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REAL PROPERTY-TENANCY BY ENTIRETIES-CREATION BY DEED FROM HUSBAND TO HUSBAND AND WIFE

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REAL PROPERTY — TENANCY BY ENTIRETIES — CREATION BY DEED FROM HUSBAND TO HUSBAND AND WIFE—*H* owned real estate in fee simple. His wife, *W*, joined with him in a warranty deed conveying the land to themselves with the expressed intention of creating a tenancy by entireties. *H* died and his heirs challenged *W*'s right to take the fee by survivorship. The trial court held that a tenancy by entireties had been created and the wife properly took

the fee. On appeal, *held*, affirmed, one judge dissenting. An Arkansas statute[1] providing that a married man may convey "the interest specified in the deed" directly to his wife permits a husband, already owner of the land, to create a tenancy by entireties by a conveyance to himself and his wife. *Ebrite v. Brookhyser*, (Ark. 1951) 244 S.W. (2d) 625.

Under the common law theory of the marriage relationship it was well settled that there could be no conveyance of land between husband and wife.[2] This rule has been obviated by statutes such as that appearing in the principal case.[3] However, whether a tenancy by entireties may be created by such a conveyance is a question which has long perplexed the courts and on which there is a variety of judicial opinion. The principal objection to such a conveyance is that it does not meet the requirement of the four unities; interest, time, title, and possession.[4] This is on the theory that since a man cannot convey to himself, the deed could only pass an interest to the wife and the husband's previously acquired title is a continuing one. Therefore their title does not accrue from the same conveyance and does not commence at the same time. Following this reasoning some courts have concluded that a tenancy in common results from such a transaction. According to this view the wife receives only an undivided one-half interest in the land.[5] Courts have reached the same conclusion where the husband conveys an undivided one-half interest to the wife, expressly stating an intention that a tenancy by entireties result.[6] In these states it would seem that the only way in which the parties may accomplish the desired result is to make a conveyance to a third party who will then reconvey to them as husband and wife.[7] The Oregon court in *Dutton v. Buckley*[8] agreed that a

[1] Act 86 of 1935, Ark. Stat. (1947) §50-413.

[2] ". . . a man may not grant, nor give, his tenements to his wife during the coverture, for that his wife and he be but one person in the law." COKE ON LITTLETON 112a.

[3] Married Women's Property Acts, removing the common law disabilities of coverture, have had varying effects upon the estate by entireties. In some states these statutes have been construed to abolish this form of concurrent ownership. In others, the incidents of the estate are modified. For a complete analysis of the position of a tenancy by entireties under the various modern statutes see Phipps, "Tenancy By Entireties," 25 TEMPLE L.Q. 24 (1951).

[4] The unities requirement is applicable to both a joint-tenancy and a tenancy by entireties. Blackstone summarized the rule by saying, ". . . 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 undivided possession." 2 BLACKST. COMM., Wendell ed., *180 (1854). A decision purporting to dispense with the four unities requirement in the creation of a joint-tenancy is Therrian v. Therrian, 94 N.H. 66, 46 A. (2d) 538 (1946), noted in 32 CORN. L.Q. 291 (1946).

[5] Wright v. Knapp, 183 Mich. 656, 150 N.W. 315 (1915); Mich. State Bank v. Kern, 189 Mich. 467, 155 N.W. 502 (1915).

[6] Pegg v. Pegg, 165 Mich. 228, 130 N.W. 617 (1911); In re Walker's Estate, 340 Pa. 13, 16 A. (2d) 28 (1940). The court in the principal case distinguished these decisions on the ground that such a conveyance was at variance with the common law theory that each spouse owned the entire estate. Principal case at 628.

[7] For cases illustrating the operation of such a "straw-man" conveyance see Young v. Brown, 136 Tenn. 184, 188 S.W. 1149 (1916) and Crow v. Crow, 348 Ill. 241, 180 N.E. 877 (1932).

[8] 116 Ore. 661, 242 P. 626 (1926), noted in 24 MICH. L. REV. 726 (1926).

tenancy by entireties could not be created by such a conveyance as that in the principal case. The court sought to effectuate the intention of the parties, however, by holding that such a deed gave the wife an undivided one-half interest in the land and a remainder in the other half, contingent upon the wife's survival of the husband.[9] In this way the entire fee vested in the wife upon the husband's death. However, while this did give effect to the intent of the parties as to survivorship, the result is different from a holding that an estate by entireties was created.[10] The view taken by the principal case was expressed by a majority of the New York court in the leading case of *Matter of Klatzl*.[11] Judge Collin answered the objection as to the unity of time and title by suggesting that "The husband did not convey to himself, but to a legal unity or entity which was the consolidation of himself and another."[12] This would seem to be a good technical argument meeting the requirements of the rule of unities and is in accord with the general theory of a tenancy by entireties, which recognizes the husband and wife as a single title-holding entity. If a tenancy by entireties is to be recognized, the result of the principal case seems proper. Clearly it is an unwarranted adherence to common law formalism to require the use of the "straw-man" conveyance to create such an estate.

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[9] Other cases have reached the same conclusion. See Runions v. Runions, 186 Tenn. 25, 207 S.W. (2d) 1016 (1948), noted in 37 GEO. L.J. 644 (1949).

[10] Under the traditional view, the essential characteristic of an estate by entireties is that each spouse is seized of the whole and not of any separable estate. Thus they are said to be ". . . seized *per tout et non per my*." 30 C.J. 565 (1923). However, in some states, under modern Married Women's Property Acts, the incidents of this estate have been altered so that in effect such tenancy is nothing more than a tenancy in common with an indefeasible right of survivorship attached. Arkansas is apparently such a jurisdiction. See Branch v. Polk, 61 Ark. 388, 33 S.W. 424 (1895); Moore v. Denson, 167 Ark. 134, 268 S.W. 609 (1924), and Phipps, "Tenancy by Entireties," 25 TEMPLE L.Q. 24 (1951). Therefore in states such as Arkansas, the same final result will be reached whether the court follows the view of the principal case or the approach taken by the Oregon court in Dutton v. Buckley, supra note 8.

[11] 216 N.Y. 83, 110 N.E. 181 (1915).

[12] Id. at 94. Judge Collin wrote a dissenting opinion in the case but a majority of the judges agreed that a tenancy by entireties had been created. Later in affirming such a result reached by a lower court in Boehringer v. Schmid, 133 N.Y. Misc. 236, 232 N.Y.S. 360 (1928) the New York court said that Matter of Klatzl's Estate must be regarded as conclusively holding that a tenancy by entireties is created by a conveyance from a husband to himself and wife. See Boehringer v. Schmid, 254 N.Y. 355, 173 N.E. 220 (1930). This result has also been reached by a number of other courts. See Cadgene v. Cadgene, 124 N.J.L. 566, 12 A. (2d) 635 (1940); Lang v. Wilmer, 131 Md. 215, 101 A. 706 (1917); and annotations in 62 A.L.R. 518 (1929) and 137 A.L.R. 350 (1942).