee and his successor and successors, if any, upon his or their appointment and qualification, as of the date of bankruptcy."[35] So also, if the bankrupt's spouse should die within the six month's period it would appear that the surviving spouse's interest as sole owner would pass to the trustee in bankruptcy. A contrary result was reached in *Dioguardi v. Curran.*[36] It must be noted, however, that this decision was rendered before the above quoted amendment to Section 70 of the Bankruptcy Act was enacted in 1938.[37]

Interesting questions may arise[38] if, after the petition in bankruptcy is filed against a husband, he and his wife convey property which they own as tenants by the entireties to a third person purchaser and then subsequently, but before six months from the filing of the petition in bankruptcy, the wife of the bankrupt dies. What is the position of the purchaser? Is his purchase subject to a right of the trustee to claim this property in the event the wife dies within six months; in other words, does this provision of the Act operate something in the nature of a *lis pendens?* So to hold, would obviously cut down the marketable value of the property during the six months period to the detriment of the wife, for the possible benefit of the husband's creditors. Such a result would seem to be contrary to the Maryland Constitutional protection of married women's property from the creditors of the husband as expounded by the Court of Appeals in *Jordan v. Reynolds.*[39] Also, looking to the purpose of the six month

[35] "Date of bankruptcy" means the date when the petition was filed, see Bankruptcy Act, Sec. 1 (13), 11 U. S. C. A. 1.

[36] 35 F. (2d) 431 (C. C. A. 4th, 1929).

[37] *Circa*, n. 34.

[38] The writer has failed to find any decisions as yet dealing directly with these questions.

[39] *Supra*, n. 12.

provisions in Section 70a of the Bankruptcy Act, added in 1938, it would seem that the purpose was to prevent the unseemly haste by a person, about to inherit property because of the imminent death of the owner, to file a petition in bankruptcy in order to block out the petitioner's creditors before the expectant property becomes available to satisfy their claims.[40] It would not seem that its purpose was in any way intended to affect adversely the rights and interests in property of persons other than the bankrupt. Accordingly, it is the writer's present opinion that the purchaser of entireties property at any time after the petition is filed should be protected from any claim that might arise out of the six months provision in Section 70a of the Bankruptcy Act. It might be quite possible, however, for a court to hold that the six months provision now applies to the proceeds, or the right to the proceeds from the purchaser, in lieu of the property sold.[41]

A more difficult problem would arise under the six months provision of Section 70a of the Bankruptcy Act if, after the petition in bankruptcy is filed against the husband, he and his wife convey entirety property to a straw man[42] who reconveys to the wife. No consideration being paid by the wife as sole owner and then subsequently, but before the six months period expires, the wife dies. Could the trustee in bankruptcy claim this property as an asset of the bankrupt estate? In the absence of bankruptcy proceedings, under the ruling in *Hertz v. Mills*,[43] referred to subsequently in this article, such a conveyance would not be deemed a fraud on the husband's creditors. Are there any provisions in the Bankruptcy Act that should enable the trustee to recapture this property as an asset of the bankrupt estate? It seems to the writer that the possibly

[40] See In re Hall, 16 Fed. Supp. 18 (W. D. Tenn., 1936), for a case decided prior to the amendments.

[41] In this connection see Brell v. Brell, *supra*, n. 4; Tait v. Safe Deposit & Trust Co., 70 F. (2d) 79 (C. C. A. 4th, 1934), where the proceeds from sale of entireties property was treated as creating a tenancy by the entireties in the proceeds.

[42] The writer understands that conveyancers are reluctant to omit the straw-man and convey directly, as apparently authorized by Md. Code (1939) Art. 50, Sec. 15.

[43] 166 Md. 492, 171 A. 709 (1934).

applicable sections of the Act are Sections 67a (1), d; 70a (4), 70e.[44]

Section 67a (1) might be of some use because of the expression "in fraud of the provisions of this Act". The difficulty here is, that Section 67a (1) is only applicable to liens obtained through legal or equitable process or proceeding which is not the situation in the problem stated above.

Section 67 (d) dealing with fraudulent conveyances apparently is applicable only to transfers made within one year prior to the filing of the petition in bankruptcy. In the problem, the transfer is made after the petition was filed. This would appear to eliminate any usefulness of Section 67 (d).

Section 70a (4) taken in conjunction with the introductory clause of Section 70a would appear to be applicable only to transfers made prior to the filing of the petition, and if this be so, it would not be useful to the trustee.

Section 70e stating that transfers fraudulent against any creditors having provable claims under any Federal or State law are null and void against the trustee, does not appear to be useful to the trustee.[45] Lacking provision to be found in the Bankruptcy Act itself, the writer has not discovered any other Federal law of which the trustee could avail himself. As to State law, the decision of the Court of Appeals of Maryland in *Hertz v. Mills*[46] would seem to be conclusive that the trustee in our problem could not attack the conveyance as void.

If the foregoing analysis is sound then it would appear that the trustee's sole remaining basis for recovering the property would be on the theory that any dealing in the entireties property after the petition is filed must be subject

[44] 11 U. S. C. A. 107a (1), d. It is doubtful that Sec. 21g (11 U. S. C. A. 44 (g)or 70d (11 U. S. C. A. 110 (d)) would have any bearing on the substantive question.

[45] Note: Sec. 70a "The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy or of the original petition proposing an arrangement or plan under this Act, except insofar as it is to property which is held to be exempt, to all . . . (4) property transferred by him in fraud of his creditors . . ."

[46] *Supra*, n. 43.

to the six months provision in Section 70a (8), i.e., on the theory of a *lis pendens*. This theory, however, for the reasons given in the discussion of the preceding problem, would appear to be of questionable validity.[47]

There have been occasional cases reaching the Court of Appeals wherein creditors have sought to attack property dealings involving tenancies by the entireties as fraudulent conveyances.

In *Hertz v. Mills*,[48] husband and wife acquired property in Montgomery County as tenants by the entireties in 1922. The property was paid for with the husband's money. Some years later, while suit against the husband in the District of Columbia was pending, husband and wife transferred the property which they held as tenants by the entireties to a straw man, and he then reconveyed to the wife as sole owner. Subsequently, the creditor having obtained a judgment, he filed a bill in equity for the purpose of enforcing his claim against the property, on the ground that the transfers were fraudulent and had been made to defeat the creditor in the event the husband survived the wife. The creditor's bill did not propose that the deeds by which the property was conveyed to the wife be annulled, but prayed to have the title decreed to be held in trust by the wife for the creditor in consequence of her participation in the fraud. The defendants, husband and wife, demurred to the bill, the demurrer was sustained by the lower court, and that ruling was affirmed on appeal. In addition to holding that the conveyance to the husband and wife in 1922 could not be attacked because of Article 45, Section 1[49] and as no objection was raised by any subsisting creditor

[47] The Bankruptcy Act provides that all property which vests in the bankrupt within six months after bankruptcy by bequest, devise, or inheritance shall vest in the trustee as of the date it vested in the bankrupt Sec. 70a (8). The Court of Appeals in Jaworski v. Wisniewski, 149 Md. 109, 139 A. 40 (1925) held that where a husband and wife, owning leasehold property as tenants by the entirety, and the husband conveyed his interest therein to her, the fact that the wife held the property as part of her sole and separate estate during her lifetime did not bar the husband's right to his statutory share therein at her death. Some affirmative act of the husband was necessary to release his statutory right in his deceased wife's estate. *Query*, would this statutory right come within the purview of the six months provision concerning property vesting by bequest, devise, or inheritance?

[48] *Supra*, n. 43.

[49] Md. Code (1939).

within three years, the Court of Appeals quoted with approval from *American Wholesale Corp. v. Aronstein*:[50]

> "As to the conveyance subsequently made by Aronstein to his wife, the estate was held by them as tenants by the entireties, and the appellants were not entitled to subject the separate interest made by Aronstein to the payment of their claims. His conveyance to his wife accordingly could not hinder or delay them in the collection of their judgments."[51]

This would seem to be a clear holding that if a spouse owning property as a tenant by the entireties voluntarily transfers his interest to the mate, thus divesting himself of the possibility by operation of law of becoming the sole owner of the property in the event of surviving his mate, such transfer cannot be regarded as a fraud upon his individual creditors.[52]

In *Davis v. Harris*,[53] a creditor tried to collect $383 on a note from a husband. It was alleged that when demand for payment was made, the husband threatened that if suit were brought on the note he would prevent its collection by disposing of all his property. On December 23, 1926, (fifteen days after the note matured) the husband executed a deed to a straw man conveying all of his estate (consisting of two leasehold properties) and the deed was recorded on December 28, 1926. While title was in the straw man, the creditor filed suit on the note in January, 1927 and obtained a judgment on January 29th. This judgment was subsequently assigned to plaintiff. On December 23, 1927, the straw man reconveyed the property to the husband and wife as tenants by the entireties, and the deed was recorded April 5, 1928. In January, 1936, plaintiff filed suit against the husband and wife, alleging a fraudulent scheme, and praying that plaintiff's judgment be declared a lien

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[50] 10 F. (2d) 991 (C. A. D. C. 1926).

[51] *Ibid*, 992.

[52] See also Warheim v. Bayliss, 149 Md. 103, 131 A. 27 (1925) where the Court found there was no conveyance in fraud of creditors; and Robbins v. Dorsey, 150 Md. 265, 132 A. 633 (1926); In Re Moore, 11 F. (2d) 62, where conveyance was set aside for fraud; In re Nicolet, 10 F. Supp. 541 (D. Md. 1935) where discharge in bankruptcy was denied.

[53] 170 Md. 610, 185 A. 469 (1936).

on the property. Defendant husband and wife demurred on grounds of limitations and laches. A demurrer was sustained by the lower court and this was affirmed on appeal. The Court of Appeals said:

> "This suit was instituted on January 17th, 1936, nearly nine years after the completed transfer of the properties in question to the defendant husband and wife as tenants by the entireties. The effect of the transfer was to vest in the wife, as well as the husband and the entire title to the properties during their joint lives, with the right of continued and complete ownership in the surviving spouse. Such an acquisition of property by the wife is within the purview of the quoted statute. The limitation of time which it imposes in absolute terms upon the rights of creditors to contest conveyances from husband to wife has been repeatedly applied."[54]

To the plaintiff's contention that his judgment was entered before the straw man reconveyed to the husband and wife, the Court said:

> "But the bill of complaint avers that the reconveyance was in furtherance of the scheme of Harris to hinder, delay and defraud his creditors, and that is the purpose for which the deed, without consideration, from Harris to Egner, is alleged to have been executed. It is thus affirmed that the reconveyance was in pursuance of the plan to which the original conveyance was likewise directed. The circumstance of the delay in the intended re-transfer does not neutralize the effect upon the plaintiff's case of the fact that the judgment debtor had conveyed his property, by a duly recorded deed, before the institution of the suit of which the judgment was procured. The object of this proceeding in equity is to enforce the judgment creditor's claim as against an estate in which the wife of the judgment debtor acquired an interest from the husband through a consummating deed recorded more than three years before the plaintiff's rights in opposition to it were thus asserted. It is assumed and declared by the bill that such a proceeding is requisite for the enforcement of the plaintiff's claim against the property conveyed by the deeds in controversy. . . ."[55]

[54] *Ibid*, n. 53, 613.
[55] *Ibid*, n. 53, 614.

One of the things of interest in this case is that (assuming the conveyance from the husband to the straw man to be fraudulent as to creditors as alleged) it was not decided because of the fact, if true, that the creditor's judgment when entered up became a lien on the property while title to it was in the name of the straw man. A question arises as to whether or not the judgment creditor would have been more successful if he had proceeded directly, without first going into equity, to have the property sold by the sheriff under Article 39B, Section 9 (b). This would then leave the purchaser at the execution sale subsequently to try the title to the property in an action at law, such as, ejectment proceedings[56] against the husband and wife.[57]

It is to be noted that the language of Article 45, Section 1,[58] protects all transfers of property from spouse to spouse from the creditors of either grantor spouse except where made to the prejudice of subsisting creditors who may attack the conveyance within three years.[59]

Sections 5, 6 and 7[60] of the Uniform Fraudulent Conveyance Act enacted in Maryland in 1920 provide that there may be conveyances, not only fraudulent as to subsisting creditors, but also fraudulent as to future creditors. These sections on their face would apply to conveyances between spouses as well as conveyances between other per-

[56] Welch v. Scotten, 59 Md. 72 (1882).

[57] Would Md. Code (1939) Art. 45, Sec. 1, be a bar to such a proceeding after three years? See Brasie v. Minneapolis Brewing Co., 87 Minn. 456, 92 N. W. 340 (1902).

[58] Md. Code (1939). A creditor may be barred by laches in period shorter than three years, Ahrenberg v. Brown, 153 Md. 598, 139 A. 280 (1927).

[59] In Stieff Co. v. Ullrich, 110 Md. 629, 73 A. 874 (1909) a creditor of the husband sought to set aside a deed taken by the husband in the name of the husband and wife as tenants by the entireties more than three years after the execution and recordation of the deed. The creditor sought to avoid the running of Art. 45, Sec. 1, on the ground that he had just recently discovered the alleged fraud. The Court indicated that under certain circumstances this might defer the running of the statute, quoting from Wear v. Skinner, 46 Md. 257, (1877), that "when a party has been injured by the fraud of another, and such fraud is concealed, or is of such character as to conceal itself, whereby the injured party remains in ignorance of it without any fault or want of diligence on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." Here, however, the Court found that the creditor did not exercise diligence, and that there was no concealment, and they refused to rule that the statute of limitations had not begun to run promptly.

[60] Md. Code (1939) Art. 39B, Secs. 5, 6, 7.

sons. However, Article 45, Section 1,[61] in transfers between spouses, specifically permits only those to be attacked which are in prejudice of the rights of *subsisting* creditors. The conflict between Sections 5, 6 and 7 of the Uniform Fraudulent Conveyance Act and Article 45, Section 1, is resolved in favor of Article 45, Section 1, by the express terms of Section 14 of the Uniform Act which provides: ". . . nothing herein shall be construed to repeal . . . the law relating to fraudulent conveyances from husband to wife as contained in Article 45, Sections 1, 2 and 11 of said Code . . ."

Therefore, under the present state of the statutory law of Maryland it may be conceivable that a husband may at any time defeat his future creditors and render nugatory the provisions of Sections 5, 6 and 7 of the Uniform Fraudulent Conveyance Act by conveying his property to his wife or to himself and his wife as tenants by the entireties. A court decision on this point of statutory construction would be of interest.

Where by a prenuptial contract, the prospective husband agreed, in consideration of marriage, to convey property which he owned to his prospective wife and himself as tenants by the entireties, the transaction was upheld as against the husband's creditors, the wife having acted in good faith and without knowledge by her of any intention on the husband's part to defraud his creditors. The Court of Appeals in the course of its opinion said:

> "There is no question as to the sufficiency of marriage as a consideration to support a pre-nuptial conveyance, even though it operates to the prejudice of creditors, unless the grantee was implicated in a fraud to be committed against their interest."[61a]

It is well settled in Maryland law, that where one spouse goes into bankruptcy the trustee in bankruptcy takes no interest in property held by the bankrupt and his spouse as tenants by the entireties for, in this State, no interest therein could have been transferred by the bankrupt to

[61] Md. Code (1939).
[61a] Braecklein v. McNamara, 147 Md. 17, 21, 127 A. 643 (1925).

the trustee, or could have been levied upon or sold under judicial process in satisfaction of his individual claim.[62]

As mentioned above, however, under Section 70a of the Bankruptcy Act, if within six months following the petition in bankruptcy, the bankrupt is divorced or his wife dies, then such entirety property which may have become converted as a result of these circumstances into a tenancy in common or the sole ownership of the bankrupt, should pass to the trustee in bankruptcy.

There have been some curious developments in bankruptcy as regards property held by tenants by the entireties in Maryland. If a husband and wife, owning property as tenants by the entireties go into individual bankruptcy, the bankruptcy court, by the device of consolidating the proceeding will pass the property to the trustee in bankruptcy free of liens obtained by judicial proceedings within the four months period prior to the petitions. In *In re Utz et ux*,[63] petitioner, on February 10, 1934, obtained a judgment against Mr. and Mrs. Utz. On February 19, 1934, Mr. Utz, a farmer, was adjudged bankrupt on a voluntary petition.[64] On the same day Mrs. Utz was similarly adjudged bankrupt. On March 7, 1934, petitioner sought execution by virtue of his judgment. On March 9, 1934, the bankruptcy proceedings of both husband and wife were consolidated by order of the bankruptcy court. The Court held that since a trustee in bankruptcy is clothed with the powers of a judgment creditor, a trustee in consolidated bankruptcy proceedings should be clothed with the powers of a joint judgment creditor of both the husband and the wife. It follows, ruled the Court, that the property of the husband and the wife in the present consolidated proceedings, held by them as tenants by the entireties, does pass to the trustee in bankruptcy and that, therefore, the judgment lien obtained by the petitioning creditor within

[62] Foland v. Hoffman, 47 A. (2d) 62 (Md. 1946); Dioguardi v. Curran, 35 F. (2d) 431 (C. C. A. 4th, 1929); Phillips v. Krakower, 46 F. (2d) 764 (C. C. A. 4th, 1931); In Re Ford, 40 F. Supp. 955 (D. Md. 1941).

[63] 7 F. Supp. 612 (D. Md. 1934).

[64] A farmer, as defined by The Bankruptcy Act, cannot be adjudicated an involuntary bankrupt. There are two definitions of "farmer" in the Act, Sec. 75 and Sec. 1 (17). Section 75 is the more recently enacted and probably is the prevailing definition at the present time.

four months of the adjudication in bankruptcy and the consolidation of the proceedings is void as against the trustee.

The same device of passing entireties property to the trustee in bankruptcy by consolidating the individual proceedings of the husband and wife has been adopted by the District Courts in Pennsylvania in *In re Carpenter*,[65] and *in the matter of Pennell*.[65a] In the *Carpenter* case, the Court adopts the opinion of the Referee, which seems to this writer far from convincing both as to its reasoning and the soundness of its conclusion. It is premised on the theory that the husband and wife are to be treated not as separate individuals in bankruptcy, but as "the bankrupt". Granting this premise, which appears most faulty, then, of course, it is clear sailing to the Referee's conclusion. The *Pennell* case cites the *Carpenter* case and the *Utz* case, and then merely says: "Our opinion is that when the estate of the husband and wife came into court on separate adjudications in bankruptcy, the trustee takes the estate held by them by entireties, but for convenience in administration, the two bankruptcy estates should be consolidated."[66] It is not clear to the writer just what the Court means when it says "when the estate of the husband and wife came into court on separate adjudications in bankruptcy". Certainly if only the husband went into bankruptcy the entireties estate did not come into court, and likewise if only the wife went into bankruptcy the entireties estate did not come into court. And if both go into bankruptcy there seems to be no substantive reason why the entireties estate should come into court. Mere consolidation of proceedings should not be the magic charm that brings the entireties estate into court when the individual proceedings would not have done so. And yet, the following two Missouri cases clearly indicate that it is the consolidation that effects this curious result.

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[65] 5 F. Supp. 101 (M. D. Pa. 1933).

[65a] 30 Am. B. R. (N. S.) 611 (1935).

[66] *Ibid*, 612.

In *Dickey v. Thompson*,[67] the Supreme Court of Missouri held that when husband and wife, owning property as tenants by the entireties were adjudged bankrupt the same day in separate proceedings, and the same person was appointed trustee for both bankrupt estates, this did not make him trustee of the estate held by the bankrupts as tenants by the entireties. The reasoning of the court in this case seems very sound. However, in a subsequent case, *Shipman v. Fitzpatrick*,[68] the same Court, after referring to the earlier case, said:

> "We might add that it seems to be the general rule where both the husband and the wife are bankrupt and the proceedings are consolidated, the trustee in the consolidated proceedings takes title to the property."[69]

These cases are of considerable interest. To the writer it is not clear on what authority in law the courts have jurisdiction to consolidate the bankruptcy proceedings of two individuals merely because they are husband and wife. There is no hint in the opinions that the husbands and wives were partners in any business so as thus to cause entirety property to pass to the trustee.[70] Remington, a

[67] 18 S. W. (2d) 388 (1929).

[68] 164 S. W. (2d) 912 (1942).

[69] *Ibid*, 913. The Court cites 8 C. J. S., Bankruptcy, Sec. 175.

[70] The Bankruptcy Act apparently contemplates consolidation of proceedings where partners and partnerships are in bankruptcy, see Section 5 and 32. There appears to be no express authority in the Act for consolidating bankruptcy proceedings of non-partners. General Order in Bankruptcy No. 37, promulgated by the United States Supreme Court: "In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, insofar as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be . . ."

U. S. C. A. Title 28, Sec. 734 "Orders to save costs; consolidation of causes of like nature. When causes of a like nature or relative to the same question are pending before a court of the United States, or of any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of Courts for avoiding unnecessary costs or delay in the administering of justice, and may consolidate said causes when it appears reasonable to do so."

Rule 81 (a) (1) Federal Rules of Civil Procedure: "These rules do not apply to proceedings in admiralty. They do not apply to proceedings in bankruptcy or proceedings in copyright under the Act of March 4, 1909 . . . , except insofar as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States . . ."

Rule 42 (a) Federal Rules of Civil Procedure: "Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in

writer on bankruptcy,[71] says: "Where husband and wife both go into bankruptcy, their cases are sometimes consolidated. This is particularly desirable where the estates consist in part of property, owned jointly or by the entireties." As authority he notes *In re Miller*.[72] But in this case, except for the statement of fact in the first sentence of the opinion, "The bankrupts were husband and wife, whose causes were consolidated in the District Court," there is no consideration of, nor question raised as to, the authority of the District Court to order such a consolidation.

If the two individual proceedings had not been consolidated, following the ruling in *Ades v. Caplin*,[73] the judgment lien on the property would have been treated as void as to the husband and, similarly, as to the wife, and the property would not have passed to their respective individual trustees. They would have come out of their respective bankruptcies owning this property free and clear of the judgment lien and it would have been invulnerable to attack by their individual creditors. Instead of this result, however, by the procedural device of consolidating the proceedings we find the property passes to the trustee in bankruptcy. Presumably, it will then be liquidated, and the proceeds therefrom will be used to pay dividends to their individual creditors (who could not have touched the property before bankruptcy) as well as their joint creditors. But if the court marshalled the assets, entirety property would be used first for joint claims, and individual property first for individual claims, and then the joint creditor would be taken care of first out of the entireties property even though his lien was voided. The windfall given individual creditors by the device of consolidation in bankruptcy is apparent.

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issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

It seems to the writer highly doubtful that these various provisions were intended to authorize the consolidation of two separate bankruptcy proceedings by individuals, be they husband and wife or not.

[71] 1934 Supp., Sec. 338. 10 (new).

[72] 95 F. (2d) 441 (C. C. A. 7th, 1938), 36 A. M. B. R. (N. S.) 361.

[73] 132 Md. 66, 103 A. 94 (1918).

It could be a subject of speculation as to what a court would do if, in a case similar to *In re Utz et ux*,[74] the wife did not file her petition in bankruptcy until more than four months after the judgment lien on the entireties property was obtained. It is respectfully suggested that the result flowing from the consolidation of bankruptcy proceedings of husband and wife, not partners, as exemplified in the above cases, should be reexamined.

Another curious development in bankruptcy law grows out of the following series of cases.

In *Frey v. McGaw*,[75] defendant-creditor obtained a judgment against Mr. and Mrs. Frey on April 3, 1913, and this became a lien on certain leasehold property which they held as tenants by the entireties. On February 11, 1914 (about ten months later) Mr. Frey filed a voluntary petition in bankruptcy. Subsequently, with the permission of the District Court, defendant-creditor directed the writ of *fieri facias* to issue from the state court and levy was made on the property. Mr. Frey, the bankrupt, then filed a bill to restrain proceedings under the writ. Defendant's demurrer to the bill was sustained by the lower court. The Court of Appeals, in affirming the lower court, held that the judgment, being against the joint defendants, husband and wife, was itself an entirety. The Court said that it has never been held in Maryland that, in the absence of statutory exemption, where there is an entire judgment against joint-defendants, no lien is imposed upon estates or interests in land held by the entireties. The Court decided the judgment lien of the defendants was not void under Section 67[76] of the Bankruptcy Act, as it had been entered more than four months prior to the petition for adjudication of bankruptcy. Nor was it void for any reason in its obtention. The discharge of the bankrupt was only personal to the debtor. It was entirely without effect as to any valid liens subsisting at the time.

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[74] *Supra*, n. 63.

[75] 127 Md. 23, 95 A. 960 (1915).

[76] 11 U. S. C. A. 204.

This case was followed by *Ades v. Caplin*,[77] where a creditor obtained a judgment on August 23, 1915 against a husband and wife who owned a leasehold interest as tenants by the entireties. About four weeks later (September 16, 1915) an involuntary petition in bankruptcy was filed against the husband and he was adjudicated bankrupt. A composition with the creditors was worked out in bankruptcy, this was confirmed and the husband was given his discharge. The judgment creditor received a dividend of $41.37. In 1917, after the bankrupt received his discharge, the creditor had a *fieri facias* issued on his judgment, and levy was made on the leasehold property. Husband and wife filed a bill to restrain the creditor and the sheriff from selling the property under the writ. The lower court restrained the sale and this was affirmed on appeal. The Court of Appeals quoted from Section 67f[78] of the Bankruptcy Act, as it was then written, and said:

> "Under the above statute, the lien of the judgment recovered against the appellees within four months prior to the filing of the petition in bankruptcy against one of them, became null and void, at least so far as the bankrupt was concerned, and it must be so held, unless there is something in the characteristics of an estate by the entirety that would require a different meaning to be given to the Act. . . .
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> ". . . upon the filing of the aforesaid petition within the period mentioned above, the lien of the judgment, so far at least as the right of the husband in the estate by entirety was concerned, was struck down by the provisions of the Federal Act, the effect of which was practically the same as if the judgment had been recovered against the wife alone, in which case the said leasehold property could not have been sold during the lifetime of the husband if at all, under an execution issued on the judgment."[79]

We shall presently see, that if the creditor in this case had been less diligent, had slept on his rights, and had not

[77] *Supra*, n. 73.

[78] 36 Stat. 842.

[79] *Supra*, n. 73, 69. For recent cases where the court refused to strike down a judgment lien on entirety property obtained within four months of petition in bankruptcy, the bankrupt having waived exemptions, see Citizens Savings Bank, Inc. v. Astrin, 61 A. (2d) 419 (Del. 1948).

prosecuted his claim to judgment until after a petition in bankruptcy had been filed, he would have been able to satisfy his claim out of this property. The logical symmetry of this proposition is certainly not apparent to this writer, but it nevertheless appears to be the present state of the law.

Thus, in *Phillips v. Krakower*,[80] Phillips was adjudged bankrupt on January 9, 1930. At the time of the filing of the petition in bankruptcy he and his wife owned as tenants by the entireties certain property in Baltimore City. Krakower, a creditor, held a note of the husband and wife for $5,500. At the time of the commencement of the bankruptcy proceedings this claim had not been reduced to judgment. On February 21, 1930 the creditor filed a petition in the bankruptcy proceeding, praying that Phillips' discharge in bankruptcy be deferred to enable him to secure a judgment on the note, and to subject to its satisfaction the property held as tenants by the entireties. The bankruptcy court so ordered and it was affirmed on appeal. The Circuit Court of Appeals, among other things, said:

> ". . . in case of bankruptcy, the interest of the bankrupt in such an estate does not pass to his trustee for the benefit of creditors. . . . Where, however, husband and wife execute a joint note, the estate by entireties can be subjected to judgment thereon obtained against both of them. Frey v. McGraw, supra. But if the liability on the note of one of the spouses be discharged in bankruptcy, a judgment on the note against the other cannot be collected out of the property during the lifetime of the first. Ades v. Caplin, supra.
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> ". . . although the bankruptcy proceeding has brought no interest in the estate by entireties into court for the benefit of the creditors of Phillips, his discharge in bankruptcy will remove that entire property beyond the reach of creditors entitled to subject it to their claims. The question is presented whether, without giving these creditors an opportunity to proceed, the court should grant the discharge knowing that it will result in a legal fraud, i.e., the effectual withdrawing of the property from the reach of those

[80] 46 F. (2d) 764 (C. C. A. 4th, 1931).

entitled to subject it to their claims, for the beneficial ownership and possession of those who created the claims against it. We cannot conceive that any court would lend its aid to the accomplishment of a result so shocking to the conscience.

"The purpose of the bankruptcy act was to equitably distribute the assets of distressed debtors among their creditors and to discharge them from further liability after this had been done. It was never contemplated that it should be used to perpetrate fraud or to shield assets from creditors. It is elementary that a bankrupt is not entitled to a discharge unless and until he has honestly surrendered his assets for the benefit of creditors; and he certainly is not in a position to ask of a court of bankruptcy, which is a court of equity, to grant him a discharge under the statute, when the effect of the discharge will be to withdraw from the reach of creditors property properly applicable to the satisfaction of their claims."[81]

If it is "legal fraud", and "shocking to the conscience", one cannot help but wonder what to think of the law as promulgated in *Ades v. Caplin*[82] (and cited in the *Phillips* case). The only substantial difference on the facts is, that in *Ades v. Caplin,* the joint creditor reduced his claim to judgment within four months of the petition in bankruptcy, while in the *Phillips* case he did not go to that trouble until after the petition was filed. A legal situation is thus created by this series of cases whereby the joint creditor if he reduces his claim to judgment will have his lien on entireties property voided if the debtor within four months thereafter files a petition in bankruptcy. If the creditor holds off taking action to obtain judgment for fear of having his lien voided by bankruptcy and waits for the debtor to file a voluntary petition or to have an involuntary petition filed against him, the creditor may have to wait indefinitely without collecting on his claim, not to mention the possibility of having it barred by limitations.

We find this same curious result recognized in the fairly recent case of *Foland v. Hoffman.*[83] On May 18, 1934,

[81] *Ibid,* 765.
[82] *Supra,* n. 73.
[83] 47 A. (2d) 62 (Md. 1946).

Foland and wife signed a confessed judgment note, under seal, for $3,200. On April 8, 1938 Foland was adjudged a bankrupt. On September 16, 1944, the holder of the note had judgment entered against the husband and wife. On October 11, 1944 Foland received his discharge in bankruptcy, and on October 14, 1944 he filed his plea of discharge in the confessed judgment case. The lower court passed an order that sufficient cause had not been shown to vacate the judgment. On appeal this was affirmed. The Court, in the course of its opinion said: "A discharge in bankruptcy does not affect liens theretofore existing against real or personal property, title to which is held by the entireties, unless acquired within four months prior to the filing of the petition in bankruptcy, and while the bankrupt was insolvent."[84] The opinion cited *Ades v. Caplin,*[85] and *Frey v. McGaw.*[86] The Court then stated: "He (Foland) was discharged on October 16, 1944, which was after the judgment had been entered and hence his discharge would not constitute cause to strike out the judgment in question as to him."[87] The Court also quoted from *Phillips v. Krakower,*[88] i.e., the part of the opinion about legal fraud.

Assuming the bankrupt was insolvent during the four months prior to the petition in bankruptcy, which is not a broad assumption, if the creditor in this case had been more diligent and obtained his judgment in the period December 8, 1937 - April 8, 1938 his lien would have been voided. By doing nothing until September 16, 1944 he established a lien that was good. The courts say that not to permit the establishment of this lien would be "legal fraud". Although all the opinions referred to above indicate the courts are aware of this situation, the interesting thing to the writer is that there is no hint in the opinions that the courts consider such a situation as incongruous.

It is suggested that the curious and illogical results discussed above would be eliminated if Section 67 of the

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[84] *Ibid*, 69.
[85] *Supra*, n. 73.
[86] *Supra*, n. 75.
[87] *Supra*, n. 83, 66.
[88] *Supra*, n. 80.

Bankruptcy Act were construed to avoid liens only on property passing to the trustee in bankruptcy as part of the estate for the benefit of creditors, but not to affect liens on property not passing to the trustee. The difficulty here, is that the United States Supreme Court,[89] in construing Section 67F, of the Bankruptcy Act, in 1913 decided that all liens obtained through legal proceedings against a person who is insolvent within four months of bankruptcy are null and void whether title to the property vests in the trustee or, as in the case of exempt property, title does not vest in the trustee. The Court said:

> "On this question there is a difference of opinion, some state and Federal courts holding that the Bankruptcy Act was intended to protect the creditors' trust fund and not the bankrupt's own property and that, therefore, liens against exempt property were not annulled even though obtained by legal proceedings within four months of filing the petition (citing cases). On the other hand (citing cases) hold that section 67F annuls all such liens, both as against the property which the trustee takes and that which may be set aside to the bankrupt.
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> ". . . This view, we think, is supported both by the language of the section and the general policy of the act which was intended not only to secure equality among creditors, but for the benefit of the debtor in discharging him from all liabilities and enabling him to start afresh with the property set apart to him as exempt. Both of these objects would be defeated if judgments like the present were not annulled, for otherwise the two Iowa plaintiffs would not only obtain a preference over other creditors, but would take property which it was the purpose of the Bankruptcy Act to secure to the debtor.
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> "Barring exceptional cases, which are specially provided for, the policy of the act is to fix a four month's period in which a creditor cannot obtain an advantage over other creditors nor a lien against the debtor's property. 'All liens obtained by legal proceedings' within that period are declared null and void . . .' "[90]

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[89] Chicago, B. & Q. R. Co. v. Hall, 229 U. S. 511 (1913).
[90] *Ibid.*

It is submitted that there is nothing in the language of the present Section 67A, which in 1938 superseded the old Section 67F, that would be a basis for saying that the opinion of the Supreme Court in *Chicago, Burlington & Quincy Railroad Co. v. Hall*[91] is not still apposite. If these conclusions are correct, then it would seem that the illogical situation of voiding a lien obtained through legal proceedings within four months of bankruptcy on property held as tenants by the entireties but permitting a joint creditor to proceed to obtain a lien on such property after bankruptcy by holding up the bankrupt's discharge can only be remedied by an appropriate amendment to the Bankruptcy Act.

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[91] *Supra*, 89.