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Creditors' Rights - Tenancy by the Entirety-A Possible Fraud on Creditors in Virginia

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TENANCIES BY THE ENTIRETY—A POSSIBLE FRAUD ON CREDITORS IN VIRGINIA

X conveyed land to H and W, husband and wife, by deed with a general warranty and containing in addition the clause, "as tenants by the entireties, with right of survivorship as at common law." Three years later, H and W conveyed the land to W without consideration. Three months afterwards, C obtained a judgment against H for $2800. Later, charging that the conveyance to W was made to defraud him, C filed a bill in equity to enforce the lien of his judgment. H and W demurred to the bill. Their demurrer was sustained and the bill dismissed, and this decree was affirmed by the Supreme Court of Appeals. *Vasilion v. Vasilion,* 192 Va. 735, 66 S.E. 2nd 599 (1951).

By this decision it would seem that the highest court of Virginia has committed itself to the proposition that a debtor, relying on the court's strict common law interpretation of tenancy by the entirety can escape his obligations, unless it is the joint debt of both spouses, in which case there is liability.[1] The court's reasoning regarding tenancies by the entirety is in accord with decided cases. *Licker v. Gluskin,* 265 Mass. 403, 164 N. E. 613 (1929), upon which the court relied, is directly in point, and represents the weight of authority given by the cases cited therein.[2]

"The nature of a tenancy by the entirety . . . is founded on the common-law doctrine of the unity of husband and wife as constituting in law but one person. A conveyance to a husband and wife as tenants by the entirety creates one indivisible estate in them both and in the survivor, which neither can destroy by any separate act. Both husband and wife are seized of such an estate per tout et non per my as one person, and not as joint tenants or tenants in common. . . . There can be no severance of such estate by the act of either alone without the assent of the other, and no partition during their joint lives, and the survivor becomes seized as sole owner of the whole estate regardless of anything the other may have done."[3]

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1. 35 A.L.R. 144.
2. Hurd v. Hughes, 12 Del. Ch. 188, 109 A. 418 (1920); Chandler v. Cheney, 37 Ind. 391 (1871); Cochran v. Kerney, 9 Bush. (Ky.) 199 (1872); Ades v. Caplan, 132 Md. 66, 103 A. 94, (1918); Turner v. Davidson, 277 Mich. 459, 198 N.W. 886 (1924); Stifel's Union Brewing Co. v. Saxy, 273 Mo. 159, 201 S.W. 67 (1918); Beihl v. Martin, 236 Pa. 519, 84 A. 953 (1912).
3. Bernatavicius v. Bernatavicius, 259 Mass. 486, 156 N.E. 685 (1927).

By statute in Virginia, a husband and wife are permitted to join in a deed conveying land to either of them alone.[4]

The result of this decision, reached by application of the exception[5] to the section of the Virginia Code abolishing tenancies by the entirety,[6] is more open to criticism than is the reasoning. These statutes were originally enacted in 1849 as a property reform[7] and not as an aid to creditors.

There is authority for limiting these estates, in behalf of creditors, by refusing to allow a debtor to hide behind the skirts of a tenancy by the entirety. The Pennsylvania court, for example, has said that a judgment against the husband is a lien on his contingent expectant interest, even though only enforceable when the husband becomes sole owner by virtue of the wife's death.[8] The Florida court has been more outspoken in deciding that estates in entirety cannot be created at the expense of creditors and held in fraud of the latter's right.[9] In this view the Supreme Court of Michigan has concurred.[10]

In Virginia this bar to creditors may very likely arise in personalty as well as in realty, for the Code reads . . . "any estate, real or personal."[11] This provision, although in accord with the law in other jurisdictions allowing estates by the entirety in personal property as well as in lands,[12] opens the door for more debt-free estates.

It is noted that dangers of tenancies by the entirety are not limited to creditors. The Supreme Court of New York has held in a recent case that a husband, co-tenant by entirety, could not evict his mother-in-law from the property.[13]

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4. VA. CODE ANN. § 55-9 (1950).
5. VA. CODE ANN. § 55-21 (1950). ("The preceding section shall not apply to any estate which joint tenants have as executors or trustees, nor to an 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 . . .").
6. VA. CODE ANN. § 55-20 (1950). (". . . And 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.").
7. 2 MINOR, REAL PROPERTY § 855 (1928).
8. Klopfenstein v. Chadbourne, 105 Pa. Super. 530, 161 A. 642 (1932).
9. Whetstone v. Coslick, 117 Fla. 203, 157 So. 666 (1934).
10. Long v. Earle, 277 Mich. 505, 269 N.W. 577, (1936).
11. VA. CODE ANN. § 55-20 (1950).
12. 41 C.J.S. Personal Property § 35, 477; George v. Dutton's Estate, 94 Vt. 76, 108 A. 515 (1920).
13. Fine v. Scheinhaus, 109 N.Y.Supp.2d 307 (1952).

The importance of the principal case is emphasized by distinguishing the three Virginia cases it refused to overrule. These,[14] although involving the indestructibility of tenancies by the entirety, concerned disallowance of partition suits between the parties in interest, not creditors or third parties.

Possible use of estates by entirety to make oneself creditor-proof was suggested by Emerson G. Spies[15] in 1948. Surely the opportunity is unique, and perhaps its use should not remain unlimited. It would seem from the creditor's standpoint that tenancies by the entirety should either be abolished without exception, or restricted. Since the Supreme Court of Appeals has taken a firm defensive stand, it is now a matter of legislation. As tenancies by the entirety have distinct advantages, restriction rather than abolition would be indicated. This might best be done by following the spirit of the legislation on spendthrift trusts and gifts. Spendthrift trusts are limited to a principal sum of $100,000 free from creditors of the beneficiary, and the grantor is prohibited from establishing any trust in prejudice of his existing creditors;[16] all gifts are void as to existing creditors of the donor.[17] Comparable restrictions upon tenancies by the entirety would bring them within our legislative policy.

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14. Burroughs v. Gorman, 166 Va. 58, 184 S.E. 174 (1936); Allen v. Parkey, 166 Va. 58, 184 S.E. 174 (1930); Drake v. Blythe, 108 Va. 38, 60 S.E. 632 (1908).
15. Emerson G. Spies, *Some Considerations in Conveying to Husband and Wife*, 34 Va. L. Rev. 480, 492 (1948).
16. VA. CODE ANN. § 55-19 (1950).
17. VA. CODE ANN. § 55-81 (1950).