Tenancy by the Entirety in North Carolina

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TENANCY BY THE ENTIRETY IN NORTH CAROLINA*

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NATURE OF TENANCY BY THE ENTIRETY

Where real property is conveyed by deed or by will to two persons who are at the time husband and wife, a "tenancy by the entirety" is created. Sometimes it is referred to as an "estate by the entirety." The husband and wife take the whole estate as one person. Each has the whole; neither has a separate estate or interest; but the survivor, whether husband or wife, is entitled to the entire estate, and the right of the survivor cannot be defeated by the other's conveyance of the property by deed or will to a stranger. The title to the land cannot be conveyed during the existence of the marriage without the signature of both the husband and the wife. Neither tenant can defeat or in any way affect the right of survivorship of the other. Each spouse is considered as the owner of the entire estate because of the common law fiction of the unity of husband and wife—"a unity of the person."[1]

Davis v. Bass,[2] decided in 1924, is the magna charta on the estate by the entirety in North Carolina. In an excellent opinion, Chief Justice Stacy described this anomalous estate and concisely stated its incidents. Quoting from the opinion of Chief Justice Stacy, the Supreme Court of North Carolina in 1955, in describing this estate, said:

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[1] Lanier v. Dawes, 255 N.C. 458, 121 S.E.2d 857 (1961); Edwards v. Arnold, 250 N.C. 500, 109 S.E.2d 205 (1959); Woolard v. Smith, 244 N.C. 489, 94 S.E.2d 466 (1956); Nesbitt v. Fairview Farms, Inc., 239 N.C. 481, 80 S.E.2d 472 (1954); First Nat'l Bank v. Hall, 201 N.C. 787, 161 S.E. 484 (1931); Davis v. Bass, 188 N.C. 200, 124 S.E. 566 (1924); Freeman v. Belfer, 173 N.C. 581, 92 S.E. 486 (1917); Motley v. Whitemore, 19 N.C. 537 (1837). For a general discussion of tenancies by the entirety, see 26 AM. JUR., *Husband and Wife* §§ 66-86 (1940); 2 AMERICAN LAW OF PROPERTY §§ 6.5-6.6 (1952); 41 C.J.S., *Husband and Wife* §§ 33, 34 (1944); MADDEN, PERSONS AND DOMESTIC RELATIONS § 45 (1931); 4 POWELL, REAL PROPERTY §§ 615-19 (1954); 2 THOMPSON, REAL PROPERTY §§ 1784-792 (repl. 1961); Phipps, *Tenancies by Entireties*, 25 TEMPLE L.Q. 24 (1951); Annot., 141 A.L.R. 179 (1942).

[2] *Supra*, note 1.

> (1) This tenancy by the entirety takes its origin from the common law when husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person. (2) These two individuals, by virtue of their marital relationship, acquire the entire estate, and each is deemed to be seized of the whole, and not of a moiety or any undivided portion thereof. They are seized of the whole, because at common law they were considered but one person; and the estate thus created has never been destroyed or changed by statute in North Carolina. (3) As between them (husband and wife) there is but one owner, and that is neither the one or the other, but both together, in their peculiar relationship to each other, constituting the proprietorship of the whole, and of every part and parcel thereof. (4) The estate rests upon the doctrine of the unity of the person, and, upon the death of one, the whole belongs to the other, not solely by right of survivorship, but also by virtue of the grant which vested the entire estate in each grantee.[3]

An estate by the entirety is a form of co-ownership of real property held by a husband and wife with the right of survivorship. It cannot be severed or divided into two separate interests by the act of one of the spouses.[4] Statutes of partition are not applicable to such estates[5] and there can be no partition during the marriage, for this would imply a separated interest in each.[6] It can, however, be destroyed or terminated by the joint acts of the husband and wife. But if they cannot mutually agree upon a sale or a division of the property, and there is no divorce, the entire property becomes vested in the survivor.

The tenancy by the entirety is today recognized in only nineteen states and the District of Columbia, and among these jurisdictions there is a variance as to the incidents.[7] This article is concerned

[3] Carter v. Continental Ins. Co., 242 N.C. 578, 579-80, 89 S.E.2d 122, 123 (1955). Other portions of Davis v. Bass were quoted at length in Lanier v. Dawes, 255 N.C. 458, 461-62, 121 S.E.2d 857, 860 (1961).

[4] Jones v. W. A. Smith & Co., 149 N.C. 317, 62 S.E. 1092 (1908); see Carter v. Continental Ins. Co., 242 N.C. 578, 580, 89 S.E.2d 122, 124 (1955). See generally 26 AM. JUR., *Husband and Wife* §§ 66, 81 (1940); 41 C.J.S., *Husband and Wife* §§ 34(c), 34(d)(1)(b) (1944).

[5] See note 4 *supra.*

[6] See Carter v. Continental Ins. Co., 242 N.C. 578, 580, 89 S.E.2d 122, 123 (1955).

[7] The jurisdictions, besides North Carolina, recognizing tenancy by the

only with the characteristics and incidents of the tenancy by the entirety in North Carolina.

Tenancies by the entirety are very popular in North Carolina. It is estimated that fully ninety per cent of all husbands and wives select this form of co-ownership when a home is purchased.[8] The Supreme Court of North Carolina in 1954 said: "And the doctrine of title by entireties between husband and wife as it existed at common law remains unchanged by statute in this State. Decisions of this Court so holding are too numerous to list."[9] Two years later the same court said: "No sound reason has been suggested why the right to create these estates should be limited or discouraged."[10]

Forces causing the elimination of tenancies by the entirety from so many states include (1) the growing independence of women, and (2) the demands of creditors for increased access to the assets of their debtors.[11] Although the tenancy by the entirety does operate to the detriment of the creditor class, it would seem definitely to have advantages for the wife, who usually outlives her husband. If a tenancy by the entirety could be reached by the creditors of either the husband or the wife, the interest of the other spouse would be adversely affected. There is, of course, nothing to prevent a husband or a wife from acquiring real estate solely in his or her own name. But if the couple buy, for example, a home as tenants by the entirety they will have at least a place in which they can live the rest of their marital life, free from unanticipated contract and tort claims.[12]

Public policy should favor, at least in the ownership of a home, the tenancy by the entirety. The family life of the state is strengthened when married couples are encouraged to buy and make im-

entirety are: Arkansas, Delaware, District of Columbia, Florida, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wyoming. For a table, with citations, setting forth the variable incidents of an estate by the entirety in the several jurisdictions, see Phipps, *supra* note 1. For a recent listing, see 4 THOMPSON, *op. cit. supra* note 1, § 1784.

[8] This estimate has been based upon conversations with real-estate operators.

[9] Nesbitt v. Fairview Farms, Inc., 239 N.C. 481, 486, 80 S.E.2d 472, 476-77 (1954).

[10] Woolard v. Smith, 244 N.C. 489, 495, 94 S.E.2d 466, 470 (1956).

[11] 4 POWELL, *op. cit. supra* note 1, §§ 621, 623; 2 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 1, § 6.6(d).

[12] The same result could probable also be achieved by improved homestead laws.

provements to a house, which they and their children can call "home." There is in North Carolina probably no other rule of property which does so much to solidify the marital status.

Creation of Tenancy by the Entirety

A tenancy by the entirety may be created by deed or by will. "When land is conveyed or devised to husband and wife, nothing else appearing, they take by the entirety, and upon the death of either the other takes the whole by the right of survivorship."[13] If the grantees in a deed are actually at the time husband and wife, a tenancy by the entirety is created even though they are not named as such, and even though there is no express mention in the instrument of a tenancy by the entirety.[14] Thus in *Byrd v. Patterson*[15] a deed to a named person "and wife" was held a sufficient designation of the grantees and vested in them a tenancy by the entirety. The name of the wife appeared nowhere in the deed, but the court said that when necessary this could be proved by extrinsic evidence.[16]

There is one instance where the grantees in a deed, who are husband and wife, do not take as tenants by the entirety.[17] This is where there is a partition deed or a voluntary exchange of deeds by tenants in common in pursuance of a scheme to divide the land held by them in common.[18] In *Smith v. Smith*[19] the court said:

> This Court has consistently held that where tenants in common divide the common land and by exchange of deeds allot to each his or her share of the land, the deeds employed create no new title and serve only to sever the unity of possession. And if any of such deeds names the tenant and his wife or the tenant and her husband as grantees, no estate by the entireties is thereby created, even if they are so named with the consent

[13] Moore v. Greenville Banking & Trust Co., 178 N.C. 118, 124, 100 S.E. 269, 272 (1919); *accord*, Bowling v. Bowling, 252 N.C. 527, 114 S.E.2d 228 (1960); Edwards v. Batts, 245 N.C. 693, 97 S.E.2d 101 (1957); Byrd v. Patterson, 229 N.C. 156, 48 S.E.2d 45 (1948); see Smith v. Smith, 249 N.C. 669, 677, 107 S.E.2d 530, 535-36 (1959); Davis v. Bass, 188 N.C. 200, 207, 124 S.E. 566, 570 (1924).

[14] 41 C.J.S., *Husband and Wife* § 31(b)(1) (1944). See Byrd v. Patterson, 229 N.C. 156, 158, 48 S.E.2d 45, 46-47 (1948) and, by inference, other cases in note 13.

[15] 229 N.C. 156, 48 S.E.2d 45 (1948).

[16] *Id.* at 159, 48 S.E.2d at 47.

[17] Smith v. Smith, 249 N.C. 669, 107 S.E.2d 530 (1959) (prior cases cited therein).

[18] *Id.* at 677, 107 S.E.2d at 536.

[19] 249 N.C. 669, 107 S.E.2d 530 (1959).

> of the tenant. The grantees must be both jointly named and jointly entitled . . . . A partition deed assigns to heir or co-tenant only what is already his. He acquires no title to the land by such deed. He already has title by inheritance from the ancestor or by the deed of conveyance to the tenants in common. The partition deed merely fixes the boundaries to his share that he may hold it in severalty. If the partition deed is made to cotenant and spouse, there is created no estate by entireties. There is no unity of time and title, and the grantees are not jointly named and jointly entitled.[20]

But where there is no evidence that a voluntary exchange of deeds between tenants in common was in the nature of a partition of the land, there may be conveyance by one tenant in common of his share to another tenant in common, and the wife of the other tenant in common to hold as tenants by the entirety.[21]

A tenancy by the entirety is not created if the grantees are not legally husband and wife even though they are so described.[22] The conveyance will be construed a tenancy in common. This was the situation in *Lawrence v. Heavner*,[23] where a man bought real estate with his own funds and had the title conveyed to himself and a woman under the mistaken belief that they were husband and wife. It turned out that the woman had a living, undivorced husband at the time of the purported marriage, and subsequently an annulment was rendered. The court noted that nothing else appearing, the parties hold the realty as tenants in common.

The nature of a tenancy by the entirety depends upon the marital status of the parties as of the time of its creation. Thus where real property is conveyed to a man and a woman who are not married, but who afterwards intermarry, they will continue to hold as tenants in common.[24] This has been said to be so even though the con-

[20] *Id.* at 677, 107 S.E.2d at 536.

[21] Morton v. Blades Lumber Co., 154 N.C. 278, 70 S.E. 467 (1911); see Smith v. Smith, 249 N.C. 669, 678, 107 S.E.2d 530, 536 (1959).

[22] *E.g.*, Lawrence v. Heavner, 232 N.C. 557, 61 S.E.2d 697 (1950); see Grant v. Toatley, 244 N.C. 463, 466, 94 S.E.2d 305, 307 (1956). See generally 26 AM. JUR., *Husband and Wife* § 70 (1940); 41 C.J.S., *Husband and Wife* § 31(b)(1) (1944).

[23] 232 N.C. 557, 61 S.E.2d 697 (1950).

[24] 26 AM. JUR., *Husband and Wife* §§ 70, 87 (1940); MADDEN, PERSONS AND DOMESTIC RELATIONS § 45 (1931); see Davis v. Bass, 178 N.C. 200, 207, 124 S.E. 566, 570 (1924); Isley v. Sellars, 153 N.C. 374, 377, 69 S.E. 279, 280 (1910); Jones v. W. A. Smith & Co., 149 N.C. 317, 319, 62 S.E. 1092, 1093 (1908).

veyance was made to them in anticipation of their intermarrying.[25]

If real property is given to *A, B,* and *C,* and *A* and *B* are husband and wife, they, being in law considered one person, will take a half interest in the property and *C* will take the other half. Thus *A* and *B* hold one-half of the land as tenants by the entirety and *C* holds the other half as a tenant in common with the married entity.[26] This ancient absurdity seems still to be the law of North Carolina,[27] and decisions in other juridictions are in accord.[28] It has similarly been held that if land is conveyed to two married couples, each husband and wife hold as tenants by the entirety as between themselves, but as tenants in common with the other pair.[29]

A tenancy in common, and not a tenancy by the entirety, arises where the husband and the wife have acquired their interests in the land by a separate deed to each. For example, if two brothers own land as tenants in common, and one conveys his half interest to the wife of the other, the husband and the wife thereafter hold the land at tenants in common and not as tenants by the entirety.[30]

A husband and a wife may acquire real property as tenants in common, where there is no right of survivorship, if the conveyance so indicates.[31] "However, in the absence of an expressed contrary intention, a tenancy by the entirety arises whenever an estate is conveyed or devised to two persons, they being, when it is so conveyed

[25] 26 AM. JUR., *Husband and Wife* § 70 (1940). "If, however, the estate created by a conveyance or devise does not vest in husband and wife until after they are married, it is immaterial that they were not married at the time of the execution of the instrument under which they claim title." *Id.* at 698.

[26] 4 POWELL, REAL PROPERTY § 622 (1954).

[27] Luther v. Luther, 157 N.C. 499, 73 S.E. 102 (1911); Darden v. Timberlake, 139 N.C. 181, 51 S.E. 895 (1905); Hampton v. Wheeler, 99 N.C. 222, 6 S.E. 236 (1888); see Davis v. Bass, 188 N.C. 200, 205, 124 S.E. 566, 569 (1924); Moore v. Greenville Banking & Trust Co., 178 N.C. 118, 124, 100 S.E. 269, 272 (1919). See generally MORDECAI, LAW LECTURES 608 (2d ed. 1916).

[28] 4 POWELL, REAL PROPERTY § 622 (1954).

[29] *Ibid.*

[30] Isley v. Sellars, 153 N.C. 374, 69 S.E. 279 (1910); see Smith v. Smith, 249 N.C. 669, 678, 107 S.E.2d 530, 536 (1959). See generally 26 AM. JUR., *Husband and Wife* § 87 (1940).

[31] Holloway v. Green, 167 N.C. 91, 83 S.E. 243 (1914); Eason v. Eason, 159 N.C. 539, 75 S.E. 797 (1912); see Davis v. Bass, 188 N.C. 200, 207, 124 S.E. 566, 570 (1924); Moore v. Greenville Banking & Trust Co., 178 N.C. 118, 125-26, 100 S.E. 269, 273 (1919); Highsmith v. Page, 158 N.C. 226, 229, 73 S.E. 998, 999 (1912); Isley v. Sellars, 153 N.C. 374, 376-77, 69 S.E. 279, 280 (1910); Stalcup v. Stalcup, 137 N.C. 305, 306-07, 49 S.E. 210, 211 (1904). See generally 2 AMERICAN LAW OF PROPERTY § 6.6(a) (1952); MORDECAI, LAW LECTURES 609 (2d ed. 1916).

or devised, husband and wife."[32] In determining whether the husband and wife take as tenants in common or as tenants by the entirety, the entire instrument passing the estate to them must be examined. And if from the instrument it is determined that it was intended that they should take as tenants in common, this intention must prevail. The intention is to be arrived at from a perusal of the entire instrument.[33] In *Eason v. Eason*[34] it was held that a conveyance to a husband and wife "each one-half interest" created a tenancy in common. It would also seem that a husband and a wife could acquire land as tenants in common if land were conveyed to them "as tenants in common and not at tenants by the entirety."

A tenancy by the entirety may exist in lands whether the estate be in fee, for life, or for years, and whether the same be in possession, reversion or remander.[35] Equitable, as well as legal, estates may be held as tenancies by the entirety.[36]

Where a wife purchases land with her separate property or money, and requests that the deed be made out to her husband and herself, there is the presumption of a resulting trust in favor of the wife and not an estate by the entirety.[37]

> It is one of the essentials of the peculiar estate by entireties sometimes enjoyed by husband and wife that the spouses be *jointly entitled* as well as jointly named in the deed. Hence, if the wife alone be entitled to a conveyance, and it is made to her and her husband jointly, the latter will not be allowed to retain the whole by survivorship. And it matters not if the conveyance is so made at her request, because being a married

[32] Davis v. Bass, *supra* note 31, at 207, 124 S.E. at 570 (1924).
[33] Highsmith v. Page, 158 N.C. 226, 73 S.E. 998 (1912).
[34] 159 N.C. 539, 75 S.E. 797 (1912).
[35] Sprinkle v. Spainhour, 149 N.C. 223, 62 S.E. 910 (1908) (life estate); Stamper v. Stamper, 121 N.C. 251, 28 S.E. 20 (1897) (equitable: contract to convey to husband and wife); Simonton v. Cornelius, 98 N.C. 433, 4 S.E. 38 (1887) (conveyance to husband and wife "during their natural lives"); see Lanier v. Dawes, 255 N.C. 458, 461, 121 S.E.2d 857 (1961); Davis v. Bass, 188 N.C. 200, 209, 124 S.E. 566, 571 (1924). See generally 26 AM. JUR., *Husband and Wife* §§ 66, 80 (1940); 2 AMERICAN LAW OF PROPERTY § 6.6 (1952); 41 C.J.S., *Husband and Wife* § 34(b) (1944); MORDECAI, LAW LECTURES 608 (2d ed. 1916).
[36] See note 35 *supra*.
[37] Deese v. Deese, 176 N.C. 527, 97 S.E. 475 (1918). See Ingram v. Easley, 227 N.C. 442, 444, 42 S.E.2d 624, 626 (1947); Wilson v. Ervin 227 N.C. 396, 399, 42 S.E.2d 468, 470 (1947); Carter v. Oxendine, 193 N.C. 478, 481, 137 S.E. 424, 425 (1927).

> woman she is presumed to have acted under the coercion of her husband.[38]

Under this view the wife is the sole and absolute owner, and upon her death the husband acquires an interest in the same only by the terms of her will[39] or the Intestate Succession Act. In 1959 the court explained the expression "jointly entitled."[40] It seems that the court could have reached the same result through an application of the ordinary doctrine of a resulting trust. Under this doctrine, when the purchase price of property is paid with the money of one person, and the title is taken in the name of another, there arises the presumption of a resulting trust in favor of the person furnishing the money.[41]

Where the husband furnishes the entire purchase price, and the title to the land is placed in the name of himself and his wife, the law presumes the creation of a tenancy by the entirety.[42] There is a presumption that the husband has made a gift to his wife of an

[38] Sprinkle v. Spainhour, 149 N.C. 223, 226, 62 S.E. 910, 911 (1908). For this quotation or its restatement in other decisions, see Smith v. Smith, 249 N.C. 669, 677, 107 S.E.2d 530, 536 (1959); Davis v. Vaughn, 243 N.C. 486, 492, 91 S.E.2d 165, 169 (1956); Ingram v. Easley, 227 N.C. 442, 444, 42 S.E.2d 624, 626 (1947); Carter v. Oxendine, 193 N.C. 478, 481, 137 S.E. 424, 425 (1927); Deese v. Deese, 176 N.C. 527, 528, 97 S.E. 475 (1918); Kilpatrick v. Kilpatrick, 176 N.C. 182, 185-86, 96 S.E. 988, 989 (1918); Speas v. Woodhouse, 162 N.C. 66, 68-69, 77 S.E. 1000-001 (1913).

[39] Or by dissent to the will pursuant to N.C. GEN. STAT. § 30-1 (Supp. 1961). Under N.C. GEN. STAT. § 30-1 either spouse may in certain instances dissent from the will of the other. But Dudley v. Staton, 257 N.C. 572, 126 S.E.2d 590 (1962) held that this statute violated Art. X, Sec. 6 of the North Carolina Constitution insofar as it permits the surviving husband to dissent from his deceased wife's will.

[40] "We should consider what is meant by the expression 'jointly entitled.' It cannot be construed to mean that both the husband and wife had paid a substantial or valuable consideration for the conveyance, nor that both of them, jointly or individually, had some equity, right, title, interest, or estate in the land before the conveyance was made." Smith v. Smith, 249 N.C. 669, 677-78, 107 S.E.2d 530, 536 (1959). If the law was otherwise a husband owning land could not create an estate by the entirety by deeding the land to himself and his wife.

[41] *E.g.*, Kelly Springfield Tire Co. v. Lester, 190 N.C. 411, 130 S.E. 45 (1925). See generally BOGERT, TRUSTS AND TRUSTEES § 450 (1951); RESTATEMENT, TRUSTS § 440 (1940); SCOTT, TRUSTS § 440 (2d ed. 1956). Where the wife furnishes only a part of the purchase price, there arises a resulting trust pro tanto in her favor. Cunningham v. Bell, 83 N.C. 328 (1880). N.C. GEN. STAT. § 39-13.3 (Supp. 1961), enacted in 1957, deals with conveyances between husband and wife and would not seem applicable to a conveyance from a third person to a husband and a wife.

[42] Bowling v. Bowling, 252 N.C. 527, 114 S.E.2d 228 (1960); Morton v. Blades Lumber Co., 154 N.C. 278, 70 S.E. 467 (1911); see Honeycutt v. Citizens Nat'l Bank, 242 N.C. 734, 741, 89 S.E.2d 598, 604 (1955); *cf.* Akin v. First Nat'l Bank, 227 N.C. 453, 42 S.E.2d 518 (1947).

interest in an estate by the entirety; and to rebut the presumption of a gift and establish a resulting trust the evidence must be clear, strong, and convincing.[43] It has been said that it is presumed the husband knew the effect of his act.[44]

Under the early common law a married person who owned real property in fee simple could not create a tenancy by the entirety by conveying the property directly to himself and the other spouse.[45] As a consequence, if a husband owned land and he wanted to convert it into a tenancy by the entirety, he circumvented the rule by conveying his land to a third person (a straw man) who in turn conveyed the land to the husband and wife. The courts held that this transaction created a valid tenancy by the entirety. "Indeed, this is the device customarily used in creating such an estate in land owned by one spouse, when it is desired that it be held by the entireties."[46] But a statute enacted in 1957 has freed our law of this anachronism. The statute provides for the creation and dissolution of a tenancy by the entirety by direct conveyance between the spouses, as well as other types of direct land conveyances between the spouses.[47]

[43] See Bowling v. Bowling, 252 N.C. 527, 531, 114 S.E.2d 228, 231 (1960); Honeycutt v. Citizens Nat'l Bank, 242 N.C. 734, 741, 89 S.E.2d 598 (1955).

[44] Morton v. Blades Lumber Co., 154 N.C. 278, 70 S.E. 467 (1911). It is generally held that a gift is presumed where a husband takes title to land in the name of his wife. But a resulting trust and not a gift is presumed where a wife purchases land in the name of her husband. *E.g.*, Bullman v. Edney, 232 N.C. 465, 61 S.E.2d 338 (1950); Kelly Springfield Tire Co. v. Lester, 190 N.C. 411, 130 S.E. 45 (1925); See generally SCOTT, TRUSTS §442 (2d ed. 1956). The author doubts that the husband knows the legal effect of his act any more than does his wife. Furthermore, to him, it seems unsound to say that there is an inference that a husband intends to make a gift to his wife, but not that a wife intends to make a gift to her husband. It is not believed that husbands have a greater affection for their wives than wives have for their husbands.

[45] Such an attempt failed because the required unities were not created at the same time; one of the grantees had acquired his interest before the other. 4 POWELL, REAL PROPERTY § 622 (1954).

[46] Smith v. Smith, 249 N.C. 669, 678, 107 S.E.2d 530, 536 (1959).

[47] N.C. GEN. STAT. § 39-13.3 (Supp. 1961) provides: "(a) A conveyance from a husband or wife to the other spouse of real property or any interest therein owned by the grantor alone vests such property or interest in the grantee. (b) A conveyance of real property, or any interest therein, by a husband or wife to such husband and wife vests the same in the husband and wife as tenants by the entirety unless a contrary intention is expressed in the conveyance. (c) A conveyance from a husband or a wife to the other spouse of real property, or any interest therein, held by such husband and wife as tenants by the entirety dissolves such tenancy in the property or interest conveyed and vests such property or interest formerly held by the entirety in the grantee. (d) The joinder of the spouse of the grantor in any conveyance made by a husband or a wife pursuant to the foregoing provisions of this section is not necessary. (e) Any conveyance by a wife authorized

A wife cannot convey her real property to her husband, either directly or indirectly, without complying with the privy examination requirements of G.S. § 52-12.[48] A deed by a husband and wife conveying lands held by them as tenants by the entirety to a trustee for the use and benefit of the husband is a conveyance of land by a wife to her husband within the meaning of G.S. § 52-12.[49] A husband however may convey to his wife any right, title or interest which he owns in the real estate without complying with the requirements of G.S. § 52-12.[50]

In *Hatcher v. Allen*[51] a husband and a wife owned land as tenants by the entirety. Subsequently they executed a deed of trust thereon to secure money borrowed. Family discord developed, and the wife left the husband. The wife contended that the husband continued in possession of the property, collected the rents therefrom, and purposely defaulted in the payments of the borrowed money so as to bring about a foreclosure. She contended that the property was purchased at foreclosure by a third person acting for the husband, such third person reconveying to the husband. The court said that if the wife could establish her allegations, the husband would hold the title upon a constructive trust for both husband and wife.[52]

No Entirety in Personal Property

A tenancy by the entirety in personal property is not recognized in North Carolina.[53] In this state a tenancy by the entirety may

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by this section is subject to the provisions of G. S. 52-12." The year preceding the enactment of this statute it was held that a husband owning land could create a tenancy by the entirety by deeding the land to himself and his wife. Woolard v. Smith, 244 N.C. 489, 94 S.E.2d 466 (1956); see Smith v. Smith, 249 N.C. 669, 678, 107 S.E.2d 530, 536 (1959).

[48] Brinson v. Kirby, 251 N.C. 73, 110 S.E.2d 482 (1959); Davis v. Vaugh, 243 N.C. 486, 91 S.E.2d 165 (1956), noted in 34 N.C.L. Rev. 571 (1956); Honeycutt v. Citizens Nat'l Bank, 242 N.C. 734, 89 S.E.2d 598 (1955); McCullen v. Durham, 229 N.C. 418, 50 S.E.2d 511 (1948); Ingram v. Easley, 227 N.C. 442, 42 S.E.2d 624 (1924) (prior cases cited therein).

[49] Fisher v. Fisher, 218 N.C. 42, 9 S.E.2d 493 (1940).

[50] Hendley v. Perry, 229 N.C. 15, 47 S.E.2d 480 (1948); Walker v. Long, 109 N.C. 510, 14 S.E. 299 (1891).

[51] 220 N.C. 407, 17 S.E.2d 454 (1941).

[52] "Where the purchase by a third person was only nominal, he merely acting as agent for one of the cotenants, a deed to him will be considered as a matter of form merely and a conveyance from him to his principal will come under the well settled rule that if one cotenant purchases an outstanding title, and claims under it the common property as against the other, if they contest it his claim will not be allowed, because it must be presumed that each, as to the common interest, acts for all. That is to say, if one cotenant purchases, either directly or indirectly, at a foreclosure sale he cannot, by his own act, thus sever the cotenancy." *Id.* at 410, 17 S.E.2d at 456.

[53] Bowling v. Bowling, 243 N.C. 515, 91 S.E.2d 176 (1956); Wilson v.

exist only in land and not in personalty of any kind. If a husband and a wife are co-owners of personal property, nothing else appearing, they hold as tenants in common.[54]

Other states which permit tenancies by the entirety as to land are divided as to whether this form of ownership can also be created in personalty.[55] It has been said that the decided weight of authority is that a tenancy by the entirety may exist in personal property as well as in real property.[56]

In *Turlington v. Lucas*[57] a husband and wife were made payees of a bond secured by a deed of trust on real property of the borrower. The husband died. The Supreme Court of North Carolina held that the bond had been held by the spouses as tenants in common; and that on the death of the husband his administrator took a half interest in the bond and that the other half interest belonged to the surviving wife. Similarly, in *Winchester-Simmons Co. v. Cutler*[58] a testator devised and bequeathed to "L. H. Cutler and wife, Laura

Ervin, 227 N.C. 396, 42 S.E.2d 468 (1947); Winchester-Simmons Co. v. Cutler, 194 N.C. 698, 140 S.E. 622 (1927); Turlington v. Lucas, 186 N.C. 283, 119 S.E. 366 (1923); see Lanier v. Dawes, 255 N.C. 458, 462, 121 S.E.2d 857, 860 (1961); Bowling v. Bowling, 252 N.C. 527, 531, 114 S.E.2d 228, 231 (1960); Dozier v. Leary, 196 N.C. 12, 13, 144 S.E. 368, 369 (1928); Davis v. Bass, 188 N.C. 200, 209, 124 S.E. 566, 571 (1924); Gooch v. Weldon Bank & Trust Co., 176 N.C. 213, 216 (1918); Note, 6 N.C.L. REV. 342 (1928). The reason for not extending the estate by entirety to the personal property in North Carolina, as has been done in a number of states, "is not only that it is an anomaly in our judicial system, without any statute recognizing it, and that it is contrary to our policy as to property rights of women, as stated in the Constitution, but that it abstracts the property embraced in it from liability to debt during the joint lives, and that all during this time the husband enjoys the income from the wife's half of the property, as well as from his own half." Turlington v. Lucas, 186 N.C. 283, 287, 119 S.E. 366, 368 (1923).

[54] As to the tenancy in common, see section 123 of the author's forthcoming text on North Carolina Family Law. For discussion of joint bank accounts, see section 126 of the same text.

[55] See 26 AM. JUR., *Husband & Wife* §§ 69, 76 (1940); 2 AMERICAN LAW OF PROPERTY § 6.6(c) (1952); 41 C.J.S., *Husband & Wife* § 35 (1944); MADDEN, PERSONS AND DOMESTIC RELATIONS § 45 (1931); 4 POWELL, REAL PROPERTY § 622 (1954); Annot., 8 A.L.R. 1017 (1920), supplemented by Annot., 117 A.L.R. 915 (1938).

[56] 26 AM. JUR., *Husband & Wife* § 76 (1940); Annot., 8 A.L.R. 1017 (1920), supplemented by Annot., 117 A.L.R. 915 (1938).

[57] 186 N.C. 283, 119 S.E. 366 (1923).

[58] 194 N.C. 698, 140 S.E. 622 (1927), noted in 6 N.C. L. REV. 342 (1928). This was a 3 to 2 decision. The dissenting opinion of Justice Conner, with Chief Justice Stacy concurring in the dissent, expressed the idea that in the light of the language used in the will a tenancy by the entirety was created: "The estate or interest which Mr. and Mrs. Cutler take in the bonds is determined, not by the law, but by the language of the testator, which shows her intention as to such estate or interest."

D. Cutler, as husband and wife by entireties, all that certain house and lot in the city of New Bern . . . and ten thousand dollars of my North Carolina four per cent bonds of par value, to have and to hold the same real estate and bonds to them as husband and wife by entireties and to the survivor of them in fee simple." The court held that the bonds were held by the spouses as tenants in common, and that the creditors of the husband could reach the husband's one-half interest in the bonds but not the remaining half belonging to the wife. The devise of the real estate was not in controversy; presumably it was considered by all parties as constituting a valid tenancy by the entirety.

When land held as a tenancy by the entirety is sold, the proceeds derived from the sale are personalty and belong to the husband and wife as tenants in common.[59] The cash proceeds of the sale are not held, as was the land itself, as tenants by the entirety with the right of survivorship.[60] The spouses have, of course, the right to dispose of the proceeds among themselves in any way they desire.[61]

Ordinarily, nothing else appearing, money in a bank deposited to the credit of husband and wife belongs one-half to the husband and one-half to the wife.[62]

Where land held as a tenancy by the entirety is sold and the purchase price is made by checks payable to both husband and wife, and the wife endorses the checks and turns them over to the husband who endorses and cashes same and invests the proceeds in other property, a trust arises by operation of law in favor of the wife in the absence of evidence that she intended to make a gift of her share of the proceeds to him, and she is entitled to an accounting of the proceeds.[63]

Husband's Right to Control, Possession and Income

Although in a tenancy by the entirety neither spouse acting alone can defeat the other spouse's right of survivorship in the whole estate, the husband is entitled to the control and use of the land the

[59] Wilson v. Ervin, 227 N.C. 396, 42 S.E.2d 468 (1947). See Bowling v. Bowling, 252 N.C. 527, 531, 114 S.E.2d 228, 231 (1960); Bowling v. Bowling, 243 N.C. 515, 519, 91 S.E.2d 176, 180 (1956); Honeycutt v. Citizens Nat'l Bank, 242 N.C. 734, 743, 89 S.E.2d 598, 605 (1955).

[60] *Ibid.*

[61] *Ibid.*

[62] Bowling v. Bowling, 243 N.C. 515, 91 S.E.2d 176 (1956). See also section 126 in the author's forthcoming text on North Carolina Family Law dealing with joint bank accounts.

[63] Bowling v. Bowling, 252 N.C. 527, 114 S.E.2d 228 (1960).

same as if it were his own.[64] The principles and incidents of a tenancy by the entirety have not been changed by article X, section 6, of the Constitution of North Carolina or by any of the statutes of this state,[65] and they remain the same as at common law.[66] During the existence of the tenancy by the entirety, the husband has the absolute and exclusive right to the control, use, possession, rents, income, and profits of the land.[67] The estate by the entirety is indeed an anomaly. It seems strange in modern times that during marriage, the wife's interest in the property held by the entirety should be her husband's and not hers.

The common-law rule giving to the husband the exclusive right to the control, use, possession and income of an estate by the entirety still exists in a small number of other states, but in the vast majority the common-law rule has been modified by statute.[68] It should be changed by the statutes of North Carolina.

In *West v. Aberdeen & R.R.R.*[69] the woods on an estate by the entirety were damaged by a fire caused by the negligence of a rail-

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[64] Dorsey v. Kirkland, 177 N.C. 520, 522-23, 99 S.E. 407, 409 (1919); Bank of Greenville v. Gornto, 161 N.C. 341, 342, 77 S.E. 222, 223 (1913).

[65] Moore v. Shore, 208 N.C. 446, 447, 181 S.E. 275, 276 (1935); First Nat'l Bank v. Hall, 201 N.C. 787, 789, 161 S.E. 484, 485 (1931); Johnson v. Leavitt, 188 N.C. 682, 684, 125 S.E. 490, 491 (1924); Bank of Greenville v. Gornto, *supra* note 64, at 343, 77 S.E. at 223; West v. Aberdeen & R.R.R., 140 N.C. 620, 621-22, 53 S.E. 477-78 (1906).

[66] Bynum v. Wicker, 141 N.C. 95, 53 S.E. 478 (1906); First Nat'l Bank v. Hall, *supra* note 65. See Johnson v. Leavitt, *supra* note 65.

[67] Lewis v. Pate, 212 N.C. 253, 193 S.E. 20 (1937); Moore v. Shore, 208 N.C. 446, 181 S.E. 275 (1935); First Nat'l Bank v. Hall, 201 N.C. 787, 161 S.E. 484 (1931); Johnson v. Leavitt, 188 N.C. 682, 125 S.E. 490 (1924); Dorsey v. Kirkland, 177 N.C. 520, 99 S.E. 407 (1919); Bank of Greenville v. Gornto, 161 N.C. 341, 77 S.E. 222 (1913); Bynum v. Wicker, *supra* note 66; West v. Aberdeen & R.R.R., 140 N.C. 620, 53 S.E. 477 (1906); see *In re* Perry's Estate, 256 N.C. 65, 70, 123 S.E.2d 99, 102 (1961); Smith v. Smith, 255 N.C. 152, 156, 120 S.E.2d 575, 579-80 (1961); Porter v. Citizens Bank, 251 N.C. 573, 577, 111 S.E.2d 904, 907-08 (1960); Nesbitt v. Fairview Farms, Inc., 239 N.C. 481, 486, 80 S.E.2d 472, 476-77 (1954); Williams v. Williams, 231 N.C. 33, 38, 56 S.E.2d 20, 24 (1949); Atkinson v. Atkinson, 225 N.C. 120, 129, 33 S.E.2d 666, 674 (1945); Wright v. Wright, 216 N.C. 693, 696, 6 S.E.2d 555, 557 (1940); Bryant v. Bryant, 193 N.C. 372, 378, 137 S.E. 188, 191 (1927); Davis v. Bass, 188 N.C. 200, 205-06, 124 S.E. 566, 569 (1924); Holton v. Holton, 186 N.C. 355, 361, 119 S.E. 751, 753 (1923); Moore v. Greenville Banking & Trust Co., 178 N.C. 118, 123-25, 100 S.E. 269, 272-73 (1919).

[68] See 26 AM. JUR., *Husband and Wife* § 77 (1940); 2 AMERICAN LAW OF PROPERTY § 6.6(b) (1952); 41 C.J.S., *Husband and Wife* § 34(d)(1)(a) (1944); 4 POWELL, REAL PROPERTY § 623 (1954); Phipps, *Tenancies by Entireties*, 25 TEMPLE L.Q. 24 (1951) (contains table of the several states).

[69] 140 N.C. 620, 53 S.E. 477 (1906).

road. In holding that the wife was not a necessary party, the Supreme Court of North Carolina said:

> But while at common law neither the husband nor the wife can deal with the estate apart from the other, or has any interest which can be subjected by creditors so as to affect the right of the survivor, yet subject to this limitation the husband has the rights in it which are incident to his own property. He is entitled during the coverture to the full control and the usufruct of the land to the exclusion of the wife . . . . She is not entitled to sue for this damage nor to share in the recovery.[70]

The husband may lease land held as a tenancy by the entirety without the joinder or consent of the wife, and such lease will be good against the wife during coverture and will fail only in the event of her surviving him.[71] This is because the husband is entitled to the possession, use, income or usufruct of the property during their joint lives. He is not required to account to his wife for any of the rent received.[72]

In *Lewis v. Pate*[73] it was held that crops raised on land held as an estate by the entirety could be levied upon and sold under an execution to satisfy a judgment against the husband to the exclusion of any interest the wife may have.[74]

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[70] *Id.* at 621-22, 53 S.E. at 477. See also Carter v. Continental Ins. Co., 242 N.C. 578, 89 S.E.2d 122 (1955); Bynum v. Wicker, 141 N.C. 95, 53 S.E. 478 (1906); *cf.* Jones v. W. A. Smith & Co., 149 N.C. 317, 62 S.E. 1092 (1908), where husband cut and delivered timber from an estate by the entirety and the wife was not allowed to bring an action for a partition of the proceeds of the sale in the hands of the purchaser.

[71] Bank of Greenville v. Gornto, 161 N.C. 341, 77 S.E. 222 (1913); see Johnson v. Leavitt, 188 N.C. 682, 683-84, 125 S.E. 490, 491 (1924); Davis v. Bass, 188 N.C. 200, 205-07, 124 S.E. 566, 569-70 (1924); Moore v. Greenville Banking & Trust Co., 178 N.C. 118, 125, 100 S.E. 269, 273 (1919); Dorsey v. Kirkland, 177 N.C. 520, 523, 99 S.E. 407, 409 (1919); Bynum v. Wicker, *supra* note 70.

[72] See cases cited note 67 *supra.*

[73] 212 N.C. 253, 193 S.E. 20 (1937).

[74] A similar result was reached in Brinson v. Kirby, 251 N.C. 73, 110 S.E.2d 482 (1959). In *Brinson* the recorded deed to a farm was in the names of a husband and wife as tenants by the entirety. A judgment was obtained against the husband and an execution was issued to have sold, to satisfy the judgment, a crop of tobacco produced on the farm. The wife brought an independent action to prevent the sale of the tobacco. The court held that the wife could do so by proving that the land was not after all held as a tenancy by the entirety, but was really her own since her deed to a "straw man" and the latter's deed to the husband and wife were void for failure to comply with G.S. § 52-12.

The husband may execute a mortgage on land held as an estate by the entirety, without the joinder or consent of his wife, to the extent of his common-law interest; but he has no right to encumber the property so as to interfere with or defeat the interest of his surviving wife.[75] Upon his death the lien of the mortgage is ipso facto cancelled and the entire estate is vested in the surviving wife.[76] In *Bynum v. Wicker,*[77] where the husband mortgaged the estate by entirety without the joinder of the wife, and upon a foreclosure of the mortgage the purchaser went into possession of the premises, the court said:

> At common law 'the fruits accruing during their joint lives would belong to the husband,' hence the husband could mortgage or convey it during their joint lives, that is, the right to receive the rents and profits; but neither could encumber it or convey it so as to destroy the right of the other, if survivor, to receive the land itself unimpaired.[78]

As a result the wife in *Bynum,* during coverture, was allowed an injunction restraining the purchaser from cutting the timber on the land.

By virtue of the husband's common-law right to the possession and control of the estate by the entirety, the husband alone may grant to a third person a license, easement or right of way affecting the property, which will be valid at least during their joint lives.[79] Whether it may continue beyond this time depends upon whether the wife or the husband survives. Thus in *Dorsey v. Kirkland,*[80] where the husband granted a right of way by deed to a third person without the joinder of the wife, the court said:

> If as appears from these authorities, the husband has the control and use of the property during the life of his wife, and may deal with it as his own, and if he may execute a valid

[75] First Nat'l Bank v. Hall, 201 N.C. 787, 161 S.E. 484 (1931); Bynum v. Wicker, 141 N.C. 95, 53 S.E. 478 (1906); see Willis v. Willis, 203 N.C. 517, 520, 166 S.E. 398, 399-400 (1932); Davis v. Bass, 188 N.C. 200, 205, 124 S.E. 566, 569 (1924); Moore v. Greenville Banking & Trust Co., 178 N.C. 118, 125, 100 S.E. 269, 273 (1919); Dorsey v. Kirkland, 177 N.C. 520, 523, 99 S.E. 407, 409 (1919).

[76] First Nat'l Bank v. Hall, *supra* note 75.

[77] 141 N.C. 95, 53 S.E. 478 (1906).

[78] *Id.* at 96, 53 S.E. at 478.

[79] Dorsey v. Kirkland, 177 N.C. 520, 99 S.E. 407 (1919). See generally 41 C.J.S., *Husband and Wife* § 34(d)(1)(c) (1944).

[80] 177 N.C. 520, 99 S.E. 407 (1919).

> mortgage or a lease for ten years, we see no reason for refusing to uphold his deed, subject to the limitation that all rights will cease upon his dying before his wife.[81]

Although the husband may make contracts or conveyances affecting his common-law right to the exclusive possession of the estate by the entirety, it was held in *Moore v. Shore*[82] that the wife is a necessary party to a contract or conveyance in reference to a "negative easement,"[83] because such involves more than mere possession during the joint lives of the spouses. In *Moore* each deed in a real estate subdivision provided that "the property herein described shall be used for residential purposes only." One of the owners of a lot in the real estate subdivision procured the written permission to erect a filling station on his lot from the owners of all the other lots affected by the restriction in their deeds, except in reference to property owned by Mr. and Mrs. Moore as tenants by the entirety. Mr. Moore gave his consent, but Mrs. Moore refused to do so. In issuing a restraining order prohibiting the erection of the filling station, the court said:

> While it is settled law with us that the husband, during coverture, may make valid conveyances and contracts affecting his right of possession in land held by him and his wife as tenants by the entireties, it is equally well settled as to tenants by the entireties that 'neither can convey during their joint lives so

[81] *Id.* at 523-24, 99 S.E. at 409. One wonders what will be the effect of the husband's alone executing a mortgage, lease, or right of way when the marriage is terminated not by death but by an absolute divorce, and the estate by entirety is automatically converted into a tenancy in common. Absolute divorces did not exist at common law.

[82] 208 N.C. 446, 181 S.E. 275 (1935).

[83] A "negative easement" is a restriction which burdens the use of land within a real estate subdivision. In discussing negative easements, the court in Craven County v. First-Citizens Bank & Trust Co., 237 N.C. 502, 75 S.E.2d 620 (1953), said: "These servitudes, commonly referred to as negative easements, are usually imposed by restrictive covenants between the developer and the initial purchasers and become seated in the chain of title so that subsequent purchasers are chargeable with notice thereof, thus fixing it so each lot in a legal sense owes to all the rest of the lots in the subdivision the burden of observing the covenant, and each of the rest of the lots is invested with the benefits imposed by the burdens . . . . Therefore, where land within a given area is developed in accordance with a general plan or uniform scheme of restriction, ordinarily any one purchasing in reliance on such restriction may sue and enforce the restriction against any other lot owner taking with record notice, and this is so regardless of when each purchased; and similarly, a prior taker may sue a latter taker. The right of action rests upon the principle that a negative easement of this sort is a property right amounting to an interest in land." *Id.* at 512, 75 S.E.2d at 628.

> as to bind the other, or defeat the right of the survivor to the whole estate,' and that 'neither could encumber it or convey it so as to destroy the right of the other, if survivor, to receive the land itself unimpaired.' . . . We think the erection of such service station would tend to defeat such rights of the wife, since under the holdings of this Court the right to enforce a restrictive building covenant will be lost where substantial and radical changes take place in the affected area. [Citations omitted.] The change from residential use to use for a filling station is both substantial and radical, and the loss of the restriction would defeat the right of the survivor to receive the lots, now held by the entireties, with a residential restriction extending to the other lots in said area.[84]

A husband may maintain an action for ejectment or damages to land held as an estate by the entirety without a joinder of the wife.[85] He may also maintain an action for the establishment of the true boundaries of the property without the joinder of the wife.[86]

While the husband is entitled to the possession of an estate by the entirety, and to take the rents and profits during marriage, this does not prevent such interest from being charged by a court order for the support of the wife and minor children.[87] The court may order the property to be rented out to produce an income to be applied to the subsistence of the wife and children.[88] The court may also issue a writ of possession, pursuant to G.S. § 50-17, giving the wife possession of the estate by the entirety, in order that she may apply the rents and profits as they shall accrue and become personalty to the payment of alimony and counsel fees as fixed by the court.[89] The court may even allow the wife exclusive possession of the home owned by the spouses as tenants by the entirety in an action fixing

[84] Moore v. Shore, 208 N.C. 446, 448, 181 S.E. 275, 276-77 (1935).

[85] Nesbitt v. Fairview Farms, Inc., 239 N.C. 481, 80 S.E.2d 472 (1954); West v. Aberdeen & R.R.R., 140 N.C. 620, 53 S.E. 477 (1906); Topping v. Sadler, 50 N.C. 357 (1858).

[86] Nesbitt v. Fairview Farms, Inc., *supra* note 85.

[87] Sellars v. Sellars, 240 N.C. 475, 82 S.E.2d 330 (1954); Wright v. Wright, 216 N.C. 693, 6 S.E.2d 555 (1940); Holton v. Holton, 186 N.C. 355, 119 S.E. 751 (1923); see *In re* Perry's Estate, 256 N.C. 65, 70, 123 S.E.2d 99, 102 (1961); Porter v. Citizens Bank, 251 N.C. 573, 577, 111 S.E.2d 904, 907-08 (1960).

[88] Holton v. Holton, *supra* note 87, at 362, 119 S.E. at 754.

[89] Porter v. Citizens Bank, 251 N.C. 573, 577, 111 S.E.2d 904, 907-08 (1960); Holton v. Holton, 186 N.C. 355, 361, 119 S.E. 751, 753 (1923).

alimony pendente lite and counsel fees under G.S. § 50-16.[90] The court does not, however, have the power to order the sale of land held as tenants by the entirety to procure funds to pay alimony to the wife or to pay her counsel fees.[91]

Rights of Creditors

In North Carolina a tenancy by the entirety is not subject to levy under execution on a judgment rendered against either the husband or the wife alone.[92] Neither the husband nor the wife has such an interest in an estate by the entirety as can be sold under execution to satisfy a judgment against him or her alone.[93] The possibility that the husband might survive the wife and thus become the sole owner cannot be the subject of a sale under execution.[94] Such a possibility does not constitute or create any present estate, legal or equitable, any more than a contingent remainder or any other prospective possibility.[95] Thus, in *Bruce v. Nickolson,*[96] the court said:

> The nature of this estate forbids and prevents the sale or disposal of it, or any part of it, by the husband or wife without the assent of both; the whole must remain to the survivor . . . . As a consequence, neither the interest of the husband, nor that of the wife, can be sold under execution so as to pass title during their joint lives or as against the survivor after the death of one of them . . . . Indeed it seems that the estate

[90] Sellars v. Sellars, 240 N.C. 475, 82 S.E.2d 330 (1954); Wright v. Wright, 216 N.C. 693, 6 S.E.2d 555 (1940).

[91] See Porter v. Citizens Bank, 251 N.C. 573, 577, 111 S.E.2d 904, 907-08 (1960); Holton v. Holton, 186 N.C. 355, 362, 119 S.E. 751, 754 (1923).

[92] Edwards v. Arnold, 250 N.C. 500, 109 S.E.2d 205 (1959); Keel v. Bailey, 214 N.C. 159, 198 S.E. 654 (1938); Winchester-Simmons Co. v. Cutler, 199 N.C. 709, 155 S.E. 611 (1930); Southern Distrib. Co. v. Carraway, 189 N.C. 420, 127 S.E. 427 (1925); Johson v. Leavitt, 188 N.C. 682, 125 S.E. 490 (1924); Martin v. Lewis, 187 N.C. 473, 122 S.E. 180 (1924); Harris v. Carolina Distrib. Co., 172 N.C. 14, 89 S.E. 789 (1916); Hood v. Mercer, 150 N.C. 699, 64 S.E. 879 (1909); Ray v. Long, 132 N.C. 891, 44 S.E. 652 (1903); Bruce v. Nickolson, 109 N.C. 202, 13 S.E. 790 (1891); see Davis v. Bass, 188 N.C. 200, 205, 124 S.E. 566, 569 (1924); Holton v. Holton, 186 N.C. 355, 361, 119 S.E. 751, 753 (1923); Bank of Glade Spring v. McEwen, 160 N.C. 414, 418-19, 76 S.E. 222, 224 (1912); *cf.* Lewis v. Pate, 212 N.C. 253, 193 S.E. 20 (1937).

[93] *Ibid.*

[94] Edwards v. Arnold, 250 N.C. 500, 506, 109 S.E.2d 205, 209-10 (1959); Bruce v. Nickolson, 109 N.C. 202, 206, 13 S.E. 790, 791 (1891).

[95] *Ibid.*

[96] 109 N.C. 202, 13 S.E. 790 (1891).

is not that of the husband or the wife; it belongs to that third person recognized by the law, the husband and wife.[97]

In states other than North Carolina there is a great deal of variation at the present time as to what, if anything, is available to the separate creditors of either spouse during the existence of the tenancy by the entirety.[98] In a majority of the states, where the estate by the entirety now exists, the interest of neither spouse may be sold to satisfy a judgment obtained against only one of the spouses.[99] However, in a number of states, where the husband is allowed the exclusive right to the control and use of the property during coverture, it has been held that all of the property held by the entirety can be reached by the husband's creditors, subject to the contingency that the wife might survive him and become entitled to the whole estate.[100] In these jurisdictions, as against the husband, the purchaser at the execution sale acquires possession and title; as against the wife, if the wife be living, the purchaser acquires title, but not the wife's title. If the wife survives her husband she will have the absolute title with the right of possession. If the husband survives the wife the purchaser's title will be absolute.

Since in North Carolina the husband has the exclusive power to the control, use, and income of an estate by the entirety,[101] the power to lease the property without the joinder of the wife,[102] the power to mortgage the property without the joinder of his wife,[103] the power to grant by deed a right away without the joinder of the wife,[104] and the power to convey the property by warranty deed, by way of estoppel, without the joinder of the wife,[105] qualified in all these instances only by the possibility that the wife may become entitled to the whole estate by surviving him—since the husband has all these far-ranging powers—it would seem logical that the law

[97] *Id.* at 204-05, 13 S.E. at 791. Also quoted in Ray v. Long, 132 N.C. 891, 895-96, 44 S.E. 652, 654 (1903).

[98] 26 AM. JUR., *Husband and Wife* §§ 84, 85 (1940); 2 AMERICAN LAW OF PROPERTY § 6.6(b) (1952); 41 C.J.S., *Husband and Wife* § 34(e) (1944); MADDEN, PERSONS AND DOMESTIC RELATIONS § 45 (1931); 4 POWELL, REAL PROPERTY § 623 (1954); Phipps, *Tenancies by Entireties,* 25 TEMPLE L.Q. 24 (1951); Annot., 166 A.L.R. 969 (1947).

[99] Phipps, *supra* note 98, at 39 and tables of states at 46-47 (1951); Annot., 166 A.L.R. 969, at 983-93 (1947).

[100] See note 98 *supra.*

[101] See note 67 *supra.*

[102] See note 71 *supra.*

[103] See note 75 *supra.*

[104] See note 79 *supra.*

[105] See notes 126 and 127 *infra.*

should let the husband's creditors reach by execution *his* interest. Generally speaking, that which a person may voluntarily transfer, his creditors may reach. In fact, in *Lewis v. Pate*[106] the Supreme Court of North Carolina held that crops raised on an estate by the entirety could be levied upon and sold to satisfy a judgment against the husband. This was not, however, a levy upon the husband's interest in the estate by entirety, as such, but only upon the husband's common-law right to the income, rents, and profits, accruing from an estate by the entirety. Logical or not, North Carolina has consistently held that land held as a tenancy by the entirety is not subject to levy under execution rendered against either the husband or wife alone.[107] In touching upon this subject, the Supreme Court of North Carolina in 1924 said "it should be remembered that law and logic are not always the best of friends."[108]

Where an attempt is made to sell under execution the interest of only one of the spouses in land held as a tenancy by the entirety, an action may be brought to restrain the sale because the deed of the officer who sells will not pass title and will only throw a cloud upon the title of the plaintiff.[109]

A joint judgment against a husband and a wife may become a lien upon land held by them as tenants by the entirety, and the land may be sold under an execution to satisfy the judgment.[110] As a consequence, when a husband or a wife owns no substantial property other than that held by them as tenants by the entirety, and either wishes to borrow money, it is customary for the lender to insist that both sign the note as co-makers. A judgment obtained jointly against a husband and a wife is a general lien on the interest of both in property held by them as tenants by the entirety.[111] Where such a judgment is taken against both spouses and thereafter one dies, the lien of the judgment continues on the land of the survivor.[112]

In *Southern Distrib. Co. v. Carraway*[113] a consent judgment

[106] 212 N.C. 253, 19 S.E. 20 (1937).
[107] See note 92 *supra.*
[108] Johnson v. Leavitt, 188 N.C. 682, 685, 125 S.E. 490, 491 (1924).
[109] Harris v. Carolina Distrib. Co., 172 N.C. 14, 89 S.E. 789 (1916).
[110] Martin v. Lewis, 187 N.C. 473, 122 S.E. 180 (1924); see Edwards v. Arnold, 250 N.C. 500, 506, 109 S.E.2d 205, 209-10 (1959); Winchester-Simmons Co. v. Cutler, 199 N.C. 709, 712, 155 S.E. 611, 612-13 (1930); Johnson v. Leavitt, 188 N.C. 682, 685, 125 S.E. 490, 492 (1924); Davis v. Bass, 188 N.C. 200, 205, 124 S.E. 566, 569 (1924).
[111] 26 AM. JUR., *Husband and Wife* § 86 (1940); 41 C.J.S., *Husband and Wife* § 34(e) at 475. See note 110 *supra.*
[112] 26 AM. JUR., *op. cit. supra* note 111.
[113] 189 N.C. 420, 127 S.E. 427 (1925).

was entered against a husband and a wife "individually," and not jointly, as upon a joint obligation. In holding that the estate by entirety was not subject to be taken under an execution issued on either judgment, the court said:

> It is specifically designated in the judgment that it is entered against these defendants 'individually.' Their liability is not joint and several .... The present judgment is against each individually, or separately, and for purposes of lien and execution, it is tantamount to a personal and separate judgment against each defendant ....[114]

A husband and a wife holding as tenants by the entirety can jointly convey the same free and clear of any judgment liens docketed against either the husband or the wife.[115] Thus, if a judgment is entered against a husband and duly docketed in a county in which he and his wife own land as tenants by the entirety, the two spouses may jointly thereafter convey to a third person a title that is not subject to the judgment against the husband.[116]

There is, however, in North Carolina frequently something to be gained in obtaining and docketing a judgment against a husband or a wife whose only property is held as a tenant by the entirety. For example, if a judgment lien is obtained and docketed against a husband, and later his wife dies, the judgment lien, if still active and unsatisfied, will attach to the property instantly and at the very moment when the title vests in the judgment debtor in his individual right.[117] The acquisition by the judgment debtor of the title to such property by right of survivorship places the property upon the same footing in relation to the judgment as after-acquired property. The lien attaches the instant there is a title capable of being encumbered. If there have been several judgments obtained and docketed against the husband during the marriage, the previously taken judgments will all stand upon the same footing, and the proceeds of a sale thereunder will be distributed pro rata without reference to the priority

[114] *Id.* at 421-22; 127 S.E. at 428.

[115] Johnson v. Leavitt, 188 N.C. 682, 125 S.E. 490 (1924); Hood v. Mercer, 150 N.C. 699, 64 S.E. 897 (1909); see Edwards v. Arnold, 250 N.C. 500, 506, 109 S.E.2d 205, 209-10 (1959); Keel v. Bailey, 214 N.C. 159, 165, 198 S.E. 654, 658 (1938).

[116] *Ibid.*

[117] Johnson v. Leavitt, 188 N.C. 682, 125 S.E. 490 (1924). See generally 41 C.J.S., *Husband and Wife* § 34(e) (1944).

of such judgments or to the time of their docketing.[118] Thus in *Keel v. Bailey*[119] a husband and a wife held real property as tenants by the entirety. A valid judgment by confession was entered against the husband in favor of his wife, and the same was duly docketed. Thereafter the husband borrowed money and executed a deed of trust on the land, without the joinder of his wife, to secure the indebtedness. Subsequently the wife died. It was held that on the death of the wife, the estate by the entirety ceased and the title to the property became vested in the husband; the lien of the wife's judgment became immediately attached to the land and had precedence over the attempted deed of trust subsequently made.

DEEDS AND MORTGAGES OF THE TENANCY BY ENTIRETY

The husband and the wife by their joint acts may convey by deed their tenancy by the entirety to a third person.[120] The tenancy by the entirety which they owned is thereby destroyed or dissolved.[121] The grantee acquires the title to the land free and clear of any judgment liens docketed against either the husband or the wife alone.[122] The proceeds derived from the sale are held by the husband and the wife as tenants in common.[123] Further, the tenancy by the entirety may be conveyed by deed directly to either one of the two spouses.[124]

Neither the husband nor the wife can convey any part of the estate by the entirety, so as to defeat the right of the survivor in the whole estate, without the written joinder of the other.[125] But in *Hood v. Mercer*[126] the court said: "It is true where the husband had

[118] Johnson v. Leavitt, *supra* note 117; Keel v. Bailey, 214 N.C. 159, 198 S.E. 654 (1938).

[119] *Ibid.*

[120] Wilson v. Ervin, 227 N.C. 396, 42 S.E.2d 468 (1947); see Moore v. Greenville Banking & Trust Co., 178 N.C. 118, 125, 100 S.E. 269, 273 (1919).

[121] *Ibid.*

[122] See note 115 *supra.*

[123] See note 59 *supra.*

[124] See note 47 *supra.*

[125] Bank of Greenville v. Gronto, 161 N.C. 341, 77 S.E. 222 (1913); Gray v. Bailey, 117 N.C. 439, 23 S.E. 318 (1895); see Harrell v. Powell, 251 N.C. 636, 640, 112 S.E.2d 81, 84 (1960); General Air Conditioning Co. v. Douglas, 241 N.C. 170, 174, 84 S.E.2d 828, 832 (1954); Nesbitt v. Fairview Farms, Inc., 239 N.C. 481, 486, 80 S.E.2d 472, 476-77 (1954); Moore v. Shore, 208 N.C. 446, 448, 181 S.E. 275, 276 (1935); Willis v. Willis, 203 N.C. 517, 519, 166 S.E. 398, 399 (1932); First Nat'l Bank v. Hall, 201 N.C. 787, 789, 161 S.E. 484, 485 (1931); Capps v. Massey, 199 N.C. 196, 197, 154 S.E. 52, 53 (1930); Bryant v. Bryant, 193 N.C. 372, 378, 137 S.E. 188, 191 (1927); Davis v. Bass, 188 N.C. 200, 205, 124 S.E. 566, 569 (1924); Turlington v. Lucas, 186 N.C. 283, 286, 119 S.E. 366, 368 (1923); Moore v. Greenville Banking & Trust Co., 178 N.C. 118, 124, 100 S.E. 269, 273 (1919).

[126] 150 N.C. 699, 64 S.E. 897 (1909).

conveyed land by deed with warranty without the joinder of the wife, and survived her, his grantee acquired title, but this by way of estoppel."[127] In *Harrell v. Powell*[128] the court affirmed the doctrine of estoppel, and further held that the principles of estoppel should apply to the wife in the same manner in which they operate against the husband. Thus where the wife conveys an estate by entirety to a third party during coverture, without joinder of her husband, and the wife survives her husband, the third party acquires title by estoppel.[129]

North Carolina recognizes a broad concept of after-acquired title by estoppel.[130] Where the title to land is vested in husband and wife as tenants by the entirety, and the husband conveys the land to his wife, and then survives her, he and those claiming under him as his heirs at law, as well as others standing in privity with him, are estopped by his deed to claim the land.[131] The same principle is applicable where the marriage is terminated by divorce.[132] And, indeed, it seems immaterial which of the spouses is conveying to the other spouse sole ownership to the land.[133]

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[127] *Id.* at 700, 64 S.E. at 898. This sentence has been quoted with approval in the following cases: Harrell v. Powell, 251 N.C. 636, 640, 112 S.E.2d 81, 84 (1960); Capps v. Massey, 199 N.C. 196, 198, 154 S.E. 52, 53 (1930); Davis v. Bass, 188 N.C. 200, 206, 124 S.E. 566, 569 (1924); *cf.* Keel v. Bailey, 224 N.C. 447, 31 S.E.2d 362 (1944).

[128] 251 N.C. 636, 641, 112 S.E.2d 81, 84 (1960); comments on this case may be found in *Seventh Annual Survey of North Carolina Case Law* 38 N.C.L. REV. 506, at 557, 588 (1960).

[129] As to whether the same principle would apply to anything other than a warranty deed, there is considerable doubt. In Harrell v. Powell, 251 N.C. 636, 641, 112 S.E.2d 81, 84 (1960), the court said: "Ordinarily the grantor in a deed of bargain and sale is estopped thereby to assert after-acquired title. But as a general rule the grantor in a quitclaim deed is not so estopped. The provisions of a quitclaim deed may in some instances require a different result, however. The deed and contract, in the case *sub judice,* are not before us. Therefore the defense of estoppel must be affirmatively pleaded in the answer if defendant relies thereon." *But see* Hallyburton v. Slagle, 132 N.C. 947, 952, 44 S.E. 655, 657 (1903), where the court in dictum stated: "Indeed it has been said to have been fully established as a principle by the best of authority, that the doctrine of estoppel applies to conveyances without warranty when it appears, by the deed, that the parties intended to deal with and convey a title in fee simple." This was quoted in Willis v. Willis, 203 N.C. 517, 521, 166 S.E. 398, 400 (1932).

[130] See *Seventh Annual Survey of North Carolina Case Law,* 38 N.C.L. REV. 506, 589 (1960).

[131] Keel v. Bailey, 224 N.C. 447, 31 S.E.2d 362 (1944); Capps v. Massey, 199 N.C. 196, 154 S.E. 52 (1930); see Harrell v. Powell, 251 N.C. 636, 641, 112 S.E.2d 81, 84 (1960).

[132] Willis v. Willis, 203 N.C. 517, 166 S.E. 398 (1932).

[133] "It is well settled in this State that a conveyance from one spouse to the other of an interest in an estate held by the entireties is valid as an

We have seen that the husband may execute a mortgage on land held as an estate by the entirety, without the joinder or consent of his wife, to the extent of his common-law interest; but he has no right to encumber the property so as to interfere with or defeat the interest of his surviving wife.[134] Upon his death the lien of the mortgage is ipso facto cancelled, and the entire estate is vested in the surviving wife.[135]

The husband and the wife may jointly execute a mortgage or deed of trust on land held by them as tenants by the entirety, and the land may be sold under execution to satisfy the encumbrance.[136] The encumbrance, executed by both spouses, continues as a lien on the land of the survivor.[137]

The statutes of North Carolina, as well as those in a number of other jurisdictions[138] provide a method of procedure to be followed where it becomes necessary or desirable for an estate by the entirety to be sold or mortgaged and the wife or the husband or both are mentally incompetent to execute a conveyance of the estate so held.[139] Another North Carolina statute defines the legal effect upon an estate by the entirety when one of the tenants is presumed dead as the result of being missing and unheard from for a period of seven years.[140]

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estoppel when the requirements of the law are complied with in the execution thereof." Jones v. Lewis, 243 N.C. 259, 262, 90 S.E.2d 547, 550 (1955). *Accord,* Edwards v. Arnold, 250 N.C. 500, 506, 109 S.E.2d 205, 209-10 (1959). "The rule is different, however, when a wife conveys an estate by the entirety to her husband without complying with G.S. 52-12 (privy examination). Even though the husband dies she is not estopped to deny the validity of the conveyance. Wallin v. Rice, 170 N.C. 417, 87 S.E. 239 (1915); Smith v. Ingram, 130 N.C. 100, 40 S.E. 984 (1902). This different result is probably not due to the wife's being under a disability different in kind from that imposed by Article X, section 6 of the North Carolina Constitution, but rather because allowing an estoppel in this situation would allow an obvious circumvention of G.S. 52-12." *Seventh Annual Survey of North Carolina Law,* 38 N.C.L. REV. 506, 558 (1960).

[134] See note 75 *supra.* [135] See note 76 *supra.*

[136] As to power of the husband and wife jointly to convey by deed their tenancy by entirety, see note 120 *supra.* As to the liability for the estate by the entirety for joint obligations of the husband and wife, see note 110 *supra.*

[137] N.C. GEN. STAT. § 39-13.2 (Supp. 1961). G.S. § 39-13.2 expressly confers upon any married person under twenty-one years of age the power to jointly execute with his or her spouse, if such spouse is twenty-one years of age or older, certain transactions with respect to a tenancy by the entirety, the same as if he or she were an adult.

[138] 41 C.J.S., *Husband and Wife* § 34(c) (1944).

[139] N.C. GEN. STAT. § 35-14 to -18 (1950). See Woolard v. Smith, 244 N.C. 489, 495, 94 S.E.2d 466, 470 (1956).

[140] N.C. GEN. STAT. § 28-197.1 (Supp. 1961).

An encumbrance or a lien cannot be placed on a tenancy by the entirety without the consent of both husband and wife. In *General Air Conditioning Co. v. Douglass*[141] a warm air-type-heating system was installed in a home owned by a husband and wife as tenants by the entirety. The contract for the installation of the heating system was made by the husband, and the company was unable to prove that the husband was the agent of his wife. It was also unable to prove agency by ratification or estoppel. As a consequence, the company was not allowed to recover a judgment against the wife or to get a mechanic's lien on the house. The court said: "A laborers' and materialmen's lien arises out of the relationship of debtor and creditor, and it is for the debt that the lien is created by statute. Without a contract the lien does not exist."[142] The heating company's remedy was against the husband alone; and a judgment against the husband alone could not be satisfied under an execution sale of the house.

Effect of Death of One Spouse

Upon the death of one of the spouses, the title to all land held as tenancy by the entirety becomes automatically vested in the survivor and the survivor becomes sole owner of the entire property.[143] No title or interest of any kind passes to the estate of the deceased and it cannot be reached by the creditors or heirs of the deceased.[144] The surviving spouse in a tenancy by the entirety acquires the whole of the property by virtue of the original title and the doctrine of survivorship which is applicable to it. As a consequence, the property so acquired is in addition to that which the survivor is entitled to under the Intestate Succession Act or the provisions of the deceased spouse's will.[145] "Death creates no new estate in the survivor. The

[141] 241 N.C. 170, 84 S.E.2d 828 (1954).

[142] *Id.* at 174, 84 S.E.2d at 832.

[143] Underwood v. Ward, 239 N.C. 513, 80 S.E.2d 267 (1954); Murchison v. Fogleman, 165 N.C. 397, 81 S.E. 627 (1914); see *In re* Perry's Estate, 256 N.C. 65, 67, 123 S.E.2d 99, 101 (1961); Honeycutt v. Citizens Nat'l Bank, 242 N.C. 734, 743, 89 S.E.2d 598, 605 (1955); Davis v. Bass, 188 N.C. 200, 204-05, 124 S.E. 566, 569 (1924). See generally 26 Am. Jur., *Husband and Wife* § 82 (1940); 41 C.J.S., *Husband and Wife* § 34(d)(2) (1940).

[144] "Upon the death of one, either the husband or the wife, the whole estate belongs to the other by right of purchase under the original grant or devise and by virtue of survivorship—and not otherwise—because he or she was seized of the whole from the beginning, and the one who died had no estate which was descendible or devisable. It does not descend upon the death of either, but the longest liver, being already seized of the whole, is the owner of the entire estate." Davis v. Bass, *supra note* 143.

[145] As to the right of the survivor to dissent from his or her deceased spouse's will, and the effect of an estate by the entirety on such dissent, see N.C. Gen. Stat. § 30-1 (Supp. 1961).

survivor takes by virtue of the original conveyance."[146]

G.S. § 41-2, which abolished the right survivorship as an incident of a joint tenancy by operation of law, does not apply to tenancies by the entirety.[147] The doctrine of survivorship is still applicable to tenancies by the entirety.

Existence of Mortgage

In *Wachovia Bank & Trust Co. v. Black*[148] a husband purchased land and had the title conveyed to his wife and to himself. They executed a mortgage on the land to secure the balance of the purchase price. The husband died. It was held that the surviving wife became the sole owner of the property and could recover one-half of the amount of the note secured by the mortgage from the estate of her husband. This case was an adjudication of the liability of the makers of the note as between themselves, and not an adjudication of their liability to the payee of the note. As makers of the note they were jointly and severally liable, and payment of the whole note by either entitled the other, or his representative, to contribution—an equitable doctrine which arises when one of several parties liable on an obligation discharges the obligation for the benefit of all. The results are that as between themselves each party is liable for one-half the debt, although the title to the whole of the land is vested in the survivor. In affirming the rule twenty-five years later, the court said:

> The fact that the plaintiff became the owner of the property as the surviving tenant in an estate by the entirety, did not thereby release the estate of her husband from liability for the

[146] Woolard v. Smith, 244 N.C. 489, 493, 94 S.E.2d 466, 469 (1956).

[147] Bruce v. Nickolson, 109 N.C. 202, 13 S.E. 790 (1891); Motley v. Whitemore, 19 N.C. 537 (1837); see Woolard v. Smith, 244 N.C. 489, 494, 94 S.E.2d 466, 469 (1956); Turlington v. Lucas, 186 N.C. 283, 285, 119 S.E. 366, 367 (1923); Moore v. Greenville Banking & Trust Co., 178 N.C. 118, 124, 100 S.E. 269, 273 (1919); West v. Aberdeen & R.R.R., 140 N.C. 620, 621, 53 S.E. 477 (1906).

[148] 198 N.C. 219, 151 S.E. 269 (1930). See also Montsinger v. White, 240 N.C. 441, 443, 82 S.E.2d 362, 364 (1954); Underwood v. Ward, 239 N.C. 513, 515, 80 S.E.2d 267, 268 (1954). See generally 26 AM. JUR., *Husband and Wife* § 79 (1940); Note, 37 N.C.L. REV. 333 (1959).

The liability of the estate of the deceased husband to the widow for contribution is not, however, such a claim as would qualify for a preference as a secured claim under N.C. GEN. STAT. § 28-105 (1950). Since the land is not an asset of the decedent's estate, the claim does not come within the first class of priority listed in G.S. § 28-105. Where the decedent's estate is insolvent, the widow has to share pro-rata with the general creditors. Underwood v. Ward, *supra;* Note, 37 N.C.L. REV. 333, at 335 (1959).

debt. Moreover, the character of the estate held by the plaintiff and her husband prior to his death, had no significance in respect to the liability of the parties on the note secured by the deed of trust thereon. But in this jurisdiction when husband and wife execute a note jointly and severally, promising to pay for money loaned to them, or for the purchase of property, and such indebtedness is secured by property held by them as tenants by the entirety, each is primarily liable, jointly and severally, and upon the death of either his or her estate becomes liable for one-half of the unpaid balance of the secured debt at the time of his or her death even though the decedent's estate gets no part of the property pledged for the debt.[149]

In *Montsinger v. White*[150] a man, while single, purchased real property and in part payment thereof executed a note secured by a deed of trust. Subsequently he married and conveyed the property to himself and his wife as tenants by the entirety. The wife neither assumed nor agreed to pay the note secured by the deed of trust on the property. Upon the husband's death, the widow paid the whole of the balance due on the note, and filed a general claim for this amount against the insolvent estate of her deceased husband. The court held that by paying the note she became subrogated to the rights of the mortgagee. One subrogated to a mortgage lien has no right and no claim beyond those possessed by the creditor. As a consequence, since the mortgagee could assert no claim against the estate of the decedent until he had exhausted his security, the widow, as subrogee of the mortgagee, could assert no general claim against the husband's estate for any amount in the absence of a contention that the property was worth less than the amount she paid to discharge the mortgage lien. The particular property was worth far more than the balance due on the note. The note was not paid to benefit the husband's estate, but to exonerate her own property from the lien. The widow, accordingly, had no cause of action against her husband's estate.

In *Rudasill v. Cabaniss*[151] a husband purchased land and requested the seller to make the deed to himself and his wife as tenants by the entirety. An unsecured note signed by the husband alone was

[149] Montsinger v. White, *supra* note 148.
[150] 240 N.C. 441, 82 S.E.2d 362 (1954).
[151] 225 N.C. 87, 33 S.E.2d 475 (1945).

given to the seller for the entire purchase price. It was held that the wife was not liable on the note, and, as a consequence, the property was subject to no lien. There does not exist in North Carolina an equitable lien for the purchase price of property. If a seller wants to reserve a lien on the real property he sells, he must do so in writing—in the form of a mortgage or deed of trust.

Doctrine of Election

In *Wachovia Bank & Trust Co. v. Burrus*[152] the testator devised to his wife a life estate in land owned by them as tenants by the entirety and devised the remainder after the life estate to another. The testator also devised to his wife a life estate in other lands actually owned by him which had a value in excess of her rights had she dissented from the will. The court held the widow was put to an election, and her acceptance of the life estates with knowledge of the nature of her title in the land theretofore held by the entirety estops her heirs from claiming the remainder therein. With respect to the doctrine of election, the court stated:

> The doctrine of election is based upon the principle that a devisee or donee cannot take benefits under a will and reject its adverse provisions. The beneficiary under a will is not required to elect unless two benefits are presented which are inconsistent with each other. And when the beneficiary chooses to accept one of them such choice is tantamount to a rejection of the other. He will not be permitted to take under the will and against it. And where the devisor purports to devise property which belongs to the beneficiary, giving it to another, and also devises property of his own to the beneficiary, such beneficiary must make a choice between retaining his own property, which has been given to another, or take the property which has been given to him under the terms of the will. By electing to take the gift from the devisor's estate, he is estopped from claiming his own property.[153]

The intention of the testator to put the beneficiary to an election must, however, appear clearly from the terms of the will.[154] There-

[152] 230 N.C. 592, 55 S.E.2d 183 (1949). See also Bolich, *Election, Dissent and Renunciation,* 39 N.C.L. REV. 17, at 17-18 (1960); Annot., 60 A.L.R.2d 789 (1958).

[153] *Id.* at 593-94, 55 S.E.2d at 184.

[154] Taylor v. Taylor, 243 N.C. 726, 92 S.E.2d 136 (1956); Honeycutt v.

fore, where it clearly appears from the will of the testator, who predeceased his wife, that he attempted to devise land held by them as tenants by the entirety under the mistaken belief that he owned the land individually, the widow is not put to her election and may claim sole ownership of the land held by the entirety, and at the same time as legatee and devisee of the will.[155] Thus in *Honeycutt v. Citizens Nat'l Bank*[156] the testator devised the tenancy by the entirety and other property to his wife. He did not devise property he did not own to a person other than the true owner. The widow's property was not devised to another so as to compel her to decide whether she would stand on her rights or abide by the terms of the will. The doctrine of equitable election did not apply. In so holding the court stated: "[I]f it appears that the testator erroneously considered the specific property so devised to be his own, no election is required. An election is required only when the will confronts a beneficiary with a choice between two benefits which are inconsistent with each other."[157]

Simultaneous Death

The Uniform Simultaneous Death Act, enacted in North Carolina in 1947 provides: "Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived."[158]

EFFECT OF MURDER OF ONE SPOUSE BY OTHER

In *Bryant v. Bryant*[159] a husband and wife owned property as tenants by the entirety. The husband was convicted of his wife's murder in the second degree and sentenced to the state prison. The

Citizens Nat'l Bank, 242 N.C. 734, 89 S.E.2d 598 (1955); Lamb v. Lamb, 226 N.C. 662, 40 S.E.2d 29 (1946); Benton v. Alexander, 224 N.C. 800, 32 S.E.2d 584 (1945).

[155] "The doctrine of election is not applicable to cases where the testator, erroneously thinking certain property is his own, gives it to a donee to whom in fact it belongs, and also gives him other property which is really the testator's own; for in such cases the testator intends that the devisee shall have both, though he is mistaken as to his own title to one." Byrd v. Patterson, 229 N.C. 156, 159, 48 S.E.2d 45, 47-48 (1948).

[156] 242 N.C. 734, 89 S.E.2d 598 (1955). Also quoted in Taylor v. Taylor, 243 N.C. 726, 733, 92 S.E.2d 136, 141 (1956).

[157] *Id.* at 744, 89 S.E.2d at 606.

[158] N.C. GEN. STAT. § 28-161.3 (1950).

[159] 193 N.C. 372, 137 S.E. 188 (1927), noted in 7 N.C.L. REV. 373 (1927) and Annot., 51 A.L.R. 1100 (1927). Also quoted and commented upon in *In re* Perry's Estate, 256 N.C. 65, 123 S.E.2d 99 (1961).

court said that the property was to be held by the husband as a constructive trustee for the heirs of his wife, subject to a beneficial life interest in the whole of the property for the murderer. The husband was perpetually enjoined from conveying the property in fee. The reason that the court permitted the murderer to have a beneficial interest for life in the whole of the property is that under the law governing a tenancy by the entirety in North Carolina, the husband is entitled to the whole of the income and use during their joint lives. In so holding the court stated:

> It is therefore manifest that if the deceased wife were now living the appellant (the husband) could not be deprived of his interest in the estate by arbitrary judgment of the court. None the less is he entitled to the enjoyment of such interest after her death; but for the benefit of her heirs at law a court of equity will interpose its protecting shield . . . . In the application of this principle a court of equity will not deprive the appellant of his interest in the estate, but the appellant by his crime took away his wife's interest, and as to this he must be held a constructive trustee for the benefit of her heirs, the judge in effect having found as a fact that the deceased would have survived him. Even in the absence of such finding, equity would probably give the victim's representatives the benefit of the doubt.[160]

The problem presented when one tenant by the entirety murders the other has been solved in a variety of ways in other jurisdictions.[161] The applicable North Carolina statute, G.S. § 31A-5, enacted in 1961, provides:

> Where the slayer and decedent hold property as tenants by the entirety: (1) If the wife is the slayer, one-half of the property shall pass upon the death of the husband to his estate, and the other one-half shall be held by the wife during her life, subject to pass upon her death to the estate of the husband; and (2) If the husband is the slayer, he shall hold

[160] *Id.* at 378-79, 137 S.E. at 191.

[161] 26 AM. JUR., *Husband and Wife* § 82 (1940); 41 C.J.S., *Husband and Wife* § 34(d)(2) (1944); MADDEN, PERSONS AND DOMESTIC RELATIONS § 45 (1931); Note, 7 N.C.L. REV. 373 (1927); 4 POWELL, REAL PROPERTY § 623 (1954); RESTATEMENT, RESTITUTION § 188 (1937); Annot., 32 A.L.R.2d 1099 (1953).

all of the property during his life subject to pass upon his death to the estate of the wife.

Subsection (2) is in substance the doctrine announced in *Bryant v. Bryant*[162] while subsection (1) is new law.

In re Perry's Etatate[163] was a case where the wife in 1956 pleaded guilty to her husband's murder in the second degree. The husband died intestate, survived by his wife and a daughter. The administrator's final account, filed in 1960, showed a balance of $1,091.53, derived wholly, prior to the husband's death, from rents accruing from a tenancy by the entirety. The sole issue in the case on appeal to the supreme court in 1961 was: Who is entitled to the rents from the real property? The supreme court, affirming the trial court, held that the surviving wife was a constructive trustee, for the daughter, of the rents and profits of the tenancy by the entirety, *at least* during the full term of the husband's life expectancy, in accordance with the equitable principle that a person will not be permitted to benefit from his own wrong. In referring to G.S. § 31A-5, which was enacted only a few months prior to the filing of the opinion, the court said: "Suffice to say, this 1961 Act has no bearing on the present case. Decision here is based on the North Carolina law with reference to an estate by the entirety and upon the equitable principles declared and underlying the decision in *Bryant*."[164] G.S. § 31A-5 probably had no bearing because it was enacted subsequent to the death of the husband. If a wife murders her husband today, it would seem that the provisions of G.S. § 31A-5 should control, such provisions seeming to give to her one-half of the income from the tenancy by the entirety for the period of her life.

Effect of Divorce

In North Carolina an absolute divorce automatically converts a tenancy by the entirety into a tenancy in common.[165] The marital

[162] See note 159 *supra*.

[163] 256 N.C. 65, 123 S.E.2d 99 (1961).

[164] *Id.* at 71, 123 S.E.2d at 103.

[165] Potts v. Payne, 200 N.C. 246, 156 S.E. 499 (1931); McKinnon v. Caulk, 167 N.C. 411, 83 S.E. 559 (1914); see Lanier v. Dawes, 255 N.C. 458, 462, 121 S.E.2d 857, 860 (1961); Smith v. Smith, 249 N.C. 669, 674-675, 107 S.E.2d 530, 535 (1959); Carter v. Continental Ins. Co., 242 N.C. 578, 580, 89 S.E.2d 122, 123 (1955); Wilson v. Ervin, 227 N.C. 396, 399, 42 S.E.2d 468, 469 (1947); Hatcher v. Allen, 220 N.C. 407, 409, 17 S.E.2d 454, 455 (1941); Fisher v. Fisher, 217 N.C. 70, 76, 6 S.E.2d 812, 816-17 (1940); Willis v. Willis, 203 N.C. 517, 520, 166 S.E. 398, 399-400 (1932); Davis v. Bass, 188 N.C. 200, 207, 124 S.E. 566, 570 (1924); Holton v.

unity, an absolute necessity for the formation and the continuance of an estate by the entirety, is destroyed by an absolute divorce. The estate by entirety is founded upon the marital status and the common law fiction of the unity of the husband and wife, and when that "unity of the person" is severed by a decree of absolute divorce, the only logical conclusion is that the former spouses thereafter become two persons and the title to the property is vested in them as tenants in common. As tenants in common, each owns an undivided one-half interest in the whole. Either may maintain a proceeding for partition. At the present time this is also the prevailing view in the vast majority of other states which recognize the tenancy by entirety.[166]

The two former spouses become equal cotenants, without inquiry as to who paid the original purchase price of the property.[167] Even though one of the former spouses paid the entire purchase price, each becomes entitled to an undivided one-half of the whole or to partition.[168] Expenditures for the property are treated as they normally would be in a tenancy in common from the date of the final decree of divorce.[169]

An absolute divorce converts a tenancy by the entirety into a tenancy in common even though the divorce was granted in one jurisdiction and the property is situated in another.[170]

A house or other building owned as an estate by the entirety may be insured in the name of either spouse or in the name of both.[171]

Holton, 186 N.C. 355, 362, 19 S.E. 751, 754 (1923); Turlington v. Lucas, 186 N.C. 283, 286, 119 S.E. 366, 367-68 (1923); Moore v. Greenville Banking & Trust Co., 178 N.C. 118, 126, 100 S.E. 269, 274 (1919); Finch v. Cecil, 170 N.C. 72, 75, 86 S.E. 992, 993-94 (1915). Where a husband and a wife own an estate for life by the entirety and are divorced, their estate is converted into a tenancy in common for life, and the survivor acquires only a life estate in an undivided one-half interest in the real property. Lanier v. Dawes, *supra*.

[166] 26 AM. JUR., *Husband and Wife* § 117 (1940); 2 AMERICAN LAW OF PROPERTY § 6.6a (1952); 27A C.J.S., *Divorce* § 180(b)(2) (1959); MADDEN, PERSONS AND DOMESTIC RELATIONS § 45 (1931); 4 POWELL, REAL PROPERTY § 624 (1954); SCHOULER, DIVORCE. MANUAL § 194 (Warren ed. 1944); 4 THOMPSON, REAL PROPERTY § 1792 (repl. 1961); Note, 36 VA. L. REV. 557 (1950); Annot., 52 A.L.R. 890 (1928).

[167] 4 POWELL, REAL PROPERTY § 624 (1954).

[168] 27A C.J.S., *Divorce* § 180(b)(2) (1959).

[169] *Ibid.*

[170] 26 AM. JUR., *Husband and Wife* § 117 (1940); 4 POWELL, REAL PROPERTY § 624 (1954).

[171] N.C. GEN. STAT. § 58-180.1 (1960) provides: "A policy of fire insurance issued to husband and wife, on buildings and household furniture owned by husband and wife, either by entirety, in common, or jointly, either name

If the husband alone has been named as the insured or as the beneficiary of the policy, his insurable interest runs to the whole of the property and covers the entire estate.[172] If the building is destroyed by fire, the proceeds inure to the benefit of the entire estate as owned by both husband and wife. In a case where the marriage was severed by divorce after the fire but before payment of the proceeds of the policy by the insurance company, the North Carolina Supreme Court held that each of the former spouses was entitled to one-half of the proceeds.[173]

A divorce from bed and board, as distinguished from an absolute divorce, has no legal effect upon an estate by the entirety.[174] This is because a divorce from bed and board does not dissolve the bond of matrimony; it is in legal effect nothing more than a decree of separation. The parties still remain husband and wife in the eyes of the law. The estate by the entirety rests upon the unity of the husband and wife, and a divorce from bed and board does not sever this "unity of the persons."

An estate by the entirety is not terminated by acts of the parties constituting grounds for absolute divorce. Nothing short of a final decree of absolute divorce will convert a tenancy by the entirety into a tenancy in common. "The existence of an estate by entirety is not

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of one of the parties in interest named as the insured or beneficiary therein, shall be sufficient and the policy shall not be void for failure to disclose the interest of the other, unless it appears that in the procuring of the issuance of such policy, fraudulent means or methods were used by the insured or owner thereof." See also Carter v. Continental Ins. Co., 242 N.C. 578, 89 S.E.2d 122 (1955), noted in 35 N.C.L. REV. 134 (1956).

[172] Carter v. Continental Ins. Co., *supra* note 171.

[173] *Ibid.* The theory, or lack of stated theory, on which this case was decided was criticized in a note in 35 N.C.L. REV. 134 (1956).

[174] Freeman v. Belfer, 173 N.C. 581, 92 S.E. 486 (1917); see Potts v. Payne, 200 N.C. 246, 249, 156 S.E. 499, 500-01 (1931); Davis v. Bass, 188 N.C. 200, 208, 124 S.E. 566, 570 (1924); Turlington v. Lucas, 186 N.C. 283, 286, 119 S.E. 366, 367-68 (1923). See generally, 26 AM. JUR., *Husband and Wife* § 117 (1940); 2 AMERICAN LAW OF PROPERTY § 6.6a (1952); 4 POWELL, REAL PROPERTY § 624 (1954); 4 THOMPSON, REAL PROPERTY § 1792 (repl. 1961); Annot., 168 A.L.R. 260 (1947). N.C. GEN. STAT. § 31A-1 (1961) would not seem to affect survivorship rights in an estate by the entirety. The doing of certain acts, set forth in subsection (a), will bar the rights of the spouse in respect to certain rights set forth in subsection (b). But nothing contained in subsection (b) deals with the survivorship rights of an estate by the entirety. Statutes in derogation of the common law are strictly construed. Among the rights lost in subsection (b)(1) are "all rights of intestate succession in the estate of the other spouse"; but as we observed in this article at note 143 *supra,* the surviving spouse in an estate by the entirety acquires the whole of the property by virtue of the original title and the doctrine of survivorship applicable to it, and not as the result of the Intestate Succession Act.

dependent upon the good conduct of the respective tenants and it is not destroyed by the bad conduct of either."[175]

It has been held that an action by a husband and wife, involving title or possession to property held by them as tenants by the entirety, will not be barred by the statute of limitations or laches as to one unless it bars both.[176] The nature of the estate and the interest of the husband and the wife are so thoroughly identified that the right of the one cannot be barred without the like bar of the other's right.

[175] Hatcher v. Allen, 220 N.C. 407, 411, 17 S.E.2d 454, 456 (1941).

[176] Johnson v. Edwards, 109 N.C. 466, 14 S.E. 91 (1891); see Davis v. Bass, 188 N.C. 200, 208, 124 S.E. 566, 570 (1924).