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ALUMNI COMMENT

VIRGINIA EXTENDS ENTIRETIES DOCTRINE

JOSEPH L. LYLE, JR.*

Of the common law estates in real property presently extant in Virginia, the tenancy by the entirety is, with some cause, easily the most controversial. The ranks of its critics are growing daily; thwarted creditors insist that to employ the estate as a means to insulate ostensible assets from individual¹ creditors is to indulge in the basest deceit. However, the judicial reply has, tacitly at least, been that these critics should seek their redress in the legislative rather than the judicial chambers.²

As a practical matter, the tenancy by the entirety possesses three distinctive, though interrelated characteristics: (1) The incident of survivorship; (2) the incident of unity, that is, that the property is not severable by the sole act of one spouse and is not subject to partition; and (3) the incident of creditor immunization, that is, that whatever may have been the relative contribution between the spouses, the creditor of one spouse can subject no part of the estate to his individual debt. It is the third characteristic which has given rise to the present barrage of criticism.

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¹An estate by the entirety may not be reached by the creditors of only the husband or only the wife. *Vasilion v. Vasilion*, 192 Va. 735, 66 S.E.2d 599 (1951). But the estate is subject to the claims of creditors of the husband and the wife who are jointly indebted. 2 *Minor Law of Real Property* § 854 (2d ed. 1928), and such estate constitutes an asset in a bankruptcy proceeding or proceedings filed by both spouses. *In re Reid*, 198 F. Supp. 689 (W.D. Va. 1961), note, 19 Wash. & Lee L. Rev. 297 (1962), *aff'd Reid v. Richardson*, 304 F.2d 351 (4th Cir. 1962).

²This writer has found no satisfactory answer to the question of whether common law dogma should be abrogated or modified by the judiciary, or whether this is purely a legislative function. As a practical matter, the answer depends in large part on the inclination of the court concerned. As said in a quotation from *C. J. S.* approved by the Virginia court in *Midkiff v. Midkiff*, 201 Va. 829, 832, 113 S.E.2d 875 (1960): "The common law does not consist of definite rules which are absolute, fixed, and immutable like the statute law, but it is a flexible body of principles which are designed to meet, and are susceptible of adaptation to, new institutions, conditions, usages, and practices, as the progress of society may require."

The critics were recently given some further grounds for concern when the Virginia Supreme Court of Appeals decided the case of *Oliver v. Givens*,³ in which the creditor immunization feature of the tenancy by the entirety was extended, at least beyond the limits previously delineated by the case law of this Commonwealth.

In the *Oliver* case, the court was confronted with these facts: In 1954, H and W acquired real estate "as tenants by the entireties with the right of survivorship as at common law." On February 23, 1959, H and W contracted to sell the property. On May 29, 1959, the sale was consummated and the deed to the purchaser was recorded. On July 2, 1959, the realtor who closed the sale delivered to W a check for the net purchase price, which W deposited to her credit in a local bank. On the same day, W drew a check on this account for part of this sum in payment of the purchase price for other real estate which, in November, 1959, was conveyed by deed to W. In a subsequent bankruptcy proceeding filed by H, the issue arose as to whether H's interest in the sales proceeds ever constituted assets which could be reached by his individual creditors. The issue was tried by an action in the state court instituted by the trustee in bankruptcy. The trial court held that the sales proceeds, once they were severed from the realty, paid to W and placed in W's bank account, lost their characteristics as entireties property and that one-half could be reached by H's creditors. On appeal, the Supreme Court of Appeals reversed the trial court and entered final judgment for W, holding specifically that the sales proceeds at all times retained their characteristics as entireties property, and were hence immune from the claims of H's individual creditors.

In order to place this case in proper perspective, it is well to trace the development of the tenancy by the entirety at common law and in Virginia, through the statutes and leading case constructions which have molded it.

At common law, it is said, "the husband and wife were one person, and that person was the husband." The interspousal unity was so strong that Lord Coke wrote:

"[T]he husband and wife cannot take by moieties during the coverture."⁴

Thus it developed that virtually any estate created between hus-

³204 Va. 123, 129 S.E.2d 661 (1963).

⁴Coke on Littleton, § 299 B (Notes by Hargrave and Butler 1853).

band and wife, where the four unities were present,⁵ resulted in a tenancy by the entirety. This constituted the common law of this Commonwealth.⁶

From this time-honored presumption favoring the tenancy by the entirety, there began a process of statutory modification. In 1850, the General Assembly enacted a statute abolishing survivorship between husband and wife unless "it manifestly appeared from the tenor of the instrument that the part of the one dying should belong to the survivor."⁷ In 1877, the Married Women's Property Act⁸ was enacted, which placed the wife in a more realistic legal position, consistent with her changing role in society. In 1888, an act was passed which provided that if any estate be conveyed or devised to husband and wife, they shall take and hold the same by moieties as if a distinct moiety had been given to each by a separate conveyance.⁹

The leading modern Virginia decisions have generally reached constructions which favor the tenancy by the entirety. In *Allen v. Parkey*,¹⁰ the court was called upon to construe a deed to H and W which specified that the survivor was to take the whole, but which made no specific mention of a tenancy by the entirety. The court held that since the survivorship feature was obvious from the tenor of the instrument, a tenancy by the entirety was created, and partition was not compellable.¹¹ In *Burroughs v. Gorman*,¹² real property was con-

⁵At common law, the creation of a joint tenancy and tenancy by the entirety presupposed the existence of the four unities of time, title, interest and possession. See 2 Minor, Law of Real Property §§ 839-843, 852-857 (2d ed. 1928).

⁶See *Thornton v. Thornton*, 24 Va. (3 Rand.) 179 (1825), wherein it was held that a will devising real property to H and W and their heirs forever, created a tenancy by the entirety, and on the death of W, H became seized of the fee. See also *Hunt v. Blackburn*, 128 U.S. 464 (1888).

⁷Virginia Code c. 116, § 18 (1849), now Va. Code Ann. § 55-21 (Repl. Vol. 1959).

⁸Va. Acts 1877, c. 329, now Va. Code Ann. § 55-36 (Repl. Vol. 1959).

⁹This enactment is presently reflected in Va. Code Ann. § 55-20 (Repl. Vol. 1959), which provides, in part: "[A]nd if hereafter any estate, real or personal, be conveyed or devised to a husband and his wife, they shall take and hold the same by moieties in like manner as if a distinct moiety had been given to each by a separate conveyance." Of course, this statute is limited by and must be read together with § 55-21, which provides: "The preceding Section shall not apply to any estate which joint tenants have as executors or trustees, nor to any estate conveyed or devised to persons in their own right when it manifestly appears from the tenor of the instrument that it was intended the part of the one dying should then belong to the others. . . ."

¹⁰154 Va. 739, 149 S.E. 615 (1929).

¹¹The contention was rejected that H and W were joint tenants with the right of survivorship and that therefore under § 52-9 of the Code of 1919, now Va. Code Ann. § 8-690 (Repl. Vol. 1957), "Joint tenants . . . shall be compelled to make partition."

¹²156 Va. 58, 184 S.E. 174 (1936).

veyed to H and W "as joint tenants with the common-law right of survivorship." The court extended the doctrine laid down in *Allen v. Parkey* and held that a tenancy by the entirety, not a joint tenancy, was created, and that W could not compel partition. In *Vasilion v. Vasilion*¹³ the court reaffirmed the sanctity of the tenancy by the entirety in Virginia, and its immunization from individual creditors.

All of the foregoing cases had dealt with the entireties doctrine as applicable to real property. The troublesome question of the extent to which the estate could exist in personal property had never been resolved in Virginia, until 1960, when the United States District Court for the Eastern District of Virginia decided the case of *Moore v. Gotzbach*.¹⁴ In this case the Internal Revenue Service, judgment creditor of H, was denied the right to levy on rents from real estate owned by H and W as tenants by the entirety.¹⁵ The funds, however, had not yet been realized and were still in the hands of the tenant so the District Court was not confronted with the question decided in *Oliver v. Givens*, and expressly declined to decide this question. The District Court stated: "We do not have the problem as to when the rent ceases to be entirety property under the facts of this case. It had never been paid by the tenant of the property to either the plaintiff or her husband. It retained its original character at all times."¹⁶

This question was clearly placed before the Supreme Court of Appeals in *Oliver v. Givens*. The court's unanimous answer was that the sales proceeds from real estate held by the entireties retained a creditor-immune characteristic even though they had been paid directly to the wife, placed in the wife's separate bank account, and used over four months later to purchase real estate in the sole name of the wife.¹⁷ The court's reasoning, briefly, ran as follows:

"It is true, as the lower court held, that the sale of the real estate which the husband and wife owned as tenants by the

¹³192 Va. 735, 66 S.E.2d 599 (1951).

¹⁴188 F. Supp. 267 (E.D. Va. 1960).

¹⁵An excellent annotation appears in 64 A.L.R.2d 8 (1959), which indicates that, although there is considerable authority to the contrary, a majority of jurisdictions have concluded that, absent statute, a tenancy by the entirety may exist in personal property.

¹⁶188 F. Supp. at 269.

¹⁷In 64 A.L.R.2d at 47-57 there is an excellent discussion of the extent to which the entireties estate is impressed on proceeds from the voluntary sale of entireties real estate. Cases which hold that the proceeds are entireties property are cited from twelve jurisdictions, while cases from five jurisdictions are cited for a contrary result. No conclusion, however, is reached as to what act or event, if any, will terminate the entireties character of the funds. It would seem that the nature of the dominion and use of the funds would affect their character.

entireties terminated such an estate in that property But it does not follow that an estate by the entireties does not exist in the proceeds of the sale of such property [W]e hold that in the present case the proceeds of the sale of the Laurel Glen property, which the husband and wife had owned as tenants by the entireties, were likewise owned and held by them as tenants by the entireties. That being so, the husband's interest therein was free of or immune from the claims of his creditors."¹⁸

The Virginia court summarily rejected the contentions that: (1) a tenancy by the entirety should not be deemed to exist in personal property; (2) even if it did exist in personal property, the estate does not exist unless the affirmative intention of the parties to create the estate is clearly manifested; and (3) the funds were severed from the realty, and converted to the wife's sole dominion, thus resulting in a tenancy in common by operation of law.¹⁹

Aside from the moral issue which is inextricably involved, this case would appear to extend the entireties doctrine beyond its anticipated limits as laid down by the precedents of this state. The court was squarely presented with the opportunity to set a limit on the operation of this peculiar characteristic of the tenancy by the entirety; instead it chose to amplify its effect. In our present legal climate, and until some boundaries, be they judicial or legislative, are delineated for the operation of the tenancy by the entirety, it is possible for vast commercial and industrial properties to be accumulated, sold and re-accumulated with relative immunity from the claims of creditors. The problem is deeply interwoven with public policy considerations. Perhaps, as the court has said, the legislature is the proper declarant of public policy. It is submitted that, to whichever forum public policy is to be entrusted, some definitive action is in order to curtail the wide implications of this embattled estate.

¹⁸204 Va. at 126-27; 129 S.E.2d at 663.

¹⁹Interestingly, the argument might still be made that the wife holds the newly acquired property, not in fee simple, but as a tenant by the entirety, at least to the extent that the entireties proceeds can be traced to its purchase. See *Frost v. Frost*, 200 Mo. 474, 98 S.W. 527 (1906).

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