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## TENANCY BY THE ENTIRETY AND RECENT WYOMING DECISIONS

In Wyoming, the common law rule is still in force and estates by the entireties have not been abolished either expressly or inferentially by statute. Such estates became a part of Wyoming's jurisprudence upon its adoption of the common law. This has been expressly provided for by statute.<sup>1</sup>

Any conveyance to a husband and wife will create an estate by the entirety, unless indicated differently.<sup>2</sup> However, no such estate arises from even the most explicit words in a conveyance to a man and woman who are not husband and wife.<sup>3</sup> Thus, for the creation of an estate by the entirety, it is essential to have the combination of the four unities<sup>4</sup> of time, title, interest and possession of a joint tenancy plus the unity of husband and wife as one person in law.<sup>5</sup>

Generally speaking, a conveyance which would make two persons joint tenants would make a husband and wife tenants by the entireties. If any of the four unities are lacking, this may be remedied by conveying to a third person, usually called a "strawman",<sup>6</sup> who will then reconvey to the husband and wife jointly. Compliance with the requirement of the necessary unities for the creation of such an estate will thereby be satisfied.

An estate by the entirety may be for any duration, i.e., in fee, for life, and it may be in possession or in reversion or remainder. Such estates may be terminated by a joint conveyance,<sup>7</sup> by a conveyance from one spouse to the other,<sup>8</sup> by death<sup>9</sup> or by divorce.<sup>10</sup>

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1. Wyo. Comp. Stat. § 16-301 (1945). "The common law of England as modified by judicial decision . . . or statutes . . . shall be the rule of decision in this state when not inconsistent with the laws thereof, and shall be considered as of full force, until repealed by legislative authority."
  2. *Peters v. Dona*, 49 Wyo. 306, 54 P.2d 817 (1936).
  3. 26 Am. Jur. 698 (1940); Annot, 92 A.L.R. 1420; 30 L.R.A. 307.
  4. The tenants must have one and the same interest; the interests must accrue by one and the same conveyance; they must commence at one and the same time; the property must be held by one and the same undivided possession. If any one of these elements is lacking, the estate will not be a joint tenancy nor an estate by the entirety. Hence, where a husband and wife acquire an interest in property at different times or by different conveyances, the estate created is not an estate by the entirety, for the unity of time or possession has been disregarded.
  5. Note 2 supra.
  6. 14 Wash. & Lee L. Rev. 291 (1957). This note contains an interesting discussion concerning the split of opinion as to the use of a strawman. The "modern view" is that a husband can convey to himself and his wife and thus create an estate by the entirety. The husband or grantor has reserved to himself the same rights he would have been granted under a deed from a third party to himself and his wife. Any interest either spouse may have had in the property prior to this conveyance is disregarded. However, in the conclusion, this article stated that because of the confused state of law at this time, the only safe method of creating a tenancy by the entirety is by a conveyance through a strawman.
  7. *Terry v. Hensen*, 75 Wyo. 444, 297 P.2d 213 (1956).
  8. *Enycars v. Kepler*, 118 Ind. 34, 20 N.E. 539 (1889). The husband may make a valid conveyance of his interest to his wife, because it is with her consent.
  9. Note 2 supra; *Hill v. Breeden*, 53 Wyo. 125, 79 P.2d 482 (1938).
  10. *Arp v. Jacobs*, 3 Wyo. 489, 27 Pac. 800 (1891). This was the earliest case to hold that a divorce terminated all rights of survivorship. This rule was followed in *Crawford v. Crawford*, 63 Wyo. 1, 176 P.2d 792 (1947), in which a husband was given 80 acres held by the entireties. These two cases were also affirmed by *Cassas v. Cassas*, 73 Wyo. 147, 276 P.2d 456 (1954).

The first modern Wyoming case recognizing an estate by the entirety, *Peters v. Dona*,<sup>11</sup> did not create much of a furor within the legal profession. This case did not specifically involve the enforcement of the incidents of such an estate as completely as the more recent cases have. The implications, however, are just as apparent in this decision as they are in the more recent decisions. In that case a mechanics' lien was filed against property held by the entireties. Only the husband's name was included as the owner. The plaintiff was granted leave to amend the petition so as to include the wife's name. This amended petition was filed within the required time. However, the lien failed because both spouses were not mentioned as owners within the period allowed for bringing such an action. It was held that the husband's interest alone in an entirety estate could not be made subject to the lien. To do so would be to take the wife's property without her being made a party to the litigation, as the law required. It was thus made clear that the interest of a husband or wife in real estate held by them as tenants by the entireties could not, during their joint lives, be attached by a creditor of either the husband or wife. The creditor could not accomplish that which the husband or wife alone could not accomplish, i.e., an alienation of the property.

The more recent cases, however, have specifically delineated the many ramifications which were not strictly involved in the earlier interpretation. In fact, many practicing attorneys have indicated their surprise at the far reaching effects of the more recent decisions.

The next step in the development after the *Peters* case involved individuals other than the surviving spouse claiming an interest in property held by the entireties.<sup>12</sup> The surviving spouse commenced an action to exclude these individuals from taking any interest in the property. The court stated that the property becomes the absolute property of the survivor and is not a part of the estate of the decedent. At this time, no great significance or change in the court's attitude toward an estate by the entirety was apparent.

The tremendous effect of the incidents of such an estate followed with the decision of the court in *Terry v. Hensen*.<sup>13</sup> A husband and wife executed a mortgage of property held by the entireties to secure an indebtedness of their joint note. Subsequently, the wife disaffirmed the note and mortgage by reason of her minority. The court ruled that the property could not be subjected to a lien against the husband alone during the life of the wife without her consent. This is consistent with the holding of the *Peters* case. However, the *Terry* case further extended this restriction to the usufruct, or in other words to the rents, profits and income from such property. These were held to be an integral and indivisible part of the premises. Thus, the wife's interest was extended to include the pro-

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11. 49 Wyo. 306, 54 P.2d 817 (1937).

12. *In re Bergman's Survivorship*, 60 Wyo. 355, 151 P.2d 360 (1944).

13. Note 7 *supra*.

ceeds of property held by the entireties. This is a modification of the common law view, which gave the husband, in his own right and in the right of his wife, the control, possession and usufruct of property which was held by the entireties.

This opinion emphasized that the husband and wife are seised, not of moieties, but are both seised of the entirety per tout and not per my. Neither has a separate estate or interest in the land, but each has the whole estate. The estate, title and fee are indivisible between husband and wife and cannot be alienated or in any way disposed of unless they both agree to do so. Such indivisibility extends to every part of the estate. Neither spouse can alone divest the other's interest against his or her wish, during the life of both. Upon the death of one, the survivor has a fee simple in the whole. He holds not by virtue of survivorship, but by virtue of the title that vested under the original limitation; the estate was merely freed from participation by the deceased and there was no succession in or transfer of title and thus no new acquisition.<sup>14</sup>

The aforementioned tremendous effect is the combination of the *Peters* and *Terry* decisions. It is now firmly established that as long as both spouses live, neither their real estate, held by the entireties, nor the proceeds from the real estate can be legally seized or sold on execution for their individual debts. This interpretation protects a debtor to the detriment of a creditor. Holders of such property can now incur individual debts without fear of having the property, or the proceeds from the property, taken for satisfaction of these debts.

Within the same year as the *Terry* case, a wife conveyed property held by the entireties to a third party.<sup>15</sup> The conveyance was set aside in favor of the husband. It was reasoned that the property was held by the entireties and the wife could not dispose of it without the husband's consent. This decision further substantiates prior holdings, that entirety property cannot be conveyed without the consent of both spouses.

The most recent case, *Amick v. Elwood*,<sup>16</sup> has not greatly elaborated or extended the rule in the *Terry* case, regarding creditors. It is merely discussed in a different perspective. In the *Amick* case, a creditor had a judgment lien against the husband individually. A life estate in some real estate was then conveyed to "O. J. Leech and Edith M. Leech." Subsequently, the husband and wife, who had not been designated as such in the prior conveyance of the life estate, conveyed this property to the town of Glendo, Wyoming. The lien creditor attacked this conveyance and demanded satisfaction of his judgment from this property. His demand was refused. It was ruled that no particular words are necessary for the creation of an estate by the entirety. Thus, an estate by the entirety arises from a conveyance or devise to a husband and wife, although the deed,

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14. 30 C.J.S. 570 (1940); 26 Am. Jur. 692 (1940).

15. *Strom v. Felton*, — Wyo. —, 302 P.2d 917 (1956).

16. *Amick v. Elwood*, — Wyo. —, 314 P.2d 944 (1957).

will, or other instrument does not describe them as husband and wife, or refer to their marital relationship. The court continued by ruling that the conveyance by the husband and wife jointly passed title to the property free and clear of any claims of creditors of the husband. This decision indicates that a judgment creditor of either spouse cannot render the title defective, or defeat the right to convey entirety property.

The dilemma facing a creditor who has a debt or a judgment secured against only one spouse is now very significant. A caveat to future creditors: demand the signatures of both spouses as obligees on any and all transactions, because a judgment against just one spouse will not subject the entirety property or its proceeds to the satisfaction of the judgment. To protect oneself from the above mentioned pitfalls, one must always keep in mind the full effect of the incidents of an estate by the entirety in day to day transactions involving real estate in Wyoming.

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### THE JUDICIAL FATE OF LEGISLATIVE ATTEMPTS TO MAINTAIN SCHOOL SEGREGATION

In the three years since the Supreme Court of the United States announced in *Brown v. Board of Education of Topeka*<sup>1</sup> (popularly entitled the "School Segregation Case") that separate public school facilities for the white and Negro races were inherently unequal and that the schools must be integrated, there has been, in the south especially, a rash of legislation aimed at delaying or defeating completely the integrative process. Some of this legislation has been examined in the courts of the United States in an effort to test its constitutionality in light of the *Brown* decision. It is the purpose of this note to present the results of such examinations.

Before entering upon a discussion of the judicial results of legislative attempts to evade the school segregation case it will be well to examine briefly our present situation through the translucent pane of history.

In 1896 the Supreme Court of the United States announced in the case of *Plessy v. Ferguson*<sup>2</sup> the "separate but equal" doctrine. Under this doctrine segregation on the basis of race alone was constitutional so long as the facilities provided for one race were substantially equal to the facilities provided for the other. Even as it was articulated, however, the doctrine of separate but equal began to lose ground. In the same case, Mr. Justice Harlan's dissent sounded the depths of the majority decision and found it wanting. He pointed out that it was unfortunate that the nation's highest tribunal should conclude that it was competent for a

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1. 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, 38 A.L.R.2d 1180 (1954).  
2. 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).