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RIGHTS OF A HUSBAND'S OR WIFE'S INDIVIDUAL CREDITOR AGAINST AN ESTATE BY ENTIRETY.

Although under the common law no question was probably more settled than that of an estate by entirety, under the recent Married Women's Acts and various State statutes dealing with husband and wife, a confusion has been brought about at present which is due not only to the peculiarities of the specific statutes but also to a conflict in the authorities. This conflict is particularly noticeable in relation to the standing of an individual creditor of the husband (or wife) toward the estate by entirety. Space requires that this specific point in regard to an estate by entirety be dealt with principally in this article. The law as it stands in England will not be referred to, and the decisions of the various American States can at the most be only hurriedly passed over.

Alabama,¹ Maine² and South Carolina³ have abolished the estate by entirety. In Wisconsin⁴ and Minnesota⁵ the intention to create an estate by entirety must be declared in the deed or grant. New York and New Jersey while still retaining the right of survivorship, recognize husband and wife as tenants in common only during coverture. *Hiles v. Fisher*,⁶ a New York case, holds that either the estate by entirety and its rents and profits are held by, and can be disposed of and charged by the husband and wife jointly, and not by either party individually, under the Married Women's Acts; or the parties become tenants in common with the right of survivorship, entitled during coverture to half the rents and profits each. The Court held that the latter view conforms more nearly to the intent of the legislature, and cites the case of

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1. *Donegan v. Donegan*, 103 Ala. 488.
 2. *Robinson, Apellant*, 88 Me. 17.
 3. *Green v. Cannady*, 77 S. C. 193.
 4. *Bassler v. Rewodlinski*, 130 Wis. 26.
 5. *Wilson v. Wilson*, 43 Minn. 398.
 6. 144 N. Y. 306, 30 L. R. A. 305.

Buttlar v. Rosenblath,⁷ a New Jersey decision. However, in Servis v. Dorn,⁸ where the plaintiffs were permitted to foreclose a mortgage given on an estate by entirety by husband and wife jointly, a judgment creditor of the husband was made co-defendant, and the Court held that the judgments were liens against the husband's interest in the land; that under the Married Women's Acts, the wife is entitled to her share of the *usufruct*, but that the husband can encumber his part voluntarily or involuntarily; and that the surplus from the foreclosure must be paid into court by the mortgagee to be held until either the husband or wife died. If the husband died first, the wife was to get the money freed from any lien; if the wife died first, the judgment creditor was entitled to have it applied on his judgment to satisfy his lien against the husband's right of survivorship. Under the Buttlar case, it would seem that the wife was entitled to at least the interest on half the money during her life. Even if the money was to stand in the place of the land sold, as the Court contends, this result should follow if the wife is a tenant in common.

In Ohio,⁹ Nebraska¹⁰ and Connecticut¹¹ the estate by entirety has been judicially repudiated. In other States, the Courts have on perfectly logical grounds gone so far as to hold that the Married Women's Acts do not apply to, or affect, an estate by entirety. This result is generally put on the ground that the Acts affect only the separate property of the *feme covert*, and her interest in an estate by entirety cannot be called her separate and sole property. The cases in Michigan are not in harmony. Morrill v. Morrill¹² holds that the Married Women's Acts do not deprive the husband of the rents and profits during coverture, to the exclusion of the wife. The grounds which this case is decided on are very unsatisfactory

7. 42 N. J. Eq. 65, 59 Am. Rep. 52.

8. 76 N. J. Eq. 241.

9. Miles v. Fisher, 10 Ohio 1; Wilson v. Fleming, 13 Ohio 68.

10. Kerner v. McDonald, 60 Neb. 663.

11. Whittlesey v. Fuller, 11 Conn. 337.

12. 138 Mich. 112.

and, although the opinion attempts to reconcile the decision with *Dickey v. Converse*,¹³ a prior decision of the same Court, the two cases are apparently in conflict. This latter case held that no interest in an estate by entirety in crops existed against which the husband's creditors could take out execution. And *Schliess v. Thayer et al.*,¹⁴ holds that property held by husband and wife as tenants by entirety before, or at the time of the incurrance of a debt by the husband, is not subject to the debt; although if the husband uses his own assets in payment for an estate by entirety after incurring a debt, the estate is liable to the amount of the assets so used. This decision does not seem quite reconcilable with *Morrill v. Morrill* and, impliedly at least, seems to question the exclusive right of the husband to the rents and profits of an estate by entirety. If the husband has an exclusive right to the entire rents and profits of the estate by entirety, his creditors should certainly be able to seize that interest.

In *Pray v. Stebbins*¹⁵ the Court held that the Married Women's Acts do not affect in Massachusetts an estate by entirety, because if a woman was held capable of holding an estate by entirety "as if she were sole," the nature of the estate would be destroyed. Not only does the Court appear to strain the language of the statute, but it also fails to distinguish between the unity of estate and the husband's marital rights during coverture. The object of the legislature appears to have been not to destroy the inherent unity of the estate by entirety, but simply to take away the husband's right during coverture to the rents and profits of his wife's real estate. In Massachusetts at present the estate by entirety has been changed by statute to an estate in common.¹⁶

An early case in Missouri, *Hall v. Stephens*,¹⁷ which allowed a judgment creditor of the husband to take the entire

13. 117 Mich. 449.

14. 170 Mich. 395.

15. 141 Mass. 219.

16. *Pease v. Inhabitants of Whitman*, 182 Mass. 363.

17. 65 Mo. 670.

estate subject to the wife's right of survivorship, declared that the Married Women's Acts did not apply to, or affect, an estate by entirety. However, this declaration of the Court appears to have been *dicta* as the effect of the Married Women's Acts was not before the Court. *Brewing Company v. Saxy*,¹⁸ a 1920 case in which the opinion was handed down by Judge Roy, declares this ruling of *Hall v. Stephens* to have been mere *dicta* and overrules it. The *Brewing Company* case holds that the judgment creditor of the husband or of the wife has no right or interest whatsoever in an estate by entirety. The case holds that it was the marital right of the husband alone that gave him the right to appropriate the rents and profits of his wife during coverture, and this right has been removed by statute. Independent of the marital right the husband has no interest in his wife's property that he can dispose of or that is vendible under execution. It follows therefore, that as neither party to an estate by entirety can dispose of or encumber it without the consent of the other party, neither can the judgment creditor of an individual party do so, as the creditor can have no greater right than his debtor. The husband's marital right during coverture to the rents and profits of his wife's estate was based on the idea that she merged in him, and not on the idea of equality which characterizes the estate by entirety. In accord is *Goldberg v. Taylor*,¹⁹ a Missouri Appellate decision which holds that a mechanic's lien against the husband is not enforceable against an estate by entirety. This case and the *Brewing Company* case directly overrule *Hall v. Stephens* and *Brockett v. Logan*,²⁰ a more recent case in accord with it.

An early Vermont case, *Corinth v. Emery*,²¹ appears to be in accord with *Brewing Co. v. Saxy*, *supra*. There is respectable authority holding that this case was overruled by

18. 273 Mo. 159.

19. 237 S. W. 900.

20. 187 Mo. App. 322.

21. 65 Vt. 505.

Laird v. Perry.²² It is true that the Laird case arrives at a directly opposite conclusion from Corinth v. Emery, but in the meantime the statute mentioned in the latter had been repealed and a different one enacted. Laird v. Perry does not declare Corinth v. Emery overruled, but bases its decision upon the grounds that under the later statute the wife's interest in an estate by entirety is not included in the exemption of her property from the marital rights of the husband. The case seems to hold that the wife's interest in an estate by entirety is not her sole property. Strictly speaking, it is not her sole property for she holds it in unity with her husband. Both own the entire estate. There are no moieties. Nevertheless, the wife possesses an interest which, like her other property, is subject, as far as rents and profits are concerned, to her husband's rights at common law. The object of the legislature in passing the Married Women's Acts was manifestly to place a woman on an equal footing with her husband as far as property rights were concerned. The legislature intended to free her property from the control of her husband. In most States the wife's interest in an estate by entirety is not specifically excluded from the operation of the statute and can only be so excluded by holding that it does not come within the letter of the statute. It is true that courts will not make a statute for the legislature, but where a case is manifestly within the intention of the legislature, the courts will not withhold it from the effect of the statute, and this is much more so especially when the case is only impliedly excluded from the statute.²³

The courts of Tennessee in *Cole Mfg. Co. v. Collier*²⁴ held that the husband, under the Married Women's Acts, has no longer the right to the rents and profits of his wife's property during coverture and therefore her interest cannot be taken in execution by his judgment creditors. However, the Court held that the husband's right of survivorship is salable un-

22. 74 Vt. 454.

23. *State ex rel Sheehan*, 269 Mo. 421; *Lincoln U. v. Hackmann*, State Auditor, 243 S. W. (Mo.) 320.

24. 95 Tenn. 115, 30 L. R. A. 315.

der an execution against him; and if the husband survived the wife, the purchaser at the execution sale would come into the entire estate. *Simpson v. Biffle*²⁵ is in accord with the Tennessee case as would seem to be *Servis v. Dorn*, *supra*.²⁶ If neither party to an estate by entirety can incumber or convey it without the other party joining, it is difficult to see how a creditor can have superior rights.

The Tennessee doctrine is repudiated in *Jordan v. Reynolds*,²⁷ which holds that to allow a judgment against the husband to be a lien against even his right of survivorship in an estate by entirety or allow execution on that right, would be an encumbrance on the estate of the wife in that it might defeat a sale by her and her husband, if he survived her. This possibility would tend to hinder a sale of the property and thus substantially deprive the wife of the use of her property.

In Re Estate of Meyer, *Weiss v. Beihl et al.*,²⁸ the Pennsylvania Court implies that the trustee in bankruptcy would succeed to the husband's right of survivorship, although the husband no longer has the right to the rents and profits of his wife's estate. This implication is decidedly repudiated in *Beihl v. Martin*.²⁹ This latter case holds that the bare expectancy of survivorship is too remote to be the subject of execution and that, besides, the husband or the wife cannot even convey their right of survivorship without the joining of the other party. Therefore, it cannot be taken involuntarily by a claimant against only one of the parties. The case further states that as the right of survivorship is a vested interest, a lien may attach against it, but this lien is immediately divested by a conveyance of husband and wife. The weight of authority seems to be against any such juggling with liens. A peculiar Pennsylvania case of earlier date which *Beihl v.*

25. 63 Ark. 289.

26. 76 N. J. Eq. 241.

27. 105 Md. 288, 9 L. R. A. (N. S.) 1026.

28. 232 Pa. 89, 36 L. R. A. (N. S.) 205

29. 236 Pa. 519, 42 L. R. A. (N. S.) 555.

Martin attempts to reconcile, is *Fleick v. Zillhaver*,³⁰ which came to the astounding conclusion that a prior judgment lien against the husband took precedence, since the husband had survived the wife, over a subsequent mortgage executed by husband and wife. The Court states that if the wife had survived, the mortgage would have taken precedence over the lien.

*Bruce v. Nicholson*³¹ holds that the North Carolina code intended a lien to attach only to some existing legal or equitable estate which could be disposed of at the time it attached. Therefore a lien was held not to attach to the husband's right of survivorship in an estate by entirety.

A note to *Beihl et al. v. Martin*, *supra*, in 42 L. R. A. (N. S.) 555, says that the weight of authority and better reasoning is against the right to obtain a lien against an estate by entirety, or any right therein, without the consent of both parties, where the Married Women's Acts prevail.³²

The effect of the Married Women's Acts in regard to a judgment creditor seems excellently summed up in a note in 9 L. R. A. (N. S.) 1026: "The effect on estates by entirety of the laws enacted in the various States which give to married women the right of possession and enjoyment of their property is a matter of much conflict among the courts. The weight of authority founded as we think on the better reasoning is that such acts do not in any way affect estates by entirety except that they deprive the husband of the right to the possession and enjoyment of the property held by himself and wife in this manner, to the exclusion of the wife. Such acts have the effect of freeing the wife's property from any liability to his creditors; and therefore her right to the possession and enjoyment of property held in common with her husband by entirety cannot in any way be interfered with by his creditors and hence the entire property during their joint lives is free

30. 117 Pa. 213.

31. 109 N. C. 202.

32. *Bank v. McEwen*, 76 S. E. 222; *Healey Ice Mach. Co. v. Green*, 181 Fed. 890; *Hood v. Mercer*, 150 N. C. 699; *Sharp v. Baker*, 96 N. E. (Ind.) 627.

from judgment or execution liens directed against either of them.'³³

When once it is determined that the general rule of common law giving the husband a right to the rents and profits of his wife's estate during coverture, is superseded by the Married Women's Acts; and the true nature of an estate by entirety is considered; the Missouri rule as laid down in *Brewing Co. v. Saxy*, *supra*, appears to be the most reasonable and logical. Since the parties are each seized of the whole and not of moieties, and neither can convey or incumber the estate in any manner whatsoever without the other party joining; which is a result of the fiction that man and wife are one; there seems to be no equitable reason to give a creditor special rights possessed by neither party individually. A creditor has the ability to investigate the title to property and as long as the estate has not been created in fraud of his rights, he cannot complain of his failure to look up the title. If he is vigilant he will deal with both parties jointly and if he fails to do so that is no reason to prejudice the rights of the other party. If he is a judgment creditor as the result of one party's tort, why should the wrong of one be inflicted on both? It is better to inflict it on neither than to make an innocent party suffer.

The estate by entirety, like the homestead estate, tends to protect one spouse from the improper actions of the other. A strict enforcement of the principles on which the estate is founded does no injustice to a creditor or lienholder and is a valuable safeguard to the marriage relation. Rather than destroy the foundation of the estate by entirety by judicial legislation it is better, "when one of two innocent parties must suffer," to let the loss fall on the least vigilant, for if the creditor knows of the condition of the title when the relation arises, he has created the relation with open eyes and cannot complain. If he does not know he has no greater equity than the innocent party to the estate.

IRVING L. SPENCER. '24.

33. Notes to 42 L. R. A. (N. S.) 555, 46 L. R. A. (N. S.) 205; 30 L. R. A. 315.