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Property--Tenancy by Entireties Creation Through Simultaneous Conveyances Involving Tenants in Common

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rounding circumstances to determine whether stripping should be allowed. In *Mount Carmel R. Co. v. M. A. Hanna Co.*, 371 Pa. 232, 89 A.2d 508 (1952), where there was a grant in 1891 with a right to mine the coal by any method, it was held that the grantee had the right to strip mine even though such method was not in common usage at that time. A year later the same court said in *Rochez Bros., Inc. v. Durica*, 374 Pa. 262, 97 A.2d 825 (1953), that language which was particularly applicable to underground mining did not include the right to strip mine. The apparent conflict in these two cases was resolved in *Commonwealth v. Fitzmartin*, 376 Pa. 390, 102 A.2d 893 (1954). This case reviewed a number of Pennsylvania decisions on the right of a grantee to strip mine under a deed of severance made at a time when such was not the common practice. The court said that the subject matter had to be considered along with other surrounding circumstances. The *Durica* case was distinguished on the ground that the land in question there was rich agricultural and farm land, while the land in *Mount Carmel R. Co. v. M. A. Hanna Co.*, *supra*, and in the case then under consideration lay in rough terrain. The Pennsylvania court felt that the cases were perfectly reconcilable on that basis.

It is the author's opinion that some sort of subjective standard, as used above, should be applied in West Virginia, especially in cases where strip or auger mining would be the only feasible and economical method of removing the coal. Such a standard would not be a panacea, but it might come closer to effectuating the original intent of the parties.

L. O. H.

PROPERTY—TENANCY BY ENTIRETIES CREATION THROUGH SIMULTANEOUS CONVEYANCES INVOLVING TENANTS IN COMMON.—*P*, holder of inchoate dower right in spouse's undivided interest in land as a tenant in common with his mother, joined with spouse, *D*₁ in conveyance of this interest to his mother, *D*₂, which conveyance vested her as sole owner of the fee in the entire tract. In the second part of this transaction, *D*₂ conveyed a portion of the tract to *P* and *D*₁. *P* divorced and remarried, brought this suit for partition; she sued as a tenant in common. The trial court held that, although *D*₁ intended to create a tenancy by the entireties as between himself and *P*, such instrument did not create that estate, and that the *P* was not a tenant in common subsequent to her divorce, and *P* had no

present interest in the land in question. *Held*, reversed. Where a spouse conveyed his interest in land to a strawman, who happened to be his mother and a party in interest, with the intent to create a tenancy by the entireties by her reconveyance to spouse and wife, that such reconveyance created an estate by the entireties as between the spouse and wife. *Smith v. Smith*, 249 N.C. 669, 107 S.E.2d 530 (1959).

The subject of the court's decision was an inter vivos grant to a husband and wife followed by the words, "Creating an Estate by the Entirety."

Tenancies by the entirety are estates created under the common law by conveyance or devise, from a third person, of property to husband and wife, who, because of the fact of their legal unity, cannot take as joint tenants (who hold per tout et per my), but take as a single person the whole estate, and not by the moieties (per tout et non per my). *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924). The estate arises by the acts of the parties and never by operation of law. *Knapp v. Windsor*, 6 Cush. 156 (Mass. 1850); *Brown v. Baraboo*, 90 Wis. 151, 62 N.W. 921 (1895).

Characteristics of the estate which must be satisfied at its creation are: (1) *title* must be vested in both of the recipients, *Sprinkle v. Spainhour*, 149 N.C. 223, 62 S.E. 910 (1908); (2) title must be taken at the same time, *Ibid*; (3) both recipients are entitled to common *possession* of the whole, and not to a part, *Madden v. Gosztonyi Sav. & T. Co.*, 331 Pa. 476, 200 Atl. 624 (1938); (4) each must have the same or equal *interest* in the land as the other, *Ibid*, and; (5) recipients must at the time of the grant or devise be *huband and wife*. *Topping v. Sadler*, 50 N.C. 357 (1858). See generally 1 BOUVIER, LAW DICTIONARY 1043 (3d ed. 1914).

The estate by the entireties is a form of joint tenancy, another concurrent estate at common law; the latter arises when the first four "unities" are present in the conveyance. *Moore v. Trust Co.*, 178 N.C. 124, 100 S.E. 269 (1919). Tenancy by the entireties resembles joint tenancy in its incident of survivorship, and it differs from it principally in that neither the husband nor the wife can partition or alienate an interest in the property without the consent of the other. *Zanzonico v. Zanzonico*, 24 N.J. Misc. 153, 46 A2d 565 (1946). See generally 2 AMERICAN LAW OF PROPERTY § § 6.1, 6.6 (Casner ed. 1952).

A divorce *a vinculo*, because it destroys the unity of the spouses, destroys the unity of seisen in an estate by the entireties, hence terminating it and converting it into an estate in common subject to partition. *Bernatavicius v. Bernatavicius*, 259 Mass. 486, 156 N.E. 685 (1927); *McKinnon Co. v. Caulk*, 167 N.C. 411, 83 S.E. 559 (1914).

Most jurisdictions today recognize the common law estate by the entireties despite the adoption of Married Women's Acts. *Schram v. Burt*, 111 F.2d 557 (6th Cir. 1940); *Bloomfield v. Brown*, 67 R.I. 452, 25 A.2d 354 (1942). See Annot., 141 A.L.R. 179, 187 (1942). These jurisdictions do, however, admit that the estate has been abrogated in that the husband has lost his exclusive control over mutually held properties. Annot., 141 A.L.R. 179, 202-203 (1942) and cases cited therein. Some jurisdictions like West Virginia are contra and have held that Married Women's Acts have wholly abolished estates by the entirety. *Wartenburg v. Wartenburg*, 100 S.E.2d 562 (W. Va. 1957); *McNeeley v. South Penn Oil Co.*, 52 W.Va. 616, 46 S.E. 499 (1903). (Where it was held that the effect of W. VA. CODE ch. 36, art. 1, § 19 (Michie 1955), abolishing survivorship, and of W. VA. CODE ch. 48, art. 3 (Michie 1955), relating to the separate estate of married women, when taken together abolish tenancies by the entirety.)

Others, Massachusetts being representative, hold that this common law estate is unaffected by the adoption of the above mentioned statutes. *Licker v. Gluskin*, 265 Mass. 403, 164 N.E. 613 (1929).

The Supreme Court of North Carolina has repeatedly held with the majority that Married Women's Acts place no disability on the creation of this form of joint tenancy. *McKinnon Co. v. Caulk*, 167 N.C. 411, 83 S.E. 559 (1914); *Jones v. Smith & Co.*, 149 N.C. 318, 62 S.E. 1092 (1908); *Bynum v. Wicker*, 141 N.C. 95, 53 S.E. 478 (1906). In fact, this jurisdiction has so far relaxed the rules for creation as to allow a husband to create the estate by his own act, a deed to himself and his wife. *Woolard v. Smith*, 244 N.C. 489, 94 S.E.2d 466 (1956).

The principal case presented a situation whereby the parties could have just as easily effected a voluntary partition through mutual exchange of deeds by merely substituting one word for another. Had the parties, *P* and *D*₁, conveyed a *moiety* to *D*₂, and she the same to them, the court could not have found the necessary five unities present, and would have probably have held this to be an

exchange of deeds between co-tenants to effect a voluntary partition of land. *Wood v. Wilder*, 222 N.C. 622, 24 S.E.2d 474 (1943); *Speas v. Woodhouse*, 162 N.C. 66, 77 S.E. 1000 (1913); *Sprinkle v. Spainhour*, 149 N.C. 223, 62 S.E. 910 (1908); *Holt v. Holt*, 188 Tenn. App. 1, 202 S.W.2d 650 (1947).

The intent of the parties at the time of the conveyance and the result were clearly different. In reaching the tenancy by the entirety "result", the court was particularly aided by the use of the word, "entire", in the description of the tract conveyed to D_2 . It held that the use of that word left no room for a construction of conveyance of a *moiety* which would have connoted voluntary partition between co-tenants.

P would have had no present interest in the land had the court construed the deeds to be partition instruments since her inchoate right to dower would have been extinguished by the divorce. *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566, 570 (1924). An inchoate dower right will not become an interest in realty unless and until the husband predeceases his wife, *Loughran v. Loughran*, 292 U.S. 216 (1933), and if the marriage has not been sooner dissolved by divorce, *Maynard v. Hill*, 125 U.S. 190 (1887), or if the spouse has not released her right to dower to her husband's grantee. *White v. Graves*, 107 Mass. 325 (1871).

The court, in arriving at the result it did, determined the intent of the parties at the time of the execution of the instruments by construing the two deeds to be a simultaneous transaction employing the use of a strawman.

Some authorities might question the fact that the court denominated D_2 's role as that of a strawman and then sustained P 's contention that a tenancy by the entirety was created by the second instrument. The use of a strawman to create this estate has, however, been long sustained and is, in fact, the most common means of accomplishing the transaction. Annot., 173 A.L.R. 1216, 1219 (1948); 132 A.L.R. 630, 641 (1941). The fact that D_2 was a party in interest, as well as a strawman, does not invalidate the intent to create the estate since the form and the time sequence of the complete transaction met all the requirements necessary to create the estate.

The result reached by the court appears to be justified for it is supported by the law of the jurisdiction as well as the intent of the parties.

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