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Toward A Uniform Cotenancy Law

ment of counsel. The Court then cites *Gideon v. Wainwright*[55] to justify its decision. *Tellier*, however, is not concerned with an indigent denied the right to counsel. If the Court's reasoning is followed to its logical conclusion, legal fees for all criminals, not just those whose crime has occurred in a business context, should be deductible.

The Supreme Court, by asserting that "the federal income tax is a tax on net income, not a sanction against wrongdoing," [56] supports the concept of moral neutrality in the tax Code. The Court's statement brings into question *any* public policy doctrine in denying deductions of otherwise "ordinary and necessary" business expenses. Rejection of the elusive public policy criteria would be consistent with what appears to be the attitude of Congress: tax laws relating to business are intended to tax net income, regardless of its source. Where Congress has intended to curb particular forms of *business* conduct by the tax statutes, it has done so by specific legislation.[57] This legislative practice combined with the inconsistencies and confusion which result from the judicial ad hoc public policy doctrine calls for legislative determination of which business expenses should be disallowed on public policy grounds. The courts should not by themselves add a morality gloss to our already complex tax Code.

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TOWARD A UNIFORM COTENANCY LAW

For the magic word "survivorship" opens a Pandora's box, releasing strange spirits from the past, spirits as strange and alien to the modern world as the Salem witches. Here comes *Joint Tenancy*, with his handmaidens, *Per Tout* and *Per My*. There in solemn black march the *Four Unities*, in cadence slow. *Vested Remainder* dances the gavotte with his wife, *Contingent* to the strains of lutes played by *Severance* and *Ius Accrescendi*. Through the air on evanescent wings float *Possibilities*, now alone and now coupled with an *interest*.[1]

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[55]372 U.S. 335 (1963).

[56]Commissioner v. Tellier, *supra* note 1, at 1120.

[57]See Int. Rev. Code of 1954, § 162(c). "No deduction shall be allowed . . . for any expenses paid or incurred if the payment thereof is made, directly or indirectly, to an official or employee of a foreign country, and if the making of the payment would be unlawful under the laws of the United States if such laws were applicable to such payment and to such official or employee." Section 162(e) disallows certain lobbying expenses.

[1]Stephenson, *Survivorship Deeds Under the Statute*, 34 Conn. B.J. 15-16 (1960).

The desirability of some form of joint ownership is demonstrated by its use in the common law for over 6 centuries[2] as well as its availability in every jurisdiction today.[3] The common law provided 3 forms of joint ownership which are still in use: Tenancy in Common, Joint Tenancy, and Tenancy by the Entirety.[4]

(1) Tenancy in Common was the simplest: each tenant owned only an undivided part of the estate[5] subject to compulsory partition by either of the tenants or forced sale for division of the proceeds of the sale[6] with no right of survivorship.[7]

(2) Joint Tenancy was that joint estate with a destructible right of survivorship. In this form of ownership the right of 1 tenant to receive the whole estate at the death of the other(s) could be cut off by compulsory partition,[8] forced sale for division of the proceeds from the sale,[9] or a sale without the permission of the other tenant.[10] This estate was favored by the common law and any transfer to 2 or more tenants was *presumed* to be a joint tenancy, which automatically carried a right of survivorship.[11]

(3) Tenancy by the Entirety, a form of joint ownership available only to married tenants,[12] contained an *indestructible* right of survivorship.[13] Since at common law husband and wife were 1 person

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[2]See English, *Concurrent Estates in Real Property I* (pt. 1), 11 Catholic U.L. Rev. 63 (1962).

[3]See 4 Powell, Real Property ¶ 602 (1965); 2 Tiffany, Real Property § 424 (3d ed. 1939).

[4]Tenancy by Coparcenary is of little or no significance today. See 1 Aigler, Smith & Tefft, Property 703 (1960); 4 Powell, Real Property ¶ 600 (1965); 2 Tiffany, Real Property ¶ 429 (3d ed. 1939).

[5]State v. Hoskins, 357 Mo. 377, 208 S.W.2d 221, 222 (1948); Taylor v. Millard, 118 N.Y. 244, 23 N.E. 376, 377 (1890); See McConnel v. Kibbe, 43 Ill. 12 (1867).

[6]Willard v. Willard, 145 U.S. 116, 120-21 (1892). "Partition" refers to division of the property itself among joint owners. *Ibid.* When property held by tenants in common is incapable of equitable division it may be sold and the proceeds from the sale divided equally among the tenants. Henry v. White, 224 Ala. 427, 140 So. 391 (1932).

[7]Hartford Nat'l Bank & Trust Co. v. Harvey, 143 Conn. 233, 121 A.2d 276, 280 (1956); In re Hoermann's Estate, 234 Wis. 130, 290 N.W. 608, 610 (1940); Woodward v. Congdon, 34 R.I. 316, 83 Atl. 433, 435 (1912).

[8]Gwinn v. Commissioner, 287 U.S. 224, 228 (1932); Midgley v. Walker, 101 Mich. 583, 60 N.W. 296 (1894).

[9]*Ibid.*

[10]*Ibid.*; Green v. Skinner, 185 Cal. 435, 197 Pac. 60, 61 (1921).

[11]Swartzbaugh v. Sampson, 11 Cal. App. 2d 451, 54 P.2d 73, 75 (1936); Allen v. Almy, 87 Conn. 517, 89 Atl. 205, 207 (1913); Prall v. Burckhartt, 299 Ill. 19, 132 N.E. 280, 283 (1921).

[12]Simons v. Bollinger, 154 Ind. 83, 56 N.E. 23, 24 (1900); see Taub v. Shampanier, 95 N.J.L. 349, 112 Atl. 322 (Sup. Ct. 1921).

[13]"Indestructible" in this sense means that it cannot be cut off by a third

and the estate belonged to that entity and not to either alone, the right of survivorship could not be cut off by compulsory partition, forced sale for division, or attempted transfer by 1 spouse without the permission of the other spouse.[14]

Two serious objections have been made to survivorship as it was used at common law. First, widespread use of survivorship among laymen without full recognition of all its ramifications often resulted in frustration of the real intent of the parties.[15] This was especially undesirable where the survivorship was created not by an act of the parties but by the common law presumption in favor of joint tenancy. The second objection was that the indestructible nature of the right of survivorship in tenancy by the entirety could be used to defeat the rights of the tenants' creditors.[16]

Different jurisdictions have attempted to meet these 2 objections in many different ways. A very small minority has tried to meet both objections by abolishing joint tenancy and tenancy by the entirety, leaving only tenancy in common, an estate without a right of survivorship.[17]

The more usual method of meeting the objection of the unin-

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party or by an act of one tenant alone. Phillips v. Krakower, 46 F.2d 764, 765 (4th Cir. 1931); Hoffmann v. Newell, 249 Ky. 270, 60 S.W.2d 607, 609 (1932).

[14]This idea was commonly expressed by saying such tenants hold per tout and not per my; see Taub v. Shampanier, 95 N.J.L. 349, 112 Atl. 322 (Sup. Ct. 1921).

[15]In Bernhard the parties apparently had no idea they were creating an indestructible right of survivorship. It can hardly be seriously asserted that the words "as tenants by the entirety with the right of survivorship" sufficiently alerts the layman to the indestructible nature of the estate he is creating.

[16]Since the survivorship cannot be destroyed and there is no way to ascertain who the survivor will be, there can be no attachment since the debtor's interest in the property is unascertained. A second reason for non-attachment is the common law fiction that the estate belongs to both of the tenants as one but to neither of them alone. English, *Concurrent Estates in Real Property II*, (pt. 2) 12 Catholic U.L. Rev. 1, 2 (1963).

[17]Washington withdrew from this dwindling minority with Wash. Sess. Laws 1961, ch. 2, which repealed Wash. Rev. Code § 11.04.070 (1953). Alabama was briefly in this minority before Ala. Code tit. 47, § 19 (1958) was amended in 1945, 4 Powell, Real Property ¶ 602 n.15 (1965). Oregon tried to abolish joint tenancy by statute, now Ore. Rev. Stat. § 93.180 (1953), but the Supreme Court of Oregon apparently construed the statute to mean that no more than the old common law presumption in favor of joint tenancy was destroyed. For an explanation of the status of the Oregon law as well as the ambiguity of the revised statute see O'Connell, *Are Joint Tenancies Abolished In Oregon?*, 21 Ore. L. Rev. 159 (1942). Alaska apparently follows the Oregon view of joint tenancy, Alaska Stat. § 34.15.130 (1962), Pilip v. United States, 186 F. Supp. 397, 402 (D. Alaska 1960), although Alaska Stat. § 34.15.140 (1962), expressly allows creation of a limited tenancy by the entirety.

tentional use of survivorship, however, has been by statutory abolition of the common law presumption in favor of joint tenancy and creation of a statutory presumption in favor of a tenancy in common.[18] Under such statutes a grant to 2 or more grantees is presumed to create a tenancy in common, an estate without survivorship, instead of a joint tenancy, an estate with survivorship. This presumption can always be rebutted by an express provision in the instrument showing a clear intent to create a joint tenancy, on the rationale that such an estate is permissible if the grantor realizes what he is doing.[19]

In slightly more than half the jurisdictions the method of dealing with the creditors' objection to tenancy by the entirety has been to abolish tenancy by the entirety outright,[20] leaving joint tenancy as the only jointly held estate with survivorship. Although a few jurisdictions have simply held that tenancy by the entirety does not completely insulate against creditors,[21] a sizable minority has refused to change the common law rule that a tenancy by the entirety is not subject to levy or attachment for any debt not incurred by both spouses jointly.[22]

Alabama judicially abolished tenancy by the entirety in 1860.[23] The *presumption* in favor of joint tenancy was abolished by a statute which allowed joint tenancy *only if* the intent to create it were clearly expressed:

> When one joint tenant dies before the severance, his interest does

[18]See, *e.g.*, Lynch v. Murray, 139 F.2d 649 (5th Cir. 1943); Prall v. Burckhartt, 299 Ill. 19, 132 N.E. 280 (1921); Salvation Army, Inc. v. Hart, 239 Ind. 1, 154 N.E.2d 487 (1958); Midgley v. Walker, 100 Mich. 583, 60 N.W. 296 (1894); In re Blumenthal's Estate, 236 N.Y. 448, 141 N.E. 911 (1923).

[19]Allen v. Almy, 87 Conn. 517, 89 Atl. 205, 207 (1913); Frey v. Wubbena, 26 Ill. 2d 62, 185 N.E.2d 850 (1962); Wilken v. Young, 149 Ind. 1, 41 N.E. 68 (1895).

[20]Another method of achieving the same result is to refuse to recognize it. For an excellent grouping and classification of the methods by which tenancy by the entirety is not recognized in 29 jurisdictions see Phipps, *Tenancy By Entireties*, 25 Temp. L.Q. 24, 32-33 (1951).

[21]In Kentucky and Tennessee the creditor can levy and sell the interest of the debtor spouse. The buyer at execution thus gets only the contingent right of survivorship, see Hoffmann v. Newell, 249 Ky. 270, 60 S.W.2d 607 (1932); Francis v. Vastine, 229 Ky. 431, 17 S.W.2d 419 (1929); Cole Mfg. Co. v. Collier, 95 Tenn. 115, 31 S.W. 1000 (1895). In Arkansas the purchaser at execution takes the debtor spouse's interest in half the rents and profits as well as the contingent right of survivorship, see Moore v. Denson, 167 Ark. 134, 268 S.W. 609 (1924); Branch v. Polk, 61 Ark. 388, 33 S.W. 424 (1895).

[22]For a grouping and classification of the 20 jurisdictions which have retained tenancy by the entirety, see Phipps, *Tenancy By Entireties*, 25 Temp. L.Q. 24, 33-34, 46-57 (1951).

[23]See Walthall v. Goree, 36 Ala. 728 (1860).

> not survive to the other joint tenants, but descends and vests as if his interest had been severed and ascertained, provided, however, that in the event it is stated in the instrument creating such tenancy, that such tenancy is with right of survivorship, or other words used therein showing such intention, then upon the death of one joint tenant, his interest shall pass to the surviving joint tenant or tenants according to the intent of such instrument. This shall include those instruments . . . in which . . . it clearly appears that the intent is to create such a survivorship between joint tenants as is herein contemplated.[24]

Thus, as in the majority of jurisdictions, after this statute was adopted the law of Alabama appeared to be that while a tenancy by the entirety with an indestructible right of survivorship could not be created under any circumstances, a joint tenancy with a destructible right of survivorship could be created if the intent to do so were clearly expressed.

The Supreme Court of Alabama, however, interpreted this statute in a very unusual way in *Bernhard v. Bernhard*.[25] There the husband filed a bill to force a sale for division of the proceeds from the house and land which he and his estranged wife had been granted. The deed stated that the parties were to take

> as joint tenants with right of survivorship . . . it being the intention of the parties to this conveyance, that (unless the joint tenancy hereby created is severed or terminated during the joint lives of the grantees herein), in the event one grantee herein survives the other, the entire interest in fee simple shall pass to the surviving grantee. . . .[26]

According to the view uniformly adhered to in jurisdictions which, like Alabama, have abolished tenancy by the entirety but allow creation of joint tenancy by express intention, such language would have created a joint tenancy (with a destructible right of survivorship) in accordance with the intent of the parties.[27] Not recognizing this, the *Bernhard* court took the novel position that the *estate* of joint tenancy, instead of the common law *presumption* in favor of joint tenancy, had been abolished by the statute.[28] The reason seems to be

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[24]Ala. Code tit. 47, § 19 (1958).

[25]177 So. 2d 565 (Ala. 1965).

[26]*Id.* at 566.

[27]*Supra* notes 18, and 19.

[28]*Bernhard*, *supra* note 25, at 567, cites only 1 case as authority for this construction, Finch v. Haynes, 144 Mich. 352, 107 N.W. 910 (1906), which is cited incorrectly since it expressly distinguished the situation presented by

the incorrect assumption that the first part of the statute abolishing joint tenancy was inconsistent with the latter part allowing it.[29] Apparently believing itself forced to choose between 2 inconsistent statutory clauses, the court implied that the more logical construction was that the legislature had intended to retain only 1 incident of joint tenancy, survivorship, rather than the entire estate of joint tenancy. To replace the abolished estate of joint tenancy the court fashioned a strange estate called a "tenancy in common with an indestructible right of survivorship" which the court equated to a tenancy in common for the joint lives of the tenants with cross-contingent remainders in both tenants.[30] This estate has been used before in other jurisdictions,[31] usually when an attempted joint tenancy fails for want of one of the 4 unities;[32] but this case is the first instance of forcibly establishing it over the intention of both the legislature and the parties to the instrument.

The court fictionalized the intent of the parties in order to achieve this result by saying that the intention of the parties was other than it patently was. It seized upon a provision in the deed which in effect

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Bernhard. The Michigan Supreme Court, in carefully limiting their result to grants "to A & B and the survivor of them," considered a precedent where, as in *Bernhard*, the grant was "to A & B as joint tenants with a right of survivorship" and held:

> That was a case where the interest of one of two joint tenants under a deed, where the right of survivorship was expressly granted, was purchased under an execution sale . . . and this court held that such interest was subject to levy and sale. . . . *If the deed under consideration had . . . made the grantees therein named joint tenants of the fee, either of those grantees could, by conveyance in her lifetime, have deprived the other of the right of survivorship.* . . . But that deed [to A & B and the survivor of them] did not make the grantees joint tenants of the fee. 'Deeds and devices . . . to two or more, and to the survivor of them and his heirs . . . make them joint tenants for life with a contingent remainder in fee to the one who survives'.

Id. at 910-11 (1906) (Emphasis added.)

[29]*Supra* note 25, at 566-67.

[30]The term "tenancy in common with cross-contingent remainders" means that each tenant has a life interest in the estate with all of the rights and duties of tenants in common followed by a remainder in fee simple in the whole estate contingent upon his surviving the other tenant. Since the survivor is unascertainable while both tenants are living, the land cannot be partitioned or sold for division of the proceeds since the interest of such party cannot be determined until the death of one.

[31]See, *e.g.*, Hass v. Hass, 248 Wis. 212, 21 N.W.2d 398 (1946); Burns v. Nolette, 83 N.H. 489, 144 Atl. 848 (1929); Schultz v. Brohl, 116 Mich. 603, 74 N.W. 1012 (1898).

[32]See, *e.g.*, Anson v. Murphy, 149 Neb. 716, 32 N.W.2d 271 (1948).

only restated the Alabama Simultaneous Death Act[33]—if both parties died simultaneously there could be no survivor hence the property must descend as if the estate had been a tenancy in common. Since by statute this rule operates in every joint tenancy, the provision added nothing. However, one provision which is not present in every joint tenancy is the clause, "unless the joint tenancy hereby created is *severed* or *terminated* during the joint lives of the grantees herein." (Emphasis added.) The intent of the parties concerning the possibility of termination could hardly be plainer.

The result in *Bernhard*, however, does not seem inequitable. The court did not allow the husband to sell the house in which his estranged wife was living and divide the proceeds from the sale, because the estate created by the court, tenancy in common with cross-contingent remainders, was not subject to compulsory sale for division.[34] Two analyses can be suggested as rational bases for the result in *Bernhard*: *First*, it can be called a protection of the rights of an estranged wife before divorce. If the court had sold the house and had given her half the proceeds, the result would have been to reduce, at least temporarily, her house-occupying station in life by one half. Normally when a marriage fails, the wife who has devoted herself to domestic skills has few, if any, skills with which she can compete in the labor market, while the husband has acquired more earning capacity by developing skills in more demand on the labor market. *Second*, married people tend to view their physically indivisible joint property not as half "his" and half "hers," but as "theirs" in the sense that it would somehow be improper for either to alienate his half interest without the consent of the other. In this sense the marital entity may be more than an old common law concept: in certain areas of behavior it is almost a psychological fact.

In fact this result, if not this analysis, would obtain in almost half the jurisdictions today under the rationale that tenancy by the entirety is neither partitionable nor salable for division.[35] While in such jurisdictions that result is restricted to married tenants,[36] the *Bernhard* result applies to *all* joint owners in Alabama since there is no distinction between married tenants and unmarried tenants.[37] The importance

[33]Ala. Code tit. 16 § 36 (1958).

[34]Simes & Smith, Future Interests § 1772 (2d ed. 1956).

[35]See Huber, *Creditors' Rights In Tenancies By The Entireties*, 1 Boston College Industrial and Commercial L. Rev. 197, 198 (1959); Phipps, *Tenancy By Entireties*, 25 Temp. L.Q. 24, 36 (1951).

[36]*Supra* note 35.

[37]*Supra* note 23.

of this difference between Alabama and other jurisdictions is that the chief objections to tenancy by the entirety, creation of an estate without full knowledge of technical results and possible defeat of creditors' rights, now attach in Alabama to *every* joint estate in which the parties have created a right of survivorship. If the only estate with survivorship left by the court's interpretation of the statute is tenancy in common with a right of survivorship, and if that kind of contingent right of survivorship is indivisible because of the contingency of the interests of the parties, it follows that every joint estate with survivorship is indivisible. It also must follow that since every joint estate with survivorship is indivisible because of the contingency of interests of the tenants, the estate is insulated against those who are creditors of 1 spouse only. For if the reason for non-division is that a contingent remainder is by its very nature indivisible, it is immaterial whether a spouse or a creditor is trying to have it sold for division. Thus every landowner in Alabama could by timely action completely insulate his estate from attachment by creditors simply by transferring it to himself and another as tenants in common for their joint lives with the right of survivorship.[38]

Obviously, the court will at least have to modify or restrict its *Bernhard* opinion. Just how it can do so without overruling *Bernhard* is not clear. The case cannot be restricted on the basis of the intention of the parties, since the intention of the parties in *Bernhard* was to create a severable joint tenancy and not a tenancy in common with an indestructible right of survivorship. There is no reason for restricting the opinion to married tenants since the statute (1842) applies to all joint owners,[39] and the judicial abolition (1860) of tenancy by the entirety leaves no distinction between married and unmarried joint tenants.[40]

Apparently the case must be distinguished on some fictional ground or it must be overruled. Assuming that the court wants to pursue a policy of protection of the rights of an estranged wife even when creditors are involved, it will probably limit this case in some way to married tenants. If that happens, the court will have done something far more significant than fictionalize the result of the present case: it will have reinstated tenancy by the entirety. Although there may be a theoretical difference between the concept of tenancy by

[38]Ala. Code tit. 46 § 19 (1958) gives a landholder the power to make a conveyance to himself and another with the right of survivorship.

[39]*Supra* note 24.

[40]*Supra* note 23.

the entirety and tenancy in common with an indestructible right of survivorship,[41] the practical results of both estates are identical: the creation of a joint estate between married tenants only, with an indestructible right of survivorship immune from attachment by creditors of 1 spouse only.

If that is the direction of the opinion, it contains 3 serious flaws. First, the court has created uncertainty as to what the substantive law of real property actually is. It is clear that the case must be modified or overruled, but how is the practicing attorney to know which? The court obviously has adopted the policy of protecting the rights of the estranged wife by preventing the husband from forcing sale of "their" property, but what will happen when that policy conflicts with the policy of protecting the rights of non-joint creditors? Assuming that the court considered all relevant implications of its decision, it has, in effect, weighed the advantages of tenancy by the entirety against its disadvantages and decided that the advantages outweigh the disadvantages. Since the court did not even mention such an obvious implication,[42] the practicing attorney can only guess whether it was considered, thus can only guess whether the court actually wishes to pursue this policy when non-joint creditors are involved.

A second flaw in the decision is the potential confusion the decision has created in the language of property law. While a tenancy in common with a right of survivorship is not exactly a technical contradiction in terms, such terminology will create pointless confusion. Although survivorship is not an estate itself, it is something more than an alienable characteristic of an estate. It is the label that identifies the estate as either a joint tenancy or a tenancy by the entirety and not a tenancy in common since a basic distinction between tenancy in common and the other 2 joint estates is that survivorship is not a feature of tenancy in common.[43] Saying that survivorship is only an incident of 1 estate which can arbitrarily be assigned to another estate, while perhaps technically permissible,[44] subject to the requirements of due process, is like saying that having equestrian

[41]A tenant by the entirety owns the whole estate while a tenant in common with an indestructible right of survivorship owns only a part of the estate with a contingent remainder in fee simple in the whole.

[42]The point was raised neither in the opinion, nor in the brief of counsel arguing for division of proceeds from forced sale, Brief for Appellee, Bernhard v. Bernhard, 177 So. 2d 565 (Ala. 1965), and it could hardly be expected to be raised in Appellant's Brief.

[43]See United States v. Jacobs, 306 U.S. 363, 370 (1939); Moynihan, Introduction to Real Property, 220, 224, 229 (1962).

[44]See *supra* note 41.

characteristics is only an incident of an animal called a "horse" which can arbitrarily be assigned to another animal. If the decision of the court is that results uniquely obtainable from tenancy by the entirety are desirable, it should overrule the 1860 case abolishing tenancy by the entirety and avoid the kind of confusion which results from a misdirected sense of reverence.[45]

The third and basic flaw in this opinion, is its ad hoc approach designed to deal with one particular problem of co-ownership without proper regard for the whole body of co-ownership law. It was this same approach that originally raised this problem in *Walthall v. Goree*[46] when the Supreme Court of Alabama abolished tenancy by the entirety on the narrow ground that it was inconsistent with the married women's property act.[47] *Bernhard* treated the problem in the same narrow way, and instead of considering the relation of a particular estate to the rest of joint ownership law, considered only the relation of that particular estate to a particular statute. The approach of trying to deal with the relation of *one* joint estate to *one* statute or set of social conditions overlooks the problem that a significant adjustment of any one common law joint estate necessitates a corresponding adjustment in some other common law joint estate. The common law provided almost any kind of estate which the parties to a conveyance wished to create, and when 1 of these estates is deprived of a useful feature by a narrow reading of a statute, then some other estate must be adapted to fulfill that feature. The proper approach would be based on the realization that the utility of a particular estate in modern property law is determined by its relation to other joint estates as well as its relation to modern social conditions. Trying to adjust joint tenancy to modern conditions without considering its relation to gaps in the law left by tenancy in common and tenancy by the entirety is as ludicrous as trying to adjust the flight pattern of an airplane without considering weather conditions.

Unfortunately, this approach is not confined to the judiciary. This is precisely the approach urged on courts and legislatures by many legal periodicals, which seem more concerned with criticizing tenancy

[45]The Alabama approach seems to be that while the decision abolishing tenancy by the entirety was not technically correct, it should not be overruled because of its venerability. *Goree*, *supra* note 23, was based on an implicit non sequitur; that because under the married women's property act tenancy by the entirety was no longer mandatory, it was no longer permissible. See, Gillon, *Joint Titles with Survivorship*, 22 Ala. Lawyer 341, 353 (1961).

[46]*Supra* note 23.

[47]*Supra* note 45.

by the entirety than with creating a viable, integrated law of co-ownership.[48] This approach as well as its conclusion is suspect.

While the lack of compulsory division among tenants by the entirety may frustrate the rights of some creditors who do not have the signatures of both husband and wife or do not check their credit properly, it does not follow that the estate should be abolished without considering whether it serves any useful function. The Alabama experience indicates that abolition of tenancy by the entirety does not automatically improve the law of co-ownership. Moreover, it would seem that protection of the wife's rights in jointly held property as opposed to her husband's creditors is at least as appealing as protection from an estranged spouse.[49]

The proper suggestion to the legislature is to begin anew. It should consider the reasons for and against all 3 common law joint estates with an eye to rewriting the whole body of co-ownership law to fit modern conditions. The final result would be surprisingly similar to the common law. Such a statute could read:

> § 1. Any transfer to two or more persons jointly is presumed to be a *tenancy in common.* This presumption is rebuttable only by language on the face of the instrument expressly showing an intent to set up a joint tenancy or a tenancy by the entirety.
>
> § 2. A common law *joint tenancy* with a *destructible* right of survivorship may be created if that is the intent of the parties as expressly manifested on the face of the instrument. Any tenants, including husband and wife, may hold as joint tenants, and any deed styled "with a right of survivorship" without stating whether it is intended to be a joint tenancy or a tenancy by the entirety is presumed to be a joint tenancy.
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> § 3a. A tenancy by the entirety with an indestructible right of survivorship may be created between husband and wife, if such intention is expressed on the face of the instrument, subject to two limitations:

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[48]See, *e.g.*, Ritter, *A Criticism Of The Estate By The Entirety*, 5 Fla. L. Rev. 153 (1952); For less extreme examples, see English, *Concurrent Estates in Real Property II* (pt. 2), 12 Catholic L. Rev. 1 (1963); Huber, *Creditors' Rights In Tenancies By The Entireties*, 1 Boston College Industrial and Commercial L. Rev. 197 (1959); Comment, 42 U. Det. L.J. 362 (1965).

[49]Under existing law a strongly reasoned case can be made out for both creditor and wife. While it seems inequitable to defeat the rights of the creditor who has done all he may think is legally necessary to insure he will be paid, it also seems inequitable to make the wife pay from her own property (and it *is* her own property: per tout) for her husband's bad judgment in business.