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Joint Tenancy and Tenancy By the Entirety Four Unities Requirement

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JOINT TENANCY AND TENANCY BY THE ENTIRETY FOUR UNITIES REQUIREMENT

Two recent decisions[1] have taken steps toward eliminating the four unities requirement for creation of joint estates and estates by the entirety, and make worth-while a re-examination of the conflicting interests and principles involved in this question, heretofore productive of much difference of opinion.[2] The situation most often before the courts, and the one with which this discussion is concerned, is that in which a present owner of real property executes a conveyance of such property to himself and his spouse, either as joint tenants or as tenants by the entirety

Often both spouses are joined as grantors, (1) when the husband is owner, to release the wife's inchoate dower right, and (2) when the wife is owner, (a) to release the husband's curtesy[3] or (b) to satisfy the requirement that a husband must join in his wife's deed to render it effective. In many states these considerations do not arise, and it is submitted that it is unnecessary for both husband and wife to execute a deed as grantors.

The four unities concept is an anachronism of the feudal common-law,[4] and is explained by Blackstone in the following language

> "1. The *creation* of an estate in joint-tenancy depends on the wording of the deed or the devise, by which the tenants claim title; for this estate can only arise by purchase or grant, that is, by the act of the parties, and never by mere act of law. Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A and B and their heirs, this makes

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[1] Switzer v. Pratt, —Iowa— 23 N.W 2d 837 (1946) Therrien v. Therrien, —N. H.—, 45 A. 2d 538 (1946).

[2] Johnson v Landefeld, 138 Fla. 511, 189 So. 666 (1939), Stuehm v Mikulski, 139 Neb. 374, 297 N.W. 595 (1941) *In re* Klatzl's Estate, 216 N.Y. 83, 110 N.E. 181 (1915).

[3] *Cf.* 2 TIFFANY, REAL PROPERTY (3d ed. 1939) sec. 503, 561.

[4] *See* Tyler v U.S., 281 U.S. 497, 74 L. ed. 991, 50 S. Ct. 356 (1930), Switzer v. Pratt, —Iowa—, 23 N.W 2d 837 (1946), Hiles v. Fisher, 144 N.Y. 306, 39 N.E. 337 (1895) Madden v. Gosztonyi Savings & Trust Co., 331 Pa. 476, 200 Atl. 624 (1937).

> immediate joint-tenants in fee of the lands. For the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal estate in them both. As therefore the grantor has thus united their names, the law gives them a thorough union in all respects. For,
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> "2. The *properties* of a joint estate are derived from its unity, which is four fold; 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 undivided possession."[5]

This concept of the four unities has existed unchanged since the 17th century, and is still a valid requirement for the creation of joint estates in a majority of jurisdictions.[6]

An estate by the entirety is merely an adaptation of the joint estate to a holding by a marital unity.[7] The principal incident of joint tenancy and tenancy by the entirety is survivorship.[8] Upon the death of one joint tenant his share vests in the survivor or survivors until there be but one survivor, then the estate becomes one in severalty to him and descends to his heirs upon his death.[9] Such estates may be created in fee, for life, or years, or even in remainder. The survivorship of joint tenancy is a *succession* to the whole estate by the right of survivorship, the survivorship incident to an estate by the entirety is the *continuation* of the whole estate in the survivor.[10]

A tenancy by the entireties may exist only if the owners are husband and wife, thus, in addition to the four unities, embodying what has been called unity of person.[11] Husband and wife are each seized of the entire estate *per tout et non per my,* each owning not an undivided part, but the whole

[5] 2 BL. COMM. *180.

[6] Stuehm v. Mikulski, 139 Neb. 374, 297 N.W 595 (1941) 2 TIFFANY, REAL PROPERTY (3d ed. 1939) sec. 418.

[7] 2 TIFFANY, REAL PROPERTY (3d ed. 1939) sec. 430; *see* U. S. v Jacobs, &c., 306 U.S. 363, 83 L. ed. 763, 59 S. Ct. 551 (1939)

[8] *Ibid.*

[9] *See* Thornburg v. Wiggins, 135 Ind. 178, 34 N.E. 999 (1893).

[10] Ashbaugh v. Ashbaugh, 273 Mo. 353, 201 S.W 72 (1918), Alles v. Lyon, 216 Pa. 604, 66 Atl. 81 (1907)

[11] Carlisle v. Parker, 188 Atl. 67 (Del. 1936) Johnson v. Landefeld, 138 Fla. 511, 189 So. 666 (1939), Hoyt v. Winstanley, 221 Mich. 515, 191 N.W 213 (1922) 2 TIFFANY, REAL PROPERTY (3d ed. 1939) sec. 430.

estate, as contrasted with a holding *per tout et per my* by joint tenants.[12] A tenancy by the entireties is a joint tenancy, modified by the common-law concept of husband and wife as one.[13] The characteristic which distinguishes tenancy by the entirety from joint tenancy is the former's inseverability by individual act of either the husband or wife. Neither can dispose of nor dissolve any part of the estate without the consent of the other.[14] Upon the death of either the husband or the wife, the other takes free of any charges on the estate made by the deceased spouse.[15]

It is apparent upon cursory examination that a conveyance from husband to husband and wife for the express purpose of creating either a joint tenancy or a tenancy by the entirety fails to satisfy the unities requirement for either of these estates. Unity of time and unity of title are lacking.[16] When a husband purports to convey an estate in joint tenancy to husband and wife it will be seen that the time of vesting of the husband's interest and the source of his title each differs from the time and source of his wife's interest. If such a conveyance purports to create a tenancy by the entirety the unities of time and title are likewise absent unless we so alter the common-law concepts as to permit viewing the marital entity as being entirely separate and distinct from its two component parts, in which case in one and the same instru-

[12] Thornburg v Wiggins, 135 Ind. 178, 34 N.E. 999 (1893) Messenbaugh v Goll, 198 Mo. App. 698, 202 S.W 265 (1918), Alles v. Lyon, 216 Pa. 604, 66 Atl. 81 (1907).

[13] 2 TIFFANY, REAL PROPERTY (3d ed. 1939) sec. 430.

[14] Thornburg v. Wiggins, 135 Ind. 178, 34 N.E. 999 (1893). Fay v. Smiley, 201 Iowa 1290, 207 N.W 369 (1926), Hoffman v Newell, 249 Ky 270, 60 S.W 2d 607 (1932), Ashbaugh v. Ashbaugh, 273 Mo. 353, 201 S.W 72 (1918), Lopez v McQuade, 151 Misc. 390, 273 N.Y. Supp. 34 (1934), Green v Cannady 77 S.C. 193, 57 S.E. 832 (1907) 2 TIFFANY, REAL PROPERTY (3d ed. 1939) sec. 430.

[15] Hoffman v Newell, 249 Ky. 270, 60 S.W 2d 607 (1932) Petty v. Petty, 220 Ky. 569, 295 S.W 863 (1927), Lang v. Wilmer, 131 Md. 215, 101 Atl. 706 (1917)

[16] Deslauriers v Senesac, 331 Ill. 437, 163 N.E. 327 (1928), Stone v Culver, 286 Mich. 263, 282 N.W 142 (1938) Union Guardian Trust Co. v Vogt, 263 Mich. 330, 248 N.W 639 (1933), Pegg v. Pegg, 165 Mich. 228, 130 N.W 617 (1911), Stuehm v Mikulski, 139 Neb. 374, 297 N.W 595 (1941), Dressler v. Mulhern, 77 Misc. 476, 136 N.Y. Supp. 1049 (1912) American Nat'l. Bank v. Taylor, 112 Va. 1, 70 S.E. 534 (1911) Breitenbach v Shoen, 183 Wisc. 589, 198 N.W 622 (1924).

ment the grantor is conceived as acting in his sole capacity and simultaneously as an indivisible part of the entity This many courts have refused to do.[17]

In addition to the requirements that the unities be satisfied, there are other obstacles to creation of joint estates and estates by the entirety at common-law. First, one may not be both grantor and grantee in the same deed.[18] Second, a husband can not convey to his wife nor she to him, she having no legal personalty apart from his.[19] Although the latter objection has generally been obviated today by statute,[20] the former is still an obstacle in many states.[21] Although statutes bearing on the former obstacle are infrequent the tendency of the courts today is to ignore this difficulty [22] Some jurisdictions have expressly denied that it has any validity in present day law.[23]

Creation of joint estates and estates by the entirely has become increasingly prevalent during the past few years and

[17] Deslauriers v. Senesac, 331 Ill. 437, 163 N.E. 327 (1928) Ames v. Chandler, 265 Mass. 428, 164 N.E. 616 (1929), Pegg v. Pegg, 165 Mich. 228, 130 N.W 617 (1911), *In re* Walker's Estate, 340 Pa. 13, 16 A. 2d 28 (1940), Madden v Gosztonyi Savings & Trust Co., 331 Pa. 476, 200 Atl. 624 (1937).

[18] Deslauriers v. Senesac, 331 Ill. 437, 163 N.E. 327 (1928) Scarborough v. Watkins, et ux, 48 Ky. (9 B. Mon.) 540 (1849), Wright v. Knapp, 183 Mich. 656, 150 N.W 315 (1915) Dutton v. Buckley, 116 Ore. 661, 242 Pac. 626 (1926) Green v. Cannady, 77 S.C. 193, 57 S.E. 832 (1907) Cameron v. Steves, 9 N.B. 141 (1858) 1 SHEP. TOUCH. *82.

[19] McCord v. Bright, 44 Ind. App. 275, 87 N.E. 654 (1909), Vicroy v. Vicroy, 45 S.W 75, 20 Ky. L. Rep. 47 (1898), Sayers v. Coleman, 5 Ky. Opin. 733 (1871).

[20] Ky. R. S. Ch. 404, and similar married women's acts in all jurisdictions.

[21] Johnson v Landefeld, 138 Fla. 511, 189 So. 666 (1939) Deslauriers v. Senesac, 331 Ill. 437, 163 N.E. 327 (1928) Wright v. Knapp, 183 Mich. 656, 150 N.W 315 (1915) Stuehm v. Mikulski, 139 Neb. 374, 297 N.W 595 (1941), Green v Cannady, 77 S. C. 193, 57 S.E. 832 (1907), Hicks v. Sprankle, 149 Tenn. 310, 257 S.W 1044 (1924), Breitenbach v Shoen, 183 Wisc. 589, 198 N.W 622 (1924).

[22] Irvine v. Helvering, 99 F 2d 265 (C.C.A. 8th, 1938) Edmonds v. Commissioner of Internal Revenue, 90 F 2d 14 (C.C.A. 9th 1937), *cert. denied* 302 U.S. 713, 82 L. ed. 551, 58 S. Ct. 32 (1937), Cadgene v. Cadgene, 17 N.J. Misc. 332, 8 A. 2d 858 (1939), *aff'd* 124 N.J. Law 566, 12 A. 2d 635 (1940), *In re* Horlers Estate, 168 N.Y. Supp. 221 (1917), Colson v. Baker, 42 N.Y. Misc. 407, 87 N.Y. Supp. 238 (1904).

[23] Switzer v. Pratt, —Iowa— 23 N.W 2d 837 (1946), Fay v Smiley, 201 Iowa 1290, 207 N.W 369 (1926).

there is reason to believe this tendency will continue.[24] The question of how such estates may properly be created is highly pertinent. In the majority opinion of *Stuehm* v. *Mikulski*[25] it is stated that counsel's brief alleges that an investigation has disclosed fifty-five such deeds (i.e. by husband to husband and wife as joint tenants or as tenants by the entirety) have been placed on record in Dodge County, Nebraska, since 1926, which interval covers approximately seventeen years. It is known that a number of such instruments have of late years been placed to record in Fayette County, Kentucky, the home of the writer, although Kentucky has not yet had such an instrument before its highest court. Can it be doubted that this is a matter the ultimate determination of which is of first importance for the purpose of stabilizing titles and avoiding needless litigation?

We now come to a consideration of the various courses of conduct open to our courts. The first course of conduct that suggests itself is adherence to the strict principles and requirements of common-law. This is to require the satisfaction of all the unities and in many jurisdictions satisfy the objection that one may not convey to himself. The general practice for complying with these common-law requirements is for the owner of property to convey to a trustee who immediately reconveys to the two spouses.[26] For the law to require such circuitous conveyancing to satisfy requirements which have no apparent substantive value is to aid and abet the layman's criticism of the profession as engaging in purposeful obfuscation for the sole purpose of making the law incomprehensible to those unschooled in it, and cannot be justified unless real substantive value can be shown. Any argument which can be stated in support of the premise that the four unities rule should be retained may be rebutted by the layman's answer that the same result may be reached by the meaningless fetish of conveying through a trustee.

Certainly, the circumstances which gave birth during

[24] Stuehm v. Mikulski, 139 Neb. 374, 297 N.W 595 (1941).

[25] *Ibid.*

[26] *See* Therrien v. Therrien, —N.H.—, 46 A. 2d 538 (1946), Dutton v. Buckley, 116 Ore. 661, 242 Pac. 626 (1926).

feudal times to these requirements no longer apply During the 17th century the common-law of England favored maintaining estates unbroken. Joint estates and estates by entireties were widely used. The four unities required is merely one manifestation of the attitude which gave rise to all the rules of primogeniture. The symmetry and simplicity of application of the four unities rule, which no doubt appealed strongly to the medieval mind, is little justification for continuing its application today [27]

In addition to considering the fact that these feudal rules of property law have no place in modern simplified conveyancing, it is instructive to note the results reached by those courts which have followed common-law. Generally these courts have held that a conveyance by one spouse to the two creates a tenancy in common.[28] This result seems to have been reached by saying that since the unities of time and title are lacking the attempt to create a joint estate or an estate by entireties has failed,[29] and the closest approximation which the court can give is tenancy in common. It is generally said that the rule against conveying to oneself is not breached, but that an interest in the property is retained by the grantor.[30] It is difficult to harmonize this conclusion with the fact the instrument purports to convey the entire estate.

Following strictly the common-law rules of construction, other courts have held that a conveyance from one person to himself and another vests the entire fee in that other,[31] reasoning that since the instrument purports to convey the entire fee and one can not take under his or her own deed, the effect is to vest the title in that grantee who is capable of tak-

[27] CHALLIS, REAL PROPERTY (3d ed. 1911) 367.

[28] Deslauriers v. Senesac, 331 Ill. 437, 163 N.E. 327 (1928), Fay v. Smiley, 201 Iowa 1290, 207 N.W 369 (1926) Stone v. Culver, 286 Mich. 263, 282 N.W 142 (1938), Green v. Cannady, 77 S.C. 193, 57 S.E. 832 (1907), 137 A. L. R. 348.

[29] Deslauriers v. Senesac, 331 Ill. 437, 163 N.E. 327 (1928), Stone v. Culver, 286 Mich. 263, 282 N.W 142 (1938).

[30] Johnson v. Landefeld, 138 Fla. 511, 189 So. 666 (1939) (dissenting opinion), Deslauriers v Senesac, 331 Ill. 437, 163 N.E. 327 (1928) Wright v. Knapp, 183 Mich. 656, 150 N.W 315 (1915) (dissenting opinion), Green v. Cannady, 77 S.C. 193, 57 S.E. 832 (1907).

[31] Wright v. Knapp, 183 Mich. 656, 150 N.W 315 (1915) Hicks v. Sprankle, 149 Tenn. 310, 257 S.W 1044 (1924), Cameron v. Steves, 9 N.B. 141 (1858).

ing. Certainly this follows common-law rules of construction,[32] but does violence to the purpose of the parties.

Still other courts have followed a course which seems to result in the creation of new types of estates in real property In *Dutton* v *Buckley*[33] the court held that a conveyance of the husband's property by husband and wife to themselves, as tenants by the entirety gave the wife one-half in fee with remainder in the other one-half. Often the courts have said that since the deed specifies that the grantor shall hold with the incident of survivorship it matters not whether the estate be a joint estate, estate by entirety, or some other estate, effect will be given to the provision for survivorship.[34] This seems to have been the view of the Kentucky court in *McKee* v *Marshall*[35] where a deed from husband to wife, "survivor to himself," was said to vest the absolute estate in the survivor, the husband in this case. The court said that in creating the estate for the benefit of the wife, the husband provided that the land survive to him in the event he outlived her. No mention is made of the four unities or of other common-law obstacles, nor does the court give its opinion as to what estate the parties enjoyed during their joint lives, merely saying that there was created such an estate as vested an absolute estate in the one surviving. Examination of the authorities fails to show that this case has ever been cited.[36]

Maryland has held that where husband and wife hold as tenants in common the right of survivorship may attach thereto.[37] New York seems to have agreed,[38] although the weight of authority is clearly contra.[39]

For the past 300 years it has been the policy of the courts

[32] 1 SHEP. TOUCH. *82.
[33] 116 Ore. 661, 242 Pac. 626 (1926)
[34] *Ibid.*
[35] 9 Ky. L. Rep. 461, 5 S.W 415 (1887)
[36] Shepard's Ky Citator.
[37] Mitchell v Frederick, 166 Md. 42, 170 Atl. 733 (1934) *Cf. In re* Brown (1932) 60 F 2d 269.
[38] Hiles v. Fisher, 144 N.Y. 306, 39 N.E. 337 (1895), *cf.* McGhee v. Henry 144 Tenn. 548, 234 S.W 509 (1921).
[39] Pegg v. Pegg, 165 Mich. 228, 130 N.W 617 (1911) *In re* Walker's Estate, 340 Pa. 13, 16 A. 2d 28 (1940), Weber v. Nedin, 210 Wisc. 39, 242 N.W 487 (1930), *see* Weber v. Nedin, 210 Wisc. 39, 246 N.W 307 (1933).

to avoid the creation of new types of estates in real property It has been felt that those estates recognized by the early common-law were more than sufficient to meet the various requirements of property owners, and that to permit, other than by statute, any new forms of estates would merely serve to complicate property law and to introduce confusion as to rights, uncertainty as to title, and useless and expensive litigation.[40]

It has been suggested that the proper course of conduct for courts today, with reference to the construction of such deeds, is to await legislative action.[41] The objection to this policy is that reliance on it for many years has failed to be productive of widespread statutory reform, and it is to be doubted whether in the absence of organized effort the question will get the attention of the various state legislatures. The statutory presumption against joint tenancy and tenancy by the entirety in deeds to more than one person which do not specify the estate created[42] is opposed to the common-law rule which favored the creation of estates carrying the incident of survivorship, and which assumed such an estate was intended unless a contrary intent was indicated. The present rule reduces the number of such estates, and thus the frequency with which such cases arise. Today, the problem is lacking in political significance, few persons are directly concerned, and it is not of a nature to be viewed as pressing by legislatures. Nor can it be said that statutes always solve the problem. In *Ames* v *Chandler*[43] the court points out that the Massachusetts statute.[44] although helpful as far as joint tenancies are concerned, leaves the problem unsolved as to estates by the entirety

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[40] CHALLIS, REAL PROPERTY (3d ed. 1911) p. 59 *et seq.*, Stuehm v Mikulski, 139 Neb. 374, 297 N.W 595 (1941).

[41] Note (1932) 18 CORN. L. Q. 284.

[42] Conlee v. Conlee, 222 Iowa 561, 269 N.W 259 (1936) KY. R. S. 381.050.

[43] 265 Mass. 428, 164 N.E. 616 (1929), *cf.* Edge v Barrow, 316 Mass. 104, 55 N.E. 2d 5 (1944).

[44] "Real estate, including any interest therein, may be transferred by a person to himself jointly with another person in the same manner in which it might be transferred by him to another person." MASS. GEN. LAWS (1932) c. 184, sec. 8.

The American Law Institute's Property Act[45] was drawn in 1936, but has not been adopted by any jurisdiction other than Nebraska to date. According to its prefactory note,

> "The act is drawn primarily to abolish anachronisms in the law of property, to abolish many out-of-date characteristics which have come down to us from the early feudal law of England, and which are out of place in the law of today and also to correct many characteristics which have crept into the law from improper application of the early law and which can be got rid of today only by statutory enactment."

This statement might well have been directed specifically at the rules which provide the subject matter for this note.

Immediately after the *Steuhm* case the Nebraska legislature became the first state to adopt the Uniform Property Act.[46] In adopting this act Nebraska eliminated so much of sec. 18 as pertained to tenancy by the entirety, but retained that portion which permits conveyancing to oneself and the creation of joint tenancy by deed from husband to husband and wife.[47] It is the writer's belief that this indicated the purpose of the legislature to discourage the creation of tenancies by the entirety and to simplify the creation of joint tenancies, whether by husband and wife or other parties. Actually, as to estates by the entirety, it leaves the law in a more chaotic condition than before.

The Model Interparty Agreement Act, which has been adopted by four states,[48] permits conveyancing to oneself and another, or others. This statute has been interpreted by Pennsylvania in *In re Vandergrift's Estate*[49] as permitting creation of a joint estate by deed by wife to husband and wife, without any discussion of the four unities. However, *In re Walker's Estate*[50] the court refused to apply the rule of the *Vandergrift* case to the creation of an estate by the entireties where there was no joint deed. Following this decision Pennsylvania in 1941 amended the Model Interparty Agreement

[45] 9 UNIFORM LAWS ANN. (1942) 611.
[46] *Ibid.*
[47] COMP. STAT. NEB. (Supp. 1941) 76-1018.
[48] Md., Nev., Pa., Utah. 9 UNIFORM LAWS ANN. (1942) 425, Supp. (1946) 122.
[49] PA. STAT. ANN. (Purdon, 1936) t. 69, sec. 541, In re Vandergrift's Estate, 105 Pa. Sup. 293, 161 Atl. 898 (1932)
[50] 340 Pa. 13, 16 A. 2d 28 (1940).

Act to direct that the statute be construed as "authorizing a conveyance of an interest in real property by either husband or wife to husband and wife as tenants by the entireties."[51]

As originally drawn this statute seems to be subject to the same shortcoming, with reference to estates by the entirety, as is the Massachusetts statute, *supra*.[52]

Under statutes authorizing a conveyance by one person to himself jointly with another[53] and authorizing a married woman to take a conveyance directly from her husband,[54] Rhode Island has held that a deed by a husband to himself and his wife is effective to create a joint tenancy, with survivorship, such intention being expressed in the instrument.[55]

But in a recent case Wisconsin has held that a statute[56] directing that "Any deed to two or more grantees which evinces an intent to create a joint tenancy in grantees shall be held and construed to create such joint tenancy" does not apply where the deed runs to the grantor and another, with intention to create a joint tenancy clearly expressed.[57]

Although overruling centuries of *stare decisis* has been objected to as creating an uncertainty in property law, and as having a retroactive effect,[58] these objections lose their force when it is observed that the present uncertainty in regard to methods of creating joint estates and estates by the entirety has been spawned by the incomprehensibility and illogical qualities of the applicable common-law rule. As to retroactive operation of judicial decisions in this field, it is patent that the only result can be to give effect to the purpose of the parties, and such decisions cannot result in defeating any purpose carried into execution through reliance on the common-law. Whatever other objections may be made are answerable by the rejoinder that the same result may be reached by conveying through a third

[51] PA. STAT. ANN. (Purdon, 1941) t. 69, sec. 541.
[52] In re Walker's Estate, 340 Pa. 13, 16 A. 2d 28 (1940)
[53] R. I. GEN. LAWS (1923) c. 297, sec. 20.
[54] R. I. GEN. LAWS (1923) c. 290, sec. 4.
[55] Lawton v. Lawton, 48 R. I. 134, 136 Atl. 241 (1927)
[56] WISC. STAT. (1943) sec. 230.45 (3).
[57] Hass v. Hass, 248 Wisc. 212, 21 N.W 2d 398 (1946)
[58] Stuehm v. Mikulski, 139 Neb. 374, 297 N.W 595, 598 (1941), Note (1932) 18 CORN. L. Q. 284.

person. It is to be noted that several courts have refused to permit common-law concepts of property tenure to interfere with the application of death transfer taxes.[59] Where property was held by the entirety, the United States Supreme Court has unanimously declined to permit an "amiable fiction of the common-law" to interfere with the collection of the federal estate tax.[60] It is believed that under present day taxing concepts all states would follow this decision. It is, of course, based on taxation law and not on real property law

Several courts have taken the course of ignoring or so warping the common-law concepts of the unities as to give effect to the intention of the parties in a deed to oneself and another, attempting to create a joint estate or an estate by the entirety New York has taken the lead in this respect.[61] The New York cases have not considered the inability of one person to be both grantor and grantee in the same deed, but appear to have based their holdings on the statute vesting in husband and wife the ability to contract with each other.[62] New Jersey has followed New York's lead.[63] These cases temporarily place the law in a state of flux by failing to define the issues and face them directly, thus introducing confusion and uncertainty until such time as enough cases have been adjudicated to clarify the position of the court.

Some courts have urged that the proper method of dispensing with the four unities requirement is by application of the rule that instruments are to be construed according to intention

[59] Tyler v. U.S., 281 U.S. 497, 50 S. Ct. 356, 74 L. ed. 991 (1930) Matter of Farrand's Estate, 214 N.Y. Supp. 793 (1926) In re Klatzl's Estate, 216 N.Y. 83, 110 N.E. 181 (1915), In re Walker's Estate, 340 Pa. 13, 16 A. 2d 28 (1940), Note, 69 A.L.R. 766.

[60] Tyler v U.S., 281 U.S. 497, 50 S. Ct. 356, 74 L. ed. 991 (1930)

[61] Boehringer v. Schmid, 254 N.Y. 355, 173 N.E. 220 (1930) In re Vogelsang, 203 N.Y. Supp. 364 (1924), In re Horlers Estate, 168 N.Y. Supp. 221 (1917), *accord* Johnson v. Landefeld, 138 Fla. 511, 189 So. 666 (1939), Conlee v. Conlee, 222 Iowa 561, 269 N.W 259 (1936) Wood v. Logue, 167 Iowa 436, 149 N.W 613 (1914) Cadgene v. Cadgene, 17 N.J. Misc. 332, 8 A. 2d 858 (1939), *aff'd* 124 N.J. Law 566, 12 A. 2d 635 (1940), Brown v Jackson, 35 N.M. 604, 4 P 2d 1081 (1931) McRoberts v. Copland, 85 Tenn. 211, 2 S.W 33 (1886).

[62] N.Y. Domestic Relations Laws (Thompson, 1939), sec. 56; In re Klatzl's Estate, 216 N.Y. 83, 110 N.E. 181 (1915).

[63] Cadgene v. Cadgene, 17 N.J. Misc. 332, 8 A. 2d 858 (1939), *aff'd* 124 N.J. Law 566, 12 A. 2d 635 (1940).

of the parties thereto.[64] It is submitted that this viewpoint is premised on the error of viewing the four unities requirement as a rule of construction, whereas actually it is a rule of substantive law.[65]

Granting that the modern tendency is to disregard technicalities of construction and to treat uncertainties in a conveyance as ambiguities subject to clarification by resort to the intention of the parties,[66] nevertheless a settled rule of property which fixes a special meaning upon particular words employed in a deed determines the legal effect of such language. Such rules of property are applied automatically as a resultant of the words used and no speculation as to intent of the parties in using such words will be indulged in by the court.[67] As illustration, the words "and his heirs" will always be held to have effect according to the rule of Shelley's case, regardless of what may have been the intention of the parties. These words will always designate a fee simple even though the parties may have believed they indicated an entailed estate.[68] The unities requirement for creation of joint estates and estates by entirety falls in the same category as Shelly's rule, namely a rule of property and not a rule of construction.[69] Therefore, however much we may desire to do away with the unities requirement, it is error to predicate this change in the law on the statute or decision authorizing the court to give effect to the intent of the parties as a matter of construction.

Rather, in view of the waning prestige of conceptualism in resolving current legal problems and the general practice of looking to substance rather than form, it is believed that the courts might easily find that the unities have no place in modern

[64] Lang v. Wilmer, 131 Md. 215, 101 Atl. 706 (1917) Bassett v. Budlong, 77 Mich. 338, 43 N.W 984 (1889) Stuehm v Mikulski, 139 Neb. 374, 297 N.W 595, 603 (1941) (dissenting opinion).

[65] Kunz v Kurtz, 8 Del. Ch. 404, 68 Atl. 450 (1899), Robinson's Appeal, 88 Me. 17, 33 Atl. 652 (1895) Stuehm v. Mikulski, 139 Neb. 374, 297 N.W 595 (1941).

[66] Hunt v. Hunt, 119 Ky. 39, 82 S.W 998 (1904)

[67] Deslauriers v. Senesac, 331 Ill. 437, 163 N.W 327 (1928) 2 TIFFANY, REAL PROPERTY (3d ed. 1939) sec. 349.

[68] Berry v. Williamson, 50 Ky. (11 B. Mon.) 245, 257 (1850) 2 TIFFANY, REAL PROPERTY (3d ed. 1939) sec. 344. (This rule is generally abolished by statute today. 2 TIFFANY, REAL PROPERTY, (3d ed. 1939) sec. 355)

[69] Stuehm v. Mikulski, 139 Neb. 374, 297 N.W 595 (1941).

law. This construction is aided by keeping in mind that most of our states in adopting the commonlaw of England or of older states qualified such adoption to apply only to so much of that law as was applicable to their circumstances and times.[70] In this connection it is worth recalling the approach of the courts to the problem of applying estate taxes to estates held by the entirety upon the death of the shorter lived spouse.[71]

The two recent decisions referred to above are *Therrien* v *Therrien*[72] and *Switzer* v *Pratt*,[73] both decided in 1946. In the former a wife conveyed to herself and her husband as joint tenants, with survivorship. In expressly denying the efficacy of the unities rule to defeat their stated purpose the court said that the interest created is that which the parties intended to create, without regard to rules surviving from feudal times. The court further said that "Neither public policy, statutes or reason prevent the parties from doing directly that which they may accomplish through a straw man indirectly," and quoted with approval from Holmes, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of 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."[74]

In *Switzer* v. *Pratt* the Iowa court in an exhaustive opinion, reviewing the authorities, likewise expressly rejected the validity of the four unities requirement and refused to be bound by concepts whose sole virtue lay in their antiquity

In this case the husband owned property which he, joined by his wife, conveyed to himself and his wife as joint tenants, with survivorship. He met his death in France in the armed forces, and the widow sought specific performance by the defendant of a subsequent contract to purchase the property, defendant resisting on the ground that the instrument was not

[70] Morris v. Fraker, 5 Colo. 425 (1880), Wagner v. Bissell, 3 Iowa (Cole's ed.) 396 (1856) cf. McKee v. Gratz, 260 U.S. 127, 43 S. Ct. 16, 67 L. ed. 167 (1922)

[71] *Supra*, p. 212.

[72] —N.H.—, 46 A. 2d 538 (1946).

[73] —Iowa—, 23 N.W 2d 837 (1946)

[74] HOLMES, COLLECTED LEGAL PAPERS (1920) 187.

sufficient to create an estate with survivorship, and that therefore there is a cloud on the widow's title.

The court expressly rejected the *Stuehm* case, saying that "a division of authorities may be conceded, but, in our opinion, the rules as laid down seem to be not only the modern, but the logical rules in the construction of such deeds, even tho some of the technical requirements for the creation of such estates, as required at common-law, may be lacking in such conveyances.[75]

In conclusion, it is believed by the writer that if the courts would dispense with the 'unities requirement for creation of joint estates and estates by the entirety as being outmoded and useless, the profession would be elevated in its own and the layman's eyes, the present and future status of property titles would be simplified, and much needless litigation avoided. It is further earnestly believed the courts should scrupulously distinguish between joint tenancy and tenancy by the entirety because of the different incidents of the two estates, and in order not to create new forms of estates. Though the technical difference between a joint tenancy and a tenancy by the entirety is the difference between a holding by two persons as individual, though joint owners, and a holding by two persons as a single owner,[76] yet the courts have not been consistent as to what facts and language will create a joint tenancy where the parties are husband and wife, and what will create a tenancy by the entirety.[77] The majority of states apparently allow the intent of the parties, as expressed by the words of the deed, to govern as to which estate is created.[78] Where neither estate is specified, the deed only providing that husband and wife are to take, and providing for survivorship, irreconcilable conflict reigns.[79] Kentucky appears to hold that a con-

[75] Switzer v. Pratt, —N.H.— 46 A. 2d 538 (1946).

[76] 2 TIFFANY, REAL PROPERTY (3d ed. 1939) Sec. 430.

[77] 26 AM. JUR. 695-697, 712-714.

[78] Edmonds v. Commissioner of Internal Revenue, 90 F. 2d 14 (C. C. A. 9th 1927), Wilken v. Young, 144 Ind. 1, 41 N.E. 68 (1895) Thornburg v. Wiggins, 135 Ind. 178, 34 N.E. 999 (1893) Saxon v Saxon, 46 Misc. 402, 93 N.Y. Supp. 191 (1905) Van Ausdall v. Van Ausdall, 48 R.I. 106, 135 Atl. 850 (1927).

[79] Hurd v. Hughes, 12 Del. Ch. 188, 109 Atl. 418 (1920), Peters v Schachner, 312 Mo. 609, 280 S.W 424, 428 (1926) Van Ausdall v Van Ausdall, 48 R.I. 106, 135 Atl. 850 (1927), Bennett v. Hutchins, 133 Tenn. 65, 179 S.W 629 (1915), 132 A. L. R. 630.

veyance to husband and wife as joint tenants with survivorship creates a tenancy by the entirety rather than a joint tenancy,[80] thus following the common-law rules of construction.[81] Only confusion can result from failure to make clear the distinction between the two estates and the requirements necessary for the existence of each, in view of their differing incidents.

Much can be said for the complete abolition from our property law of estates by the entirety Already such estates are not recognized in many jurisdictions.[82] Other courts have shorn estates by the entirety of many of the incidents constituting an integral part of such estates at common-law [83] Kentucky, for instance, has held that during the joint lives of tenants by the entirety the expectancy of one, as survivor, is subject to execution.[84] However, the creditors can levy only on the debtor's expectancy, and if the debtor dies before his spouse the creditors are left without further remedy as to such property [85]

Certain it is that the common-law concept of husband and wife as an entity is no longer valid, neither as a part of our law nor our mores. The Kentucky court has clearly indicated that husband and wife are no longer the indivisible unit they were before our Married Women's Act of 1894.[86]

[80] Laun v DePasqualte, 254 Ky 314, 71 S.W 2d 641 (1934).

[81] BLACKSTONE (SHARSWOOD'S ED.) 181, see In re Brown, 60 F 2d 269 (W D. Ky., 1932), Hoag v. Hoag, 213 Mass. 50, 99 N.E. 521 (1912) Dutcher v. Van Dune, 242 Mich. 477, 219 N.W 651 (1928), Alles v. Lyon, 216 Pa. 604, 66 Atl. 81 (1907).

[82] Mittel v Karl, 133 Ill. 65, 24 N.E. 553 (1890), Fay v. Smiley, 201 Iowa 1290, 207 N.W 369 (1926), Wales v. Coffin, 95 Mass. (13 Allen) 213 (1866) Robinson's Appeal, 88 Me. 17, 33 Atl. 652 (1895), McNeeley v. South Penn Oil Co., 52 W Va. 616, 44 S.E. 508 (1903) Thornley v Thornley, 2 Ch. 229, 62 L. J. Ch. 370 (1893), *cf.* CHALLIS, REAL PROPERTY (3d ed. 1911) 378; 2 TIFFANY, REAL PROPERTY (3d ed. 1939) sec. 419; PROCEEDINGS OF THE SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, AMERICAN BAR ASSOCIATION (Sept. 1944) 82.

[83] Sherrman v Weber, 113 N.J. Eq. 451, 167 Atl. 517 (1933) In re Klatzl's Estate, 216 N.Y. 83, 110 N.E. 181 (1915), Barnett v. Couey, 224 Mo. App. 913, 27 S.W 2d 757 (1930).

[84] Hoffman v. Newell, 249 Ky. 270, 60 S.W 2d 607 (1933).

[85] *Ibid; cf.* KY. CIVIL CODE, sec. 490.

[86] Smith v. Hughes, 292 Ky. 723, 167 S.W 2d 847 (1943), Smith v. Butt & Hardin, 281 Ky 127, 135 S.W 2d 67 (1940) Coleman v. Coleman, 142 Ky. 36, 133 S.W 1003 (1911).

The element of inseverability of estates by the entirety except upon agreement of the parties, when viewed in connection with the present day high incidence of marital separation and divorce, indicates an undesirable restriction upon the alienability of property

And it is doubted whether the public interest is served by legal sanction of a form of tenancy under which one owner may not bring action against the other for waste or for an accounting for rents—even after marital separation.[87] Tenancy by the entirety is open to the further criticism that it offers an obvious and foolproof avenue for avoiding creditors. A bankrupt, for instance, may continue to enjoy the use and income of property owned by the entireties with his spouse.[88]

The writer believes that the only reasonable course for those courts which continue to recognize tenancy by the entireties is to follow the route clearly pointed out by the recent New Hampshire and Iowa opinions.

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[87] Stimson v. Stimson, 346 Pa. 68, 29 A. 2d 679 (1943), Wakefield v. Wakefield, 149 Pa. Super. 9, 25 A. 2d 841 (1942).

[88] Cullom v. Kearns, 8 F 2d 437 (C.C.A. 4th, 1925) *see* Wilkerson, *Creditors Rights against Tenants by the Entirety* (1933) 11 TENN. L. REV. 139.