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Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate

John V. Orth[*]

> *A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career.*
>
> — *Oliver Wendell Holmes, The Common Law*

Sir William Blackstone entitled one chapter of his survey of English property law in the mid-eighteenth century "Estates in Severalty, Joint-Tenancy, Coparcenary, and Common."[1] "We come now to treat of estates," he magisterially commenced, "with respect to the number and connexions of their owners, the tenants who occupy and hold them."[2] Considered in this regard, estates, Blackstone observed, "may be held in four different ways: in severalty, in joint-tenancy, in coparcenary, and in common."[3] Tenancy in severalty was sole ownership, for Blackstone "the

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1. 2 WILLIAM BLACKSTONE, COMMENTARIES 179 (Clarendon Press 1766).

2. 2 *id.* The common law did not at first use the concept of "ownership" with respect to land, preferring to describe those with interests in real property as "tenants," a word derived from the Latin for "holders." What was held was, therefore, a "tenancy." *See* A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 47-48 (2d ed. 1986). By the time of Blackstone, the words "owners" and "tenants" were already interchangeable.

3. 2 BLACKSTONE, *supra* note 1, at 179.

most common and usual way of holding an estate."[4] To this form of ownership he devoted few words: "[T]here is little or nothing peculiar to be remarked concerning it, since all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise."[5] The bulk of his remarks were therefore directed to estates with more than one owner, what today would be called concurrent estates, which Blackstone explicitly described as "the other three species of estates, in which there are always a plurality of tenants."[6]

Of the three concurrent estates, Blackstone gave pride of place to the historic joint tenancy, stating flatly that "if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A and B and their heirs, this makes them immediately joint-tenants in fee of the lands."[7] This rule has today been everywhere reversed by means more or less straightforward.[8] Blackstone then catalogued the four unities of the joint tenancy: interest, title, time, and possession. In words made classic by repetition over two centuries, he succinctly summarized the law: "[J]oint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession."[9] Blackstone's doctrine of the four unities remains relevant to this day wher-

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4. 2 *id.* Despite the centuries-old legal assumption that individual ownership is the norm and concurrent ownership the exception, the fact is that ancient law, as Sir Henry Maine long ago pointed out, "knows next to nothing of Individuals. . . . It is more than likely that joint-ownership, and not separate ownership, is the really archaic institution." HENRY J. S. MAINE, ANCIENT LAW 152-53 (1861).

5. 2 BLACKSTONE, *supra* note 1, at 179. The Commentator's unqualified assertion that ownership in severalty is "the most common and usual way of holding an estate" must be understood in the context of the contemporary English practice of placing the bulk of aristocratic estates in strict settlement, by which the title to the land was tied up for the benefit of many family members. For the legal history of the strict settlement, see LLOYD BONFIELD, MARRIAGE SETTLEMENTS, 1601-1740: THE ADOPTION OF THE STRICT SETTLEMENT (D.E.C. Yale ed., 1983); EILEEN SPRING, LAW, LAND, AND FAMILY: ARISTOCRATIC INHERITANCE IN ENGLAND, 1300-1800 (Thomas A. Green ed., 1993). *See also* John V. Orth, *After the Revolution: "Reform" of the Law of Inheritance*, 10 LAW & HIST. REV. 33 (1992).

6. 2 BLACKSTONE, *supra* note 1, at 179.

7. 2 *id.* at 180.

8. The first states that reformed the law of joint tenancy abolished the right of survivorship. *See, e.g.*, N.C. GEN. STAT. § 41-2 (1984); PA. STAT. ANN. tit. 68, § 110 (West, 1994); TENN. CODE ANN. § 66-1-107 (1993). Later, reform was accomplished more simply by reversing the presumption in favor of joint tenancy. *See, e.g.*, 765 ILL. COMP. STAT. ANN. 1005/1 (West 1993); IOWA CODE ANN. § 557.15 (West 1992).

9. 2 BLACKSTONE, *supra* note 1, at 180.

ever joint tenancies are found, not only for determining whether a joint tenancy has been created but also for determining whether a severing event has occurred—one that transforms the joint tenancy into a tenancy in common. Describing the unity of possession, he repeated a time-hallowed phrase in the archaic dialect known as Law French: "[J]oint tenants are said to be seised *per my et per tout*,"[10] by the share and by all. "[T]hat is, [he explained,] they each of them have the entire possession, as well of every *parcel* as of the *whole*."[11] From the unity of the joint tenancy comes what Blackstone labeled the "grand incident of joint estates; *viz.* the doctrine of *survivorship*,"[12] by which the entire estate continues in the surviving joint tenants until only one remains and the estate returns to a severalty.

The ancient estate in coparcenary occupied Blackstone next. This estate arose when land descended from an ancestor to two or more persons, an eventuality which, apart from the prevalence of wills, occurred only about half as often in his day as in ours because the first-born male then inherited to the exclusion of all others.[13] At common law, multiple heirs meant inheritance by or through females: daughters, sisters, aunts, cousins, or their representatives. Today the tenancy in coparcenary is subsumed in the tenancy in common.[14]

At last, the Commentator reached the third form of concurrent ownership, the tenancy in common. For him, it was a sort of default tenancy, what multiple owners had when either a joint

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10. 2 *id.* at 182. The Law French word *my*, equivalent to the English *moiety*, means generally "share" or more particularly "half." Because joint tenants at common law hold equal interests, Blackstone translated the phrase *per my et per tout* as "by the *half* or *moiety*, and by *all*." 2 *Id.* If there are more than two joint tenants, however, each holds "by the equal share and by the whole" (author's translation).

11. 2 *id.* (footnote omitted).

12. 2 *id.* at 183.

13. Of the seven common-law canons of inheritance, the first three operated together to produce the result in favor of the first-born male, often described as the law of primogeniture: (1) "inheritances shall lineally descend to the issue of the person last actually seised, *in infinitum*; but shall never lineally ascend," 2 *id.* at 208; (2) "the male issue shall be admitted before the female," 2 *id.* at 212; (3) "where there are two or more males in equal degree, the eldest only shall inherit; but the females all together," 2 *id.* at 214.

Surviving spouses were not heirs at common law. Widows were entitled to dower (a life estate in one-third of the lands of which their husbands were seized during marriage). If live issue was born to the marriage, widowers were entitled to curtesy (a life estate in all lands of which their wives were seized during marriage). *See* 2 *id.* at 126, 129.

14. *See* Patsy Woodham Thomley, *Tenancy in Coparcenary*, *in* 4 THOMPSON ON REAL PROPERTY § 35.08 (David A. Thomas ed., 1994).

tenancy or a tenancy in coparcenary was destroyed, or when a special limitation in a deed or will to two or more persons managed to escape the common-law presumption in favor of a joint tenancy. For the latter, incidentally, Blackstone recommended a form of words still commonly used: "*as tenants in common, and not as joint-tenants*."[15]

In the first edition of the *Commentaries* in 1765-69, as apparently in the decade of lectures that preceded it, and in all the editions that followed it during his lifetime, Blackstone made mention of no other concurrent estate. Only in the posthumous edition of 1783, prepared by Richard Burn, did another estate intrude and then only in a single sentence, awkwardly inserted in the discussion of the joint tenancy:

> And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout et non per my*; the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor.[16]

The unnamed estate here referred to by Blackstone for the first time later became commonly known as the tenancy by the entirety because of its undivided and indivisible seisin. Over the years that followed, in all the multitude of editions of the *Commentaries* prepared by a myriad of editors, the developing body of law concerning the tenancy by the entirety had to appear as a gloss on this solitary sentence.

The fractured foundation on which the law of tenancy by the entirety was subsequently built is revealed in Blackstone's one-sentence afterthought. The reason the logical Commentator had excluded the marital estate from his original list of concurrent

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15. 2 BLACKSTONE, *supra* note 1, at 194.

16. 2 BLACKSTONE, COMMENTARIES 182 (photo. reprint 1978) (R. Burn ed., 1783). Burn disclaimed making any changes of his own in the text:

> The editor judges it indispensable to preserve the author's text intire. The alterations which will be found therein, since the publication of the last edition, were made by the author himself, as may appear from a corrected copy in his own handwriting. What the editor hath chiefly attended to is, to note the alterations made by subsequent acts of parliament. These, together with some few other necessary observations, in order to prevent confusion, are inserted separate and distinct at the bottom of the page.

R. Burn, *Advertisement* to 1 BLACKSTONE, *supra*, at xi (footnote omitted).

estates was simply that he did not think of it as an estate with a "plurality of tenants." Husband and wife were "one person in law," so the marital estate was not a concurrent estate at all, but rather a peculiar form of tenancy in severalty. Both husband and wife were seised of the entirety, which meant that there were no shares (moieties) to speak of. For this reason, the marital tenancy could not be a joint tenancy, let alone a tenancy in common. The legal effect was neatly summarized and the distinction from the joint tenancy clearly demarcated by the modification of the Law French tag describing the seisin of joint tenants as *per my et per tout*; tenants by the entirety held, by contrast, *per tout et non per my*. In consequence, "neither the husband nor the wife can dispose of any part without the assent of the other."[17] Not having a share at all, it necessarily followed that neither had an alienable share.[18] Finally, in the tenancy by the entirety, "the whole must remain to the survivor."[19] Functionally, this is a right of survivorship, but it is not the same as that "grand incident of joint estates"[20] mentioned by Blackstone for the simple reason that the tenancy by the entirety was not for him a joint estate; it was in law always a severalty.

The marital estate was paradoxically a severalty with two owners; there was only one tenant, who happened to be a couple. Although the concept could be thus encapsulated, it posed constant problems in practice—reminiscent of Lord Macnaghten's comment on Lord Thurlow's attempt to put the Rule in Shelley's Case in a nutshell: "[I]t is one thing to put a case like Shelley's in a nutshell and another thing to keep it there."[21] Given that each owned all in a tenancy by the entirety, who had the right of use? And who was entitled to rents and profits? In a joint tenancy the answer was simple: each joint tenant had equal rights. Another question which was closely related and often of critical importance was, What were the rights of creditors in a tenancy by the entirety? In a joint tenancy creditors had all the rights of the indebted tenant, including the power to alienate or to compel a partition or a sale and division of the proceeds.

17. 2 BLACKSTONE, *supra* note 16, at 182.

18. In fact, the only reason shares are recognized in joint tenancies is that each joint tenant has something to alienate; title, interest, and possession in that estate are undivided.

19. 2 BLACKSTONE, *supra* note 16, at 182.

20. *See supra* note 12 and accompanying text.

21. Van Grutten v. Foxwell, 1897 App. Cas. 658, 671 (Eng.), *quoted in* W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, n.* (1938).

The conceptual difficulty in answering these quotidian questions with respect to the tenancy by the entirety stemmed from the fact that the law was trying to perform a particularly difficult form of doublethink: to think about two persons as though they were one. Although Blackstone elsewhere categorically declared that during marriage "the very being and existence of the woman is suspended,"[22] he could not consistently maintain that legal fiction, as he himself candidly admitted. "[N]either the husband nor the wife can dispose of any part without the assent of the other,"[23] he said of the tenancy by the entirety. She may have been a nonperson in some sense, but for a sale her separate assent was required.[24] The problem inevitably suggested comparison to that other great class of person nonpersons: slaves—and antebellum feminists made the most of it.[25]

Whatever the theoretical deficiencies, answers to the practical questions had to be found. Courts recognized the right of use in the husband, even to the exclusion of the wife.[26] Rents and profits, too, were the husband's with no duty to account to the wife.[27] By marriage the two had become one, the cruel quip ran, and "the husband was the one."[28] From this point, it was just a small step to recognizing the rights of creditors, at least the husband's creditors. If the husband was entitled to rents and profits and if he had the exclusive right of use during his lifetime, why not extend these rights to his creditors? A few courts went that

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22. 2 BLACKSTONE, *supra* note 1, at 433.

23. 2 BLACKSTONE, *supra* note 16, at 182.

24.
> But, though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void, or at least voidable; except it be a fine, or the like matter of record, in which case she must be solely and secretly examined, to learn if her act be voluntary.

2 BLACKSTONE, *supra* note 1, at 432.

25. *See, e.g.*, SARAH M. GRIMKE, LETTERS ON THE EQUALITY OF THE SEXES AND THE CONDITION OF WOMAN ADDRESSED TO MARY S. PARKER, PRESIDENT OF THE BOSTON FEMALE ANTI-SLAVERY SOCIETY 74-83 (1838) (comparing the legal condition of free women to slaves). *See also* Elizabeth B. Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America*, 8 LAW & HIST. REV. 25 (1990).

26. *See, e.g.*, Voight v. Voight, 147 N.E. 887 (Mass. 1925).

27. *See, e.g.*, Pineo v. White, 70 N.E.2d 294 (Mass. 1946); Childs v. Childs, 199 N.E. 383 (Mass. 1936); North Carolina Bd. of Architecture v. Lee, 142 S.E.2d 643 (N.C. 1965).

28. JOHN E. CRIBBET ET AL., CASES AND MATERIALS ON PROPERTY 329 (6th ed. 1990).

far.[29] The wife's interest was whittled down, in other words, from "seisin of the entirety" to a mere indefeasible right of survivorship. As one North Carolina court conceded, "It is possible that a wife might receive no benefits at all from land held by the entireties if she predeceases her husband."[30] Blackstone's tenancy by the entirety, in which "neither the husband nor the wife can dispose of any part without the assent of the other,"[31] became an alienable estate in the husband subject only to the wife's contingent (but indestructible) future interest. These answers had to be accepted by the married woman because she had no cause of action against her husband; the law heard no complaints because the injured party could not speak in a legally audible voice.

This state of affairs could exist, however, only so long as a married woman's legal existence remained in suspended animation. Passage of the married women's property acts in the middle decades of the nineteenth century[32] shook the unstable foundations of the tenancy by the entirety. In some states, courts took the entirely logical position that once the rights of married women to hold property were recognized, the two were no longer one and there was no longer any such estate as tenancy by the entirety.[33] In England, the original home of the estate, after the 1882 Married Women's Property Act[34] husband and wife seemingly took as joint tenants,[35] and in 1925 the flickering flame was snuffed out altogether when the tenancy by the entirety was abolished.[36]

"The life of the law," however, "has not been logic,"[37] as Oliver Wendell Holmes famously reminded us, and in about half of the American states the tenancy by the entirety persists,[38] de-

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29. *See, e.g.*, Raptes v. Cheros, 155 N.E. 787 (Mass. 1927); Lewis v. Pate, 193 S.E. 20 (N.C. 1937).

30. Dearman v. Bruns, 181 S.E.2d 809, 811 (N.C. Ct. App. 1971).

31. *See supra* note 23 and accompanying text.

32. "Major reforms came in the married women's property acts. The first of these, a crude and somewhat tentative version, was enacted in 1839, in Mississippi." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 185 (1973).

33. *See, e.g.*, Cooper v. Cooper, 76 Ill. 57 (1875); Appeal of Robinson, 33 A. 652 (Me. 1895); Clark v. Clark, 56 N.H. 105 (1875).

34. Married Women's Property Act, 1882, 45 & 46 Vict., ch. 75 (Eng.).

35. *See In re* March, 27 Ch. D. 166 (1884) (dictum); *see also* JOSHUA WILLIAMS, PRINCIPLES OF THE LAW OF REAL PROPERTY 365 (T. Cyprian Williams ed., 17th ed. 1894).

36. Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 20, § 39(6), sch. I (Eng.) (converting tenancy by entirety into joint tenancy).

37. O.W. HOLMES, JR., THE COMMON LAW 1 (1881).

38. *See* John V. Orth, *Tenancies by the Entirety*, *in* THOMPSON ON REAL PROPERTY, *supra* note 14, § 33.06(e) n.81 (listing states).

spite the recognition of the legal capacity of married women with respect to property. It is only in those states that the tenancy by the entirety is a true concurrent estate, one in which (to use Blackstone's words) "there are always a plurality of tenants."[39] Rather than being a peculiar form of tenancy in severalty, the tenancy by the entirety became a peculiar form of joint tenancy. "An estate in entirety is an estate in joint tenancy," a Massachusetts judge flatly declared in 1893, "but with the limitation that during their joint lives neither the husband nor the wife can destroy the right of survivorship without the assent of the other party."[40] So far had the common law come since 1783 when Blackstone with equal assurance had added in his afterthought: "[I]f an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common."[41]

The forces that carried the tenancy by the entirety into the modern world included more than simple inertia, although that undoubtedly played a part. Perhaps some judges thought that married women still needed the protection of a male-dominated tenancy, that men were in general better suited to decide property questions, or simply that some legal rule was required to resolve intraspousal property disputes.[42] Clearly, some judges were loath to end the tenancy by the entirety on the uncertain trumpet of the married women's property acts, which did not explicitly refer to the estate. Finally, there may even have been a forward-looking concern to provide protection to marital property—to build, in other words, out of the scraps of common law an analog to the civil-law system of community property, in which property acquired with the earnings of either spouse during marriage is treated as owned in equal undivided shares by husband and wife.[43]

Although verbally the tenancy by the entirety was equated with the joint tenancy, subject to the significant exception of the indefeasible right of survivorship, it remained a concurrent estate with strikingly different qualities. Well past the middle of

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39. 2 BLACKSTONE, *supra* note 1, at 179.

40. Morris v. McCarty, 32 N.E. 938, 939 (Mass. 1893) (Allen, J.) (Justice Holmes joined in the unanimous opinion of the court).

41. 2 BLACKSTONE, *supra* note 16, at 182.

42. Marriage is, after all, a democracy in which each spouse has one vote, and the one with the most votes wins.

43. On the system of community property, see WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES (4th ed. 1994). The rules of community property apply to personal as well as real property.

the twentieth century, it was still male-dominated in a number of states.[44] Despite the married women's property acts, for many married women holding property with their husbands as tenants by the entirety, the husband was still "the one." This, of course, defied logic. What could the unities of title, interest, and possession, essential to the existence of a joint tenancy, mean when the husband had the right of use, even to the exclusion of the wife, the other co-owner? A North Carolina court candidly admitted that "husband and wife do not 'share equally' in an estate by the entireties. The husband has the exclusive right during coverture to possession, control, and use of the land."[45]

The creative juices of the common-law courts had now seemingly dried up, and legislative solutions were required. With glacial slowness, in a process not completed until late in the twentieth century, state after state legislated to equalize the rights of the spouses over property held in the tenancy by the entirety. In what was probably the last law of its type in the United States, North Carolina adopted the Tenancy by the Entirety Reform Act in 1982, which provided: "A husband and wife shall have an equal right to the control, use, possession, rents, income, and profits of real property held by them in tenancy by the entirety."[46] As the tenancy by the entirety now truly does approximate the joint tenancy, one would expect, incidentally, to see the same sort of remedies provided to one tenant by the entirety whose interest is injured by the other. In the future there may be suits by one spouse against the other for trespass, waste, or an accounting, just as for centuries there have been such suits by one joint tenant against another. The dilemma lurking in this

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44. See, for example, *D'Ercole v. D'Ercole*, 407 F. Supp. 1377 (D. Mass. 1976):

> The tenancy by the entirety is designed particularly for married couples and may be employed only by them. . . . This form of property ownership differs from the joint tenancy in two respects. First, each tenant has an indefeasible right of survivorship in the *entire* tenancy, which cannot be defeated by any act taken individually by either spouse during his or her lifetime. There can be no partition. Second, the spouses do not have an equal right to control and possession of the property. The husband during his lifetime has paramount rights in the property.

Id. at 1380.

45. Dearman v. Bruns, 181 S.E.2d 809, 811 (N.C. Ct. App. 1971).

46. N.C. GEN. STAT. § 39-13.6(a) (1984). The section preserves the common-law restraint on individual alienation: "Neither spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber any property so held without the written joinder of the other spouse." *Id.* For a discussion of issues raised by the reform, see William A. Reppy, Jr., *North Carolina's Tenancy by the Entirety Reform Legislation of 1982*, 5 CAMPBELL L. REV. 1 (1982).

development, of course, is that a tenant by the entirety lacks the easy escape hatch provided the joint tenant by the power of alienation and the right to partition.

The reconceptualization of the tenancy by the entirety as a form of joint tenancy has left some unanswered questions. What, for example, should be the effect of divorce on property held in tenancy by the entirety? Absent a severance, the ex-spouses still hold the property together as concurrent owners. It would not be at all illogical, although it would certainly be impractical, to find that the specialized form of joint tenancy limited to married persons permutates at divorce into the ordinary form of joint tenancy, complete with a right of survivorship in each ex-spouse. At least one court has so held,[47] and at least seven legislatures[48]—not to mention the drafters of the Uniform Probate Code[49]—have taken the possibility seriously enough to provide explicitly for conversion into the more realistic tenancy in common.

Two situations involving the creation (or attempted creation) of a tenancy by the entirety reveal the legal muddle. Where a grantor deeds property to a husband, a wife, and a third party, the result may be, in states still recognizing the tenancy by the entirety, a one-half interest in the married couple as tenants by the entirety and a one-half interest in the third party, the two shares being held in tenancy in common.[50] The reason, firmly based in the old law, is that marriage made the two one and that the marital unit shares equally with the other grantee, a true

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47. *See* Shepherd v. Shepherd, 336 So. 2d 497 (Miss. 1976). This rule was reaffirmed in Ayers v. Petro, 417 So. 2d 912 (Miss. 1982).

48. *See* ARK. CODE ANN. § 9-12-317 (Michie 1987); FLA. STAT. ANN. § 689.15 (West 1994); 765 ILL. COMP. STAT. ANN. 1005/3 (West 1993); IND. CODE ANN. § 32-4-2-2 (Michie 1995); MICH. COMP. LAWS § 552.102 (1988); 23 PA. CONS. STAT. § 3507 (1991); VA. CODE ANN. § 20-111 (Michie 1995).

49. *See* UNIF. PROBATE CODE § 2-804(b)(2) (1993) (applying to interests held as "joint tenants with the right of survivorship"); *id.* § 1-201(26) (defining "joint tenants with the right of survivorship" to include "co-owners of property held under circumstances that entitle one . . . to the whole of the property on the death of the other," that is, tenants by the entirety).

50. *See, e.g.*, Jenni v. Gamel, 602 S.W.2d 696 (Mo. Ct. App. 1980); Mosser v. Dolsay, 27 A.2d 155 (N.J. Ch. 1942); *In re* Buttonow, 49 Misc. 2d 445 (N.Y. Sup. Ct. 1966); *In re* Gardner, 202 S.E.2d 318 (N.C. Ct. App. 1974).

integer.[51] This is almost certain to baffle the intention of a modern grantor.

Where, in a case of more common occurrence, one spouse deeds property once held in severalty to both spouses together (as when a husband deeds to himself and his wife, or a wife deeds to herself and her husband), the result may not be a tenancy by the entirety at all, even if the grantor plainly expresses the intention to create that estate. The reason here was once consistent with that in the last case: the two have become one, therefore one cannot grant to the two. "A man cannot grant any thing to his wife," Blackstone bluntly explained, "for the grant would be to suppose her separate existence."[52] (A grant by the wife, a legal nonentity, was simply unimaginable.)

As the tenancy by the entirety is conflated (not to say confused) with the joint tenancy, this result continues to be reached, but the reason shifts. Now, to create the tenancy by the entirety, the requirements for the creation of the joint tenancy—specifically the four unities—must also be met. Since at common law a joint tenancy cannot be created by a transfer from a grantor to the grantor and another because a self-transfer does not create the unities of time and title,[53] the grant by one spouse to the two of them cannot be effective to create a tenancy by the entirety. Giving a bizarre twist to the argument, a few judges, uncomfortable with the result which obviously defeats intention,

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51. The principle is traceable to the fifteenth century:

> Also, if a joint estate be made of land to husband and wife, and to a third person: in this case, the husband and wife have not in law in their right but the half; [and the third person shall have as much as the husband and wife, *scil.* the other half]. And the cause is, for that the husband and wife are but one person in law, and are in like case as if an estate be made to two joint-tenants, where each one hath by force of the jointure the one moiety in law, and the other the other moiety. In the same manner it is, where estata is made to the husband and to his wife, and to two other men; in such case, the husband and wife have but the third part, and the other two men the other two parts.

SIR THOMAS LITTLETON, LYTTLETON, HIS TREATISE OF TENURES § 291 (photo. reprint 1978) (T.E. Tomlins ed., 1841) (written circa 1481) (alteration in original) (footnote omitted). The words within brackets first appeared in a 1516 edition, from which Tomlins believes most corruptions of the text originated. *See* T.E. Tomlins, *Advertisement* to LITTLETON, *supra*, at viii n.*. Littleton speaks in terms of joint tenancy because of the common-law presumption in favor of that form of concurrent estate, now everywhere reversed. *See supra* note 7 and accompanying text.

52. 1 BLACKSTONE, *supra* note 1, at 430.

53. *See, e.g.*, Dolley v. Powers, 89 N.E.2d 412 (Ill. 1949); Stuehm v. Mikulski, 297 N.W. 595 (Neb. 1941). This result has been reversed by statute in many states. *See* Orth, *supra* note 38, § 31.06(c) (summarizing 30 statutes).

suggested that the unities are in fact present because the grant is from one spouse as an individual to the two spouses as a unit.[54] Judicial improvisation, however ingenious, proved insufficient in most states. The problem is taken seriously enough that a large majority of the states still recognizing the tenancy by the entirety have adopted statutes explicitly authorizing conveyances by one spouse to both as tenants by the entirety.[55]

What about the all-important question of creditors' rights? Creditors of one joint tenant can compel alienation or partition or a sale and division of the proceeds. A few states, feeling bound by the married women's property acts to enforce complete equality between the sexes, have recognized creditors' rights in the wife's interest, even in her right of survivorship,[56] but a sizeable number of states refuse any rights in the entirety property to the creditors of either spouse.[57] The traditional justification of the latter result is rooted in the notion of the unity of the married couple. If the two have indeed become one, then the only creditors who matter are the creditors of that one. (Of course, in the *Alice-in-Wonderland* logic of the tenancy by the entirety, the *one* in this case means the *two*.) In states that had recognized the rights of the husband's creditors, the same result may today be reached by the paradoxical means of reforming the tenancy by the entirety to recognize the wife's co-equal rights of use and to rents and profits. The result is now justified as protection of the marital property from the profligacy of one member of the marital unit.[58]

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54. *See, e.g.*, Woolard v. Smith, 94 S.E.2d 466, 469 (N.C. 1956) (stating that a married couple is "an entity separate from the individuals"); *In re* Klatzl's Estate, 110 N.E. 181, 185 (N.Y. 1915) (Collin, J., dissenting) ("The husband did not convey to himself, but to a legal unity or entity which was the consolidation of himself and another.").

55. *See* Orth, *supra* note 38, § 33.06(c) (summarizing 17 statutes).

56. *See, e.g.*, King v. Greene, 153 A.2d 49 (N.J. 1959).

57. *See, e.g.*, Sawada v. Endo, 561 P.2d 1291, 1294-97 (Haw. 1977) (listing states).

58. When a family can afford to own real property, it becomes their single most important asset. Encumbered as it usually is by a first mortgage, the fact remains that so long as it remains whole during the joint lives of the spouses, it is always available in its entirety for the benefit and use of the entire family. Loans for education and other emergency expenses, for example, may be obtained on the security of the marital estate. This would not be possible where a third party has become a tenant in common or a joint tenant with one of the spouses, or where the ownership of the contingent right of survivorship of one of the spouses in a third party has cast a cloud upon the title of the marital estate, making it virtually impossible to utilize the estate for these purposes.

If we were to select between a public policy favoring the creditors of

As with all jerry-built structures run up with the materials at hand, the tenancy by the entirety as a device to protect marital property is a haphazard affair. The marks of its making remain all too obvious. Holmes once illustrated the process of common law development with a striking biological simile: "[J]ust as the clavicle in the cat only tells of the existence of some earlier creature to which a collar-bone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten."[59] The clavicle in this particular cat is laid bare in the answer to one simple question: Why is the tenancy by the entirety limited in most states to land? After all, a great amount of family wealth is today held in personal, as opposed to real, property; in community-property states no such distinction is drawn. Why should the common law protect only marital real estate from one spouse's improvidence? The answer (but not the reason) is because at common law the husband had complete dominion over his wife's personalty, unlimited by even the modest restraints imposed by the tenancy by the entirety on his control of the marital realty. Once married women gained control over their own personal property through the married women's property acts, the matter was at an end.[60] Not so with land held by the entirety (at least in those states in which the tenancy persists).

Today, no discussion of the tenancy by the entirety would be complete without addressing one final question: Why is the tenancy by the entirety still limited to married persons? The unity now produced by matrimony is, after all, considerably attenuated in practice as well as in theory, and there are pairs today

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> one of the spouses and one favoring the interests of the family unit, we would not hesitate to choose the latter. But we need not make this choice for . . . by the very nature of the estate by the entirety as we view it, and as other courts of our sister jurisdictions have viewed it, "[a] unilaterally indestructible right of survivorship, an inability of one spouse to alienate his interest, and, importantly for this case, a broad immunity from claims of separate creditors remain among its vital incidents."

Id. at 1297 (quoting *In re* Estate of Wall, 440 F.2d 215, 218 (D.C. Cir. 1971)); *see also* Fairclaw v. Forrest, 130 F.2d 829, 833 (D.C. Cir. 1942) (describing tenancy by the entirety as "a convenient mode of protecting a surviving spouse from inconvenient administration of the decedent's estate and from the other's improvident debts").

59. HOLMES, *supra* note 37, at 35.

60. An exception to the rule of no holding of personalty in tenancy by the entirety is recognized in cases in which realty held in that estate is converted into its money value without the consent of both owners. The usual case of "involuntary conversion" occurs when real property is taken by condemnation. *See, e.g.*, Ronan v. Ronan, 159 N.E.2d 653 (Mass. 1959).

that function as couples but that are not, for one reason or another, legally united. Why should the law—to use fashionable jargon—"privilege" one relationship above others? No combination of joint tenancy or tenancy in common plus contracts not to partition and to make a will can give the unmarried couple all the benefits automatically conferred on spouses holding property as tenants by the entirety. In fairness, it should be said that this question applies with equal force to any form of marital property, both to the civil-law system of community property as well as to the common-law estate of tenancy by the entirety. Should unmarried persons ever be allowed the benefits of the tenancy by the entirety (perhaps calling it by some other name), it would only add a new twist to the estate's already strange career. Having survived the earthquake of the married women's property acts (at least in some states), the tenancy by the entirety could probably survive the shock.

Over the years, the common-law marital estate has evolved into its present shape. The legal existence of married women and their capacity to handle their own property has everywhere been recognized. The unfairness inherent in a male-dominated tenancy has also now been eliminated; insofar as interest and possession are concerned, the tenancy by the entirety is today indistinguishable from the joint tenancy. With respect to alienability and the right of survivorship, however, the tenancy by the entirety remains distinct. One tenant by the entirety cannot, acting alone, sever the estate, in effect withdrawing a one-half share and terminating the right of survivorship; so much seems owing to the special relationship between the parties. Creditors' rights are more troublesome. In many states, land may be protected to an unlimited extent from the creditors of either tenant by the entirety, but, in most states, no amount of personal property may be so shielded. In practice, however, the real estate that is protected is usually the marital residence, often compensating for a miserly homestead exemption. The exclusion of personal property from the ambit of the estate means that creditors usually have adequate assets available to them.

The common-law marital estate is by no means perfect; Holmes was, of course, right about the life of the law not being logic. The tenancy by the entirety since Blackstone has been an awkward compromise, renegotiated in each generation, and only belatedly catching up with social reality. Today, no doubt, further adjustments are required. The only justification for the present system must be that people are familiar with it and that,

by and large, it works. Perhaps we may console ourselves with the reflection that while Tabby may be endowed with a needless clavicle, she more often than not catches the mice.