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Tenancies by the Entirety in New York

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TENANCIES BY THE ENTIRETY IN NEW YORK

Complex problems in real property law arise from concurrent ownership of land. Aside from coparcenary, the common law types of such ownership are tenancy in common, joint tenancy, and tenancy by entireties. Although this Comment relates to the last of these only, it is well to distinguish the other two. A tenancy in common exists where two or more persons have distinct but undivided shares in an estate or interest in property. The only unity essential to such a tenancy is the unity of possession, "for indeed tenancies in common differ in nothing from sole estates but merely in the blending and unity of possession."[1] Joint tenancies, on the other hand, are characterized by a four-fold unity: "the unity of interest, the unity of title, the unity of time, and the unity of possession; or in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same possession."[2] Unlike the tenancy in common, joint tenancies are characterized by the right of survivorship, whereby on the death of a tenant his interest passes to the surviving joint tenants.

Where land is devised or conveyed to husband and wife as tenants by the entirety, a fifth unity is added to the four unities of the joint tenancy, *viz.*, unity of person, for husband and wife were considered as one at common law. Survivorship is characteristic of both such tenancies, with this important difference, that the right of the surviving spouse to the whole of property held by the entirety cannot be defeated by the act of the other spouse, while a joint tenant may destroy the right of survivorship by any act which converts the joint tenancy into one in common. And the manner of seizin is different in the two tenancies. Joint tenants are seized of a share and of the whole, while tenants by the entirety are each seized of the whole interest and not of a share, or as expressed in the ancient phrase, *per tout et non per my.*

The distinctions between these varieties of cotenancy may be clarified by considering how a tenancy by entireties may be created, who may hold by the entirety, and what kind of property may be so held.

(1) *Creation.* When real property is conveyed to persons who at the time of the conveyance are husband and wife, prima facie they hold by entireties.[3] Thus where a grant is made to husband and wife without any words specially pre-

1. 2 Bl. Com. 180.
2. *Id.*
3. *Booth v. Fordham,* 100 App. Div. 115, 91 N. Y. Supp. 406 (4th Dept. 1905), *aff'd.* 185 N. Y. 535, 77 N. E. 1182 (1906); 2 Tiffany, Real Property (3rd ed.), 221. For the proposition that tenants by the entirety must take by deed or will and not by inheritance, see *Knapp v. Windsor,* 60 Mass. 156 (1850).

scribing the quality of the estate taken, the grantees hold by the entirety.[4] The same is true although the grantees are not described as man and wife.[5] This presumption, however, is rebuttable, and it is well settled that a married couple may hold land by another species of tenancy if the instrument of conveyance so requires.[6] Thus if a deed in terms creates a tenancy in common[7] or joint tenancy[8] the expressed intention will be respected. Once it is determined that a tenancy by entireties has not been created, the presumption is in favor of a tenancy in common and against a joint tenancy.[9]

A difficult theoretical problem is whether *H.* may, by a direct conveyance to himself and *W.*, create a tenancy by entireties. Such a deed lacks two of the essential unities (title and time) of that tenancy, but the grantor's intention to create a tenancy by the entirety has been upheld in New York.[10] This view is preferable, for it avoids the useless interposition of a straw man.

(2) *Husband and Wife Only.* Tenancy by the entirety is based on the common law fiction of unity of man and wife.[11] Accordingly, only those who are in fact married at the time of the conveyance may take as such tenants, and a deed given under a mistaken belief that the grantees are married creates a tenancy in common in spite of an expressed intention to grant by the entirety.[12] The fiction of unity also explains the rule that, where real property is granted to *H.*, *W.*, and

4. *Miner v. Brown,* 133 N. Y. 308, 31 N. E. 24 (1892). It is immaterial that one spouse paid the entire consideration for the land, as the law presumes a gift. *Hosford v. Hosford,* 273 App. Div. 659, 80 N. Y. S. 2d 306 (4th Dept. 1948); *Shapiro v. Shapiro,* 208 App. Div. 325, 203 N. Y. Supp. 442 (1st Dept. 1924).

5. *Armondi v. Dunham,* 221 App. Div. 679, 225 N. Y. Supp. 87 (3rd Dept. 1927), *aff'd* 248 N. Y. 603, 162 N. E. 542 (1928).

6. *Booth v. Fordham, supra* n. 3; *Miner v Brown, supra* n. 4.

7. *Miner v. Brown, supra* n. 4.

8. *Jooss v. Fey,* 129 N. Y. 17, 29 N. E. 136 (1891); *Cloos v. Cloos,* 55 Hun 450, 8 N. Y. Supp. 660 (2nd Dept. 1890). These cases negate the rule of construction still prevailing in some jurisdictions, that the same words of conveyance which would make other grantees joint tenants will make husband and wife tenants by the entirety. See *Hoag v. Hoag,* 213 Mass. 50, 99 N. E. 521 (1921).

9. Real Property Law sec. 66. The usual statutory presumption against joint tenancy is founded on the view it is undesirable that the ultimate ownership of the property should turn on the accident of survivorship. See *Hoag v. Hoag, supra* n. 8. This presumption was early held not to apply against tenancies by the entirety. *Wright v. Saddler,* 20 N. Y. 320 (1859).

10. Domestic Relations Law sec. 56; Real Property Law sec. 240-b; *Boehringer v. Schmid et al.,* 254 N. Y. 355, 173 N. E. 220 (1930); *Matter of Klatzl,* 216 N. Y. 83, 110 N. E. 181 (1915).

11. 2 Bl. Com. 182; 2 Kent's Com. 132. It seems pointless to speculate at this late date as to the origin of the fiction of unity. See Bryce, Studies in History and Jurisprudence, 819; 2 Pollock and Maitland, History of English Law (2nd ed.), 399-436.

12. *Perrin v. Harrington,* 146 App. Div. 292, 130 N. Y. Supp. 944 (4th Dept. 1911); *Bell v. Little,* 204 App. Div. 235, 197 N. Y. Supp. 674 (4th Dept. 1922), *aff'd* 237 N. Y. 519, 143 N. E. 726 (1923). Such a conveyance was held to create a joint tenancy in *Gaza v. Gaza,* 247 App. Div. 837, 286 N. Y. Supp. 378 (3rd Dept. 1936), *aff'd* 272 N. Y. 617, 5 N. E. 2d 359 (1936) where there was an evident intent to create a right of survivorship.

a third person, *H.* and *W.* together receive only one moiety, as tenants by entireties among themselves and tenants in common as to the third person, who takes the other undivided half.[13] As a unity, man and wife take but one share, whatever the number of grantees. This, however, is only a rule of construction and not of law.[14] Because it destroys the unity of person a divorce terminates a tenancy by the entirety and converts it into one in common, each tenant holding an undivided half.[15] A separation would not have that effect.[16] The tenancy obviously comes to an end on the death of either husband or wife, the survivor thereafter holding the land in severalty.

(3 *Real Property Only.* Generally, tenancy by the entirety is limited to real property, and cannot exist in personalty except by analogy.[17] The question when personalty is constructively realty has arisen primarily in three classes of cases: where the land held by entireties is condemned, where it is mortgagd and foreclosed, and where it is conveyed by joint act of the spouses. It is law in New York that a tenancy by the entirety is not destroyed by the taking of the property for a public use under the power of eminent domain, and the right of survivorship continues in the proceeds until paid.[18] So where land owned by *H.* and *W.* as tenants of the entirety was taken in condemnation, and *H.* died before payment, *W.* became the sole owner of the award.[19] It has also been held that where a mortgage on property held by the entirety is foreclosed, the surplus over the mortgage indebtedness is constructively real property still held in entirety by both spouses.[20] On the other hand, where the spouses convey the land, receiving a bond and mortgage, they do not hold the latter by the entirety, but as tenants in common, each having an undivided half with no right of survivorship.[21] Why the distinction between conveyances, on the one hand, and condemnation and foreclosure proceedings on the other? Perhaps the answer is that the latter involve

13. *Barber v. Harris,* 15 Wend. 615 (N. Y. 1836); *Bartholomew v. Marshall,* 257 App. Div. 1060, 13 N. Y. S. 2d 568 (3rd Dept. 1939).

14. *Hilton v. Bender et al.,* 69 N. Y. 75 (1877).

15. *Hosford v. Hosford, supra* n. 4; *Stelz v. Schreck,* 128 N. Y. 263, 28 N. E. 510 (1891). It is immaterial whose misconduct caused the divorce. *Id.* The decree does not make the parties tenants in common ab initio, *Carpenter v. Carpenter,* 130 Misc. 701, 225 N. Y. Supp. 426 (Sup. Ct. 1927), but either may thereafter maintain a partition action. *Yax v. Yax,* 240 N. Y. 590, 148 N. E. 717 (1925).

16. 2 Tiffany, *op. cit.,* 236; *Freeman v. Belfer,* 173 N. C. 581, 92 S. E. 486 (1917).

17. *Matter of McKelway,* 221 N. Y. 15, 116 N. E. 348 (1917); *Matter of Albrecht,* 136 N. Y. 91, 32 N. E. 632 (1893); *Matter of Blumenthal,* 236 N. Y. 448, 141 N. E. 911 (1923).

18. *In re Idlewild Airport,* 85 N. Y. S. 2d 617 (Sup. Ct. 1948); *Matter of One Hundred & Fifteenth & Vistula Avenues,* 137 Misc. 358, 242 N. Y. Supp. 6 (Sup. Ct. 1930).

19. *Matter of City of New York (Jamaica Bay),* 252 App. Div. 103, 297 N. Y. Supp. 415 (2nd Dept. 1937).

20. *Stretz v. Zolkoski,* 118 Misc. 806, 195 N. Y. Supp. 46 (Sup. Ct. 1922).

21. *Matter of Blumenthal, supra* n. 17; *In re Baum,* 121 App. Div. 496, 106 N. Y. Supp. 113 (2nd Dept. 1907), *appeal dismissed* 190 N. Y. 564, 83 N. E. 1122 (1908).

no exercise of the tenants' will, whereas they presumably know a conveyance to be destructive of the right of survivorship.[22] As a rule, however, tenancies by the entirety exist only in real estate. Such a holding is normally in fee simple, but it may be for the life of the survivor[23] or for years.[24] The tenancy may also be in an equitable estate: the interest of husband and wife in land contracted to be sold to them is an estate by the entirety.[25]

It is necessary at this point to indulge in one of those historical excursions which so often clarify the present state of our law. At common law, "For purposes of property and of contract, the married woman was under a complete legal blackout termed coverture. Man and wife were one and the one was male."[26] The result was that the husband was entitled to the full control of his wife's property, including that held by the entirety, and to receive and dispose of the rents and profits to the exclusion of his spouse.[27] The husband could also mortgage or convey the land, and his deed passed to the grantee an estate for the grantor's life, with the possibility of a fee simple absolute if the wife predeceased her husband.[28] In time the liberal thought of the nineteenth century revolted against these harsh rules, and the Legislature by the Married Women's Property Acts (1848, 1849, 1860, 1862) conferred upon married women independent status as property holders.[29]

It was for a time questioned whether the tenancy by the entirety could survive these enactments, but the Court of Appeals in *Bertles v. Nunan*[30] held that the Acts do not limit or define what estate husband and wife take in lands conveyed to them jointly, but merely enable the wife to control and convey her own property. This decision was based on the correct premise that the husband's com-

22. See *Matter of City of New York, supra* n. 19.
23. *Torrey v. Torrey,* 14 N. Y. 430 (1856). A grant of a life estate until either spouse shall die is not by the entirety as there is no survivorship. 2 Tiffany, *op. cit.,* 219.
24. *Goelet v. Gori,* 31 Barb. 314 (N. Y. 1860).
25. 2 Tiffany, *op. cit.,* 219-220.
26. Phipps, *Tenancy by Entireties,* 25 Temp. L. Q. (1951), 24.
27. *Barber v. Harris, supra* n. 13; *Jackson v. McConnell,* 19 Wend. 175 (N. Y. 1838).
28. 4 Thompson, Real Property, 351. Such conveyance would not sever the estate.
29. Domestic Relations Law sec. 50: "Property, real or personal, now owned by a married woman, or hereafter owned by a woman at the time of her marriage, or acquired by her as prescribed in this chapter, and the rents, issues, proceeds and profits thereof, shall continue to be her sole and separate property as if she were unmarried, and shall not be subject to her husband's control nor liable for his debts." Sec. 51 provides: "A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person, including her husband, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts as if she were unmarried. . ."
30. 92 N. Y. 152 (1883).

mon law rights in his wife's property were not a peculiar feature of the tenancy; instead, they were derived from the general principle which vested in the husband *jure uxoris* the control and enjoyment of all his wife's property during their joint lives.[31] *Bertles v. Nunan* was followed by another leading case, *Hiles v. Fisher,*[32] holding that the Married Women's Acts also swept away the husband's right of control and disposition of property held by the entirety. These statutes, as interpreted in *Hiles v. Fisher,* have completely altered the nature of tenancies by entireties in New York. This is true both as to the rights of the spouses inter se and with respect to outsiders. Only the doctrine of inseverability, whereby neither spouse may do any act in derogation of the other's survivorship, remains unaffected.

(1) *Rights of Spouses Inter Se.* Between themselves, tenants by the entiretly stand on an equal footing, and it has been said that they hold somewhat as tenants in common modified by the doctrine of survivorship.[33] Both spouses are entitled to possession, and they share the rents and profits equally; the interest of each is a right to the use of an undivided half of the estate during their joint lives, and to the fee (or other remaining interest) if predeceased by the other spouse.[34] When the tenants join in executing a deed, each is entitled to one-half the proceeds of the sale.[35] Where one tenant retains all the rents and profits, the other may sue at law for money had and received.[36] Perhaps one spouse may also maintain an action for waste.[37] Either may sue a third party for damages to the land, but the recovery is limited to the injury to plaintiff's interest, and does not bar an action by the other tenant.[38] It is settled that neither spouse may compel a partition: Domestic Relations Law sec. 56 is permissive only.[39] One spouse may not unilaterally subject the property to an easement.[40]

(2) *Rights of Third Parties.* Where property held by the entirety is con-

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31. 2 Kent's Com. 130.
32. 144 N. Y. 306, 39 N. E. 337 (1895).
33. *Hiles v. Fisher, supra* n. 32; *Matter of Goodrich v. Village of Otego,* 216 N. Y. 112, 110 N. E. 162 (1915); *MacFarland v. State,* 177 Misc. 117, 29 N. Y. S. 2d 996 (Ct. Cl. 1941).
34. *Hiles v. Fisher, supra* n. 32.
35. *Villone v. Villone,* 135 Misc. 512, 239 N. Y. Supp. 49 (Sup. Ct. 1930), *aff'd* 228 App. Div. 884, 240 N. Y. Supp. 927 (4th Dept. 1930).
36. *Niehaus v. Niehaus,* 141 App. Div. 251, 125 N. Y. Supp. 1071 (1st Dept. 1910). But a tenant in common or by the entirety is not liable to his cotenant for use and occupancy except where such tenant occupies the premises to the exclusion of the other. *Kullman v. Wyrtzen,* 266 App. Div. 791, 802, 41 N .Y. S. 2d 682 (2nd Dept. 1943).
37. *Kawalis v. Kawalis,* 183 Misc. 896, 53 N. Y. S. 2d 162 (Sup. Ct. 1945).
38. *Matter of Goodrich v. Village of Otego, supra* n. 33; *MacFarland v. State, supra* n. 33.
39. *Vollaro v. Vollaro,* 144 App. Div. 242, 129 N. Y. Supp. 43 (2nd Dept. 1911); *Lerbs v. Lerbs,* 71 Misc. 51, 129 N. Y. Supp. 903 (Co. Ct. 1911); *Dievendorf v. Dievendorf,* 198 Misc. 807, 100 N. Y. S. 2d 543 (Co. Ct. 1950); 2 Walsh, Real Property, 40.
40. *Grassi et al. v. Loweth et ux.,* 130 Misc. 861, 225 N. Y. Supp. 91 (Sup. Ct. 1927).

veyed by the spouses jointly or is subjected to satisfaction of their joint debts,[41] no peculiar problems are presented. The difficulties arise with the creditors, mortgagees, and grantees of the individual spouse. There is no doubt that the interest of each tenant is subject to sale on execution for his individual debts.[42] The purchaser at such a sale merely acquires the interest of the debtor spouse and becomes a tenant in common with the other spouse subject to his or her right of survivorship. Such purchaser, therefore, is unable to compel partition.[43] Nor may he eject the non-debtor spouse; as was said in *Finnegan v. Humes*: "Plaintiff had no right to remove the defendant Helen Humes from the premises or to order her to vacate. The sole right which the plaintiff had was to be put into possession with the defendant Helen Humes and share with her the occupancy and use of the premises."[44] The rights of individual mortgagees are put on the same basis. Under the rule of *Hiles v. Fisher*, each spouse may mortgage his interest. The purchaser at the foreclosure sale becomes a tenant in common with the non-debtor spouse, and may acquire the fee if the latter is survived by his mate. The surviving spouse, however, holds the land immune from liability for the other's debts.[45]

The law is no longer clear (if indeed it ever was) whether either tenant may separately convey his interest subject to the other's survivorship. It has been said that such an attempted conveyance passes no title.[46] On the other hand, Chief Judge Andrews stated in *Hiles v. Fisher* that husband and wife holding real estate by the entirety are "tenants in common or joint tenants of the use, each being entitled to one-half of the rents and profits during the joint lives, with power to each to dispose of or charge his or her moiety during the same period . . ."[47] (Dictum as to disposal.) In the light of the rationale of that case, it seems probable that grantees of a single spouse will enjoy equal rights with his creditors, although the Court of Appeals has never squarely so held. At any rate, the separate lease by either spouse has been held effective to entitle the lessee to con-

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41. That this is permissable, see 4 Thompson, *op. cit.*, 354; 2 Tiffany, *op. cit.*, 231.

42. *Finnegan v. Humes*, 252 App. Div. 385, 299 N. Y. Supp. 501 (4th Dept. 1937), *aff'd* 277 N. Y. 682, 14 N. E. 2d 389 (1938); *Beach v. Hollister*, 3 Hun 519 (4th Dept. 1875); *Bartowaik v. Sampson*, 73 Misc. 446, 133 N. Y. Supp. 401 (Co. Ct. 1911); *Mardt v. Scharmack*, 65 Misc. 124, 119 N. Y. Supp. 449 (Sup. Ct. 1909).

43. *Bartowaik v. Sampson, supra* n. 42.

44. 252 App. Div. at 385, 299 N. Y. Supp. at 504-505 (4th Dept. 1937).

45. *In re Vogelsang's Estate*, 122 Misc. 599, 203 N. Y. Supp. 364 (Surr. Ct. 1924). Where there is no sufficient evidence that the spouses died otherwise than simultaneously, property held by the entirety is divided equally, unless a deed or will otherwise provides. Decedent Estate Law sec. 89. As to taxation of survivorship, see Tax Law sec. 220, which was enacted to meet the objection that, as under the original grant the survivor was seized of the entirety, there was no change of ownership when the cotenant died. Cf. *Fernandez v. Wiener*, 326 U. S. 34 (1945).

46. *Zorntlein v. Bram et al.*, 100 N. Y. 12, 2 N. E. 388 (1885); *O'Connor v. McMahon*, 53 Hun 66, 7 N. Y. Supp. 225 (5th Dept. 1889). See also, *Jooss v. Fey, supra* n. 8. These cases, however, antedate *Hiles v. Fisher, supra*, n. 32.

47. 144 N. Y. at 315, 39 N. E. at 339 (1895). And see *Finnegan v. Humes, supra* n. 42; *Kawalis v. Kawalis, supra* n. 37.

current possession with the other spouse during the marriage and sole possession for the period of the lease if the lessor should survive.[48] Of course, an attempted devise of his interest by the husband's will is void as the title passes to his wife as survivor.[49]

CONCLUSION

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. 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."[50] The ancient common law fiction of marital unity has been with us long enough. It may have served well enough at one time (whatever its origin and purposes were), but should no longer guide the destinies of a substantial portion of real property. The tenancy by entireties, in the minority of jurisdictions in which it still exists, is unobjectionable so long as the tenants are prosperous and happily married, but works such absurdities under other circumstances that a Committee of the American Bar Association has recommended its abolition.[51] The principal advantage of survivorship may still be had by joint tenancy or tenancy in common for life, remainder to the survivor in fee.

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48. *Infante v. Sperber,* 187 Misc. 9, 61 N. Y. S. 2d 76 (Sup. Ct. 1946), *reversed on other grounds,* 271 App. Div. 896, 67 N. Y. S. 2d 82 (2nd Dept. 1946).

49. *Randolph v. Edwards,* 191 N. C. 334, 132 S. E. 17 (1926).

50. Holmes, Collected Legal Papers (1920), 187.

51. Report of the Committee on Substantive Real Property Principles, Real Property, Probate and Trust Law Division, A.B.A. (1944).