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desire in the purchaser for the early death of the ancestor.⁵³ And, in addition, it has been held that an assignment operates as a fraud upon the ancestor, perhaps deluding him into leaving his property not to the person intended but to a stranger.⁵⁴ Thus it would appear that of the two, the release is looked on less harshly because it generally keeps the inheritance in the family and is more in the nature of a family settlement, which is favored by the courts.⁵⁵

It would appear that *Allen v. Allen* and *Coward v. Coward* actually left little room for doubt as to the validity of the release of an expectancy in North Carolina. However, the seemingly square holding contra in *Cannon v. Nowell* caused confusion in this area. *Price v. Davis* has at last removed this confusion.

THOMAS STEPHEN BENNETT

Fire Insurance—Estate by the Entirety—Insurable Interest—Right to Proceeds

A husband and wife own an estate in land as tenants by the entirety. The spouses are separated, the husband remaining the occupant of the dwelling-house. He insures the home in his name alone for \$4,000 and pays the premiums from his own funds. The home burns and pending payment of the claim by the insurance company the spouses obtain an absolute divorce. To whom do the proceeds of the policy belong?

The above facts presented a case of first impression in North Carolina.¹ The supreme court, reversing the decision of the trial court, held in *Carter v. Continental Ins. Co.*² that the husband's interest in the property was not insurable for his benefit alone as a separate moiety apart from the estate owned by him and his wife and the proceeds of a policy so taken insured to the benefit of the entire estate. Thus, upon absolute divorce the wife was entitled to one half of the proceeds,³ even though she was not named as insured or beneficiary in the policy and had not contributed to the payment of premiums.

Ordinarily a fire insurance policy is a personal contract to indemnify the insured for a loss sustained;⁴ and where one has an insurable in-

⁵³ *McClure v. Raben*, 125 Ind. 139, 147, 25 N. E. 179, 182 (1890).

⁵⁴ *In re Edelman's Estate*, 148 Cal. 233, 82 Pac. 962 (1905); *Hale v. Hollon*, 90 Tex. 427, 39 S. W. 287 (1897); See SIMES & SMITH, *FUTURE INTERESTS* § 395 (2d ed. 1956).

⁵⁵ *Bank of Wadesboro v. Hendley*, 229 N. C. 432, 50 S. E. 2d 302 (1948); *Redwine v. Clodfeter*, 226 N. C. 366, 38 S. E. 2d 203 (1946); *Fish v. Hanson*, 223 N. C. 143, 25 S. E. 2d 461 (1943).

¹ *Carter v. Continental Ins. Co.*, 242 N. C. 578, 89 S. E. 2d 122 (1955).

² 242 N. C. 578, 89 S. E. 2d 122 (1955).

³ Divorce converts a tenancy by the entirety into a tenancy in common.

⁴ VANCE, *INSURANCE* § 13 (1951).

terest in the property and pays the premiums from his own funds, the proceeds inure to his sole benefit.⁵ Normally, one not a party to a fire insurance contract can have no lawful claim in any amount realized by the insured.⁶ In view of these general insurance principles, it is interesting to observe the rationale of the court in reaching a seemingly contrary result in the *Carter* case. The facts of the case raise questions concerning theories which the court did not consider in its opinion. It is the purpose of this note to explore these questions. There seem to be relatively few cases concerning the points of law involved; therefore analogies must be drawn from related cases.

It is seemingly well settled in most jurisdictions that the husband has an insurable interest⁷ in the whole of the premises held by him and his wife as tenants by the entireties.⁸ The case of *Conley v. Fidelity-Phoenix Fire Ins. Co.*⁹ presented an interesting problem. The husband and wife owned certain property by the entireties which included a \$4,000 home. The husband insured the home for \$2,000 and loss occurred. The insurance company resisted on the ground that the husband's interest was limited to half of the value of the policy since the wife had an equal interest in the property. The court held that he was entitled to the full amount of the insurance, saying that the policy covered the interest of the insured—which in a tenancy by the entirety is of the whole and not of the moiety.¹⁰

⁵ *Wattenbarger v. Tullock*, 280 S. W. 2d 925 (Tenn. 1955).

⁶ See *Lynch v. Johnson*, 196 Va. 516, 523, 84 S. E. 2d 419, 423 (1954): "... if the insurance so procured exceeds the value of the insured's insurable interest, then the excess is of no concern to any other person who also has an interest in the property, but it is a question exclusively between the insured and the insurer."

⁷ See *Federal Land Bank v. Atlas Assurance Co.*, 188 N. C. 747, 125 S. E. 631 (1934) (any interest is insurable if peril insured against would bring pecuniary loss upon insured by immediate and direct effect); BLACK, LAW DICTIONARY 942 (4th ed. 1951) (all that is required for an insurable interest is "... such a real and substantial interest in specific property as will prevent the contract from being a mere wager policy"). The exact nature of the husband's interest in an estate by the entirety might be one or more of the following: (1) right of survivorship (2) right of usufruct (3) his interest in the estate (4) the joint interest in the estate.

⁸ *North British & Mercantile Ins. Co. v. Sciandra*, 256 Ala. 409, 54 So. 2d 764, 27 A. L. R. 2d 1047 (1951) (where husband and wife each owned undivided one-half interest in property destroyed, held: husband's insurable interest under the policy in his name was not confined to his estate in the property but his interest extended to pecuniary benefit expected from its continued existence); *Emery v. Clark*, 303 Mich. 461, 6 N. W. 2d 746 (1942) (where creditor sought to have policy issued in name of husband on tenancy by the entirety reformed to include the wife in order to get judgment against both, held: husband had insurable interest in the whole of the premises in his own right and policy may not be reformed); *Clawson v. Citizen's Mut. Fire Ins. Co.*, 121 Mich. 591, 80 N. W. 573, 68 A. L. R. 365 (1899); *Miotke v. Milwaukee Mechanics' Lien Ins. Co.*, 113 Mich. 166, 71 N. W. 463 (1897); *Lux v. Milwaukee Mechanics' Ins. Co.*, 30 S. W. 2d 1090 (Mo. App. 1930).

⁹ 102 F. Supp. 474 (W. D. Ark. 1952).

¹⁰ See 2 AMERICAN LAW OF PROPERTY § 6.6. (Casner ed. 1952): each spouse is seised *per tout et non per my*.

In some jurisdictions the failure of the husband to disclose the interest of his wife may void the policy for breach of warranty that he was sole and unconditional owner of the fee in the premises.¹¹ However, G. S. § 58-180.1¹² removes this from consideration in the instant case, since it provides that the naming of either spouse alone shall be sufficient and the policy shall not be void for a failure to disclose the interest of the other spouse.¹³ It may be noted that the statute does not state that the insurer will be liable for the full value of the policy but *only* that it shall not be void. In the principal case the insurer admitted liability on the policy; thus the litigation concerned only the rights of the respective spouses to the proceeds of the policy paid into court.

The estate by the entirety exists in North Carolina as at common law with all its incidents.¹⁴ These incidents were vividly set out by the late Chief Justice Stacy in his notable opinion in *Davis v. Bass*¹⁵ and were relied on by the court in the *Carter* case. Those pertinent to the instant case appear to be:

- (a) The estate is based on the common law doctrine that a husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person.
- (b) Each spouse is seised *per tout et non per my*, each being seised of the whole and not of a moiety or undivided portion.
- (c) The husband is entitled to the rents and profits of the land for his life (usufruct).
- (d) The estate is only severed by absolute divorce or by consent of both parties.
- (e) One spouse, without the consent of the other can neither have the property partitioned nor sell the whole or a part thereof.
- (f) Upon the death of either spouse the entire estate vests in the other, not solely by right of survivorship, but also by virtue of the grant which vested the entire estate in each grantee.

¹¹ *Cook v. Farmers' Mut. Fire Ass'n*, 139 W. Va. 700, 83 S. E. 2d 71 (1954) *But see* *Connecticut Fire Ins. Co. v. McNeil*, 35 F. 2d 675 (6th Cir. 1929). The latter case said that under the law of Tennessee there is but one owner; the legal existence of the wife is incorporated into that of the husband. Thus insurance in the name of the husband procured on an estate by the entirety satisfies the policy requirement of sole and unconditional ownership.

¹² N. C. GEN. STAT. § 58-180.1 (1950): "*Policy issued to husband or wife on joint property.*—Any policy of fire insurance issued to husband or wife, on buildings and household furniture owned by the husband and wife, either by entirety, in common, or jointly, either name 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 procuring of the issuance of such policy, fraudulent means or methods were used by the insured or owner thereof."

¹³ See N. C. GEN. STAT. § 58-30 (1950) which provides that statements in an application of insurance shall be deemed representations and not warranties.

¹⁴ *Nesbitt v. Fairview Farms Inc.*, 239 N. C. 481, 86 S. E. 2d 472 (1954).

¹⁵ 188 N. C. 200, 204-09, 124 S. E. 566, 567-71 (1924).

Legal separation does not affect the rights of the parties in the estate,¹⁶ but divorce absolute converts the tenancy by the entirety into a tenancy in common by operation of law.¹⁷

In the *Carter* case the supreme court did not comment on an interesting theory which prevails in some jurisdictions. In *Scutella v. County Fire Ins. Co.*¹⁸ a husband took out insurance in his name alone on property held by himself and his wife as tenants by the entireties. It was held that when the husband died, after loss but pending payment of the claim, the wife was entitled to the whole of the proceeds by right of survivorship.¹⁹ This would seem to import the idea that the proceeds due on the policy in one sense replaced the property destroyed and were impressed with its real property characteristics.²⁰ If this were the position of North Carolina it would greatly simplify the situation in the *Carter* case. It seems that North Carolina, however, follows a contrary view in this type of situation.²¹ An analysis of a few similar cases seems to verify this proposition. It is well settled that a tenancy by the entirety does not exist in personal property in North Carolina.²²

It has been held that a life tenant insuring his interest is entitled to the proceeds of the policy without having to share with the remainderman.²³ The life tenant may recover not merely in proportion to the value of his life estate but for the full amount due under the policy up to the fee value of the property destroyed.²⁴ In *In re will of Wilson*²⁵ the husband held a life estate by curtesy right after his wife

¹⁶ *Freeman v. Belfer*, 173 N. C. 581, 92 S. E. 486 (1917). The majority of the court were of opinion that divorce *a mensa et thoro* did not sever the marital relationship and thus did not affect the rights of the spouses in a tenancy by the entirety. There were vigorous dissents.

¹⁷ *McKinnon v. Caulk*, 167 N. C. 411, 83 S. E. 559 (1914). It severs the unity of person, one of the five unities required in the holding of the title as tenants by the entireties.

¹⁸ 231 App. Div. 343, 247 N. Y. S. 689 (4th Dep't 1931).

¹⁹ *Rigby v. Allegany County Cooperative Fire Ins. Co.*, 242 App. Div. 809, 275 N. Y. S. 211 (4th Dep't 1934) (memorandum decision following the *Scutella* case as conclusive).

²⁰ *Rolater v. Rolater*, 198 S. W. 391 (Tex. Civ. App. 1917) (a similar line of reasoning was used: where a home is destroyed by fire, the proceeds of insurance thereon stand in place of and instead of the insured property and has the same character, community or separate, as the insured property); *In re Hickman's Estate*, 41 Wash. 2d 519, 250 P. 2d 524 (1953).

²¹ See *Wilson v. Ervin*, 227 N. C. 396, 42 S. E. 2d 468 (1947); *Stockton v. Maney*, 212 N. C. 231, 193 S. E. 137 (1937). *But see* *Campbell v. Murphy*, 55 N. C. 357 (1856); *Graham v. Roberts*, 43 N. C. 99 (1851).

²² *Bowling v. Bowling*, 243 N. C. 515, 91 S. E. 2d 176 (1956); *Turlington v. Lucas*, 186 N. C. 283, 119 S. E. 366 (1923); Note, 6 N. C. L. Rev. 342 (1928).

²³ *Stockton v. Maney*, 212 N. C. 231, 193 S. E. 137 (1937). Where husband held a life estate by curtesy right and insured the property, *held*: nothing else appearing the husband insured only his interest in the dwelling and upon destruction by fire he was entitled to the entire proceeds of the policy and the remainderman had no interest in the real property bought by the life tenant with the proceeds.

²⁴ *Ibid.*

²⁵ 224 N. C. 505, 31 S. E. 2d 543 (1944).

died intestate. He insured the home for its full value and it was destroyed by fire. The heirs of the deceased wife brought suit for their ratable portion of the proceeds. The court held that unless an intention to insure for the benefit of the heirs appeared, the husband was entitled to the whole amount of the insurance. The rationale of this view appears to be: (1) that the interest of the life tenant and the remainderman are entirely separate (2) that the insurance arises not out of the property itself but from an independent contract.

However, the situation seems otherwise if a testator devises property on which he holds insurance and loss occurs after his death. It has been held that a life tenant under the devise receives the interest on the proceeds in lieu of the use of the destroyed property and at his death the principal passes to the remainderman.²⁶ Apparently this is one instance where North Carolina has followed the view that the proceeds in a sense replace the property and retain its characteristics.²⁷

In another analogous insurance situation it has been held that one joint owner may insure his interest to the exclusion of the other,²⁸ and in most instances collect the total amount of the insurance proceeds for his sole benefit.²⁹ Where a wife and husband held property by joint tenancy and the wife insured the family dwelling as sole owner for its full insurable value and paid the premiums from her own earnings, it was held that she was entitled to the whole of the proceeds and the husband could not maintain an action in law or equity for any portion thereof.³⁰ In this and other cases the courts declined to set up a fixed rule as to the right of the non-insuring joint owner to share in the proceeds. Rather the decision appeared to depend on "the equities of the particular case" in deciding whether the other joint owner had a right to share in the proceeds of the insured's personal contract.³¹

It seems clear in North Carolina that when an estate by the entirety is sold the funds derived from the sale become personalty³² and are held

²⁶ *Graham v. Roberts*, 43 N. C. 99 (1851). VANCE, INSURANCE § 133 (1951) says that since the insurance policy is a personal contract, the right of action is in the personal representatives of the deceased who hold the proceeds in trust for those entitled to succeed by inheritance or devise to the insured property. This doctrine applies only to inheritance or devise and not grants inter vivos.

²⁷ See *Graham v. Roberts*, *supra* note 26; *cf.* *Campbell v. Murphy*, 55 N. C. 357 (1856).

²⁸ 14 AM. JUR., *Cotenancy* § 23 (1938).

²⁹ *Clapp v. Farmers Mutual Fire Ins. Assn*, 126 N. C. 388, 35 S. E. 617 (1900); *American Cent. Ins. Co. v. Harrison*, 205 S. W. 2d 417 (Tex. Civ. App. 1947).

³⁰ *Miles v. Miles*, 211 Ala. 26, 99 So. 187 (1924); *accord*, *Bell v. Barefield*, 219 Ala. 319, 122 So. 318 (1929).

³¹ *Currier v. North British Etc. Co.*, 98 N. H. 366, 101 A. 2d 266 (1953); *Godfrey*, *Some Limited-Interest Problems*, 15 LAW & CONTEMP. PROB. 415, 423 (1950).

³² *Turlington v. Lucas*, 186 N. C. 283, 119 S. E. 366 (1923) (where husband and wife sold an estate by the entirety and received mortgage secured by bonds,

by the parties as tenants in common.³³ In *Wilson v. Ervin*³⁴ the husband and wife sold property held by the entireties and the money was deposited in the bank in the husband's name. After the death of the husband, the wife asserted that she was entitled to the whole amount of the money by right of survivorship. It was held that no right of survivorship existed in such funds and she was entitled to only half. The rationale of this view seems to be: (1) the sale of the property terminates the estate by the entirety by joint act and consent of both spouses, making them each entitled to half the proceeds as tenants in common. (2) the money or claim for money replaces the property *only* in the sense that it represents the value.³⁵ Similar cases in other jurisdictions have held that such sale proceeds go by right of survivorship.³⁶

The court might have considered the theory that the husband in the *Carter* case insured the property in trust for himself and his wife. It seems clear that there was no intention present which is essential to the existence of an express or implied trust.³⁷ A constructive trust might be plausible.³⁸ Constructive trusts are *created* by courts of equity³⁹ and arise entirely by operation of law without reference to any actual or supposed intention to create a trust but often contrary to such intention.⁴⁰ Generally a constructive trust is declared only when equity finds that one has obtained or now retains title to property by any kind of wrongdoing; or where, although title was obtained originally without fraud or wrong, it is against equity that the property should be retained by him

held: the bonds were personal property and at the death of the husband jus accrescendi did not apply to vest the whole of the proceeds in the wife); *Moore v. Greenville Banking and Trust Co.*, 178 N. C. 118, 100 S. E. 269 (1919); Note, 13 N. C. L. Rev. 256 (1935). *But cf.* *Place v. Place*, 206 N. C. 676, 174 S. E. 747 (1934); *Isley v. Sellars*, 153 N. C. 374, 69 S. E. 279 (1910).

³³ *Honeycutt v. Citizens Nat'l Bank*, 242 N. C. 734, 89 S. E. 598 (1955).

³⁴ 227 N. C. 396, 42 S. E. 2d 468 (1947).

³⁵ For an excellent discussion of this doctrine see *In re Estate of Blumenthal*, 236 N. Y. 448, 141 N. E. 911, 30 A. L. R. 901 (1923).

³⁶ *Koehring v. Bowman*, 194 Ind. 433, 142 N. E. 117 (1924) (tenancy by the entirety does not exist in personalty except as to personal property directly derived from real estate held by that title such as proceeds arising from the sale of property so held); *Brell v. Brell*, 143 Md. 443, 122 Atl. 635 (1923); *Johnson v. Johnson*, 268 S. W. 2d 439 (Mo. App. 1954) (where husband and wife sold an estate by the entirety and the money was deposited in the bank in the name of the husband, *held*: proceeds of sale retained all features and characteristics of an estate by the entirety and upon the death of the husband the wife was entitled to the whole amount of the deposit by right of survivorship); *Citizens Sav. Bank and Trust Co. v. Jenkins*, 91 Vt. 13, 99 Atl. 250 (1916).

³⁷ BOGERT, TRUSTS § 77 (1952).

³⁸ See *Connecticut Fire Ins. Co. v. McNeil*, 35 F. 2d 675, 678 (6th Cir. 1929) (dictum): "Nor do we decide that the husband is entitled to the sole and exclusive enjoyment of the proceeds of the policy. . . . It might well be that the proceeds are held by the husband as trustee for the wife and the wife's interest thus preserved." See note 11 *supra* for facts and holding of this case.

³⁹ *Lefkowitz v. Silver*, 182 N. C. 339, 109 S. E. 56 (1921).

⁴⁰ *Speight v. Branch Banking & Trust Co.*, 209 N. C. 563, 183 S. E. 734 (1936).

who holds it.⁴¹ Evidence to establish a constructive trust must be clear, strong, cogent, and convincing.⁴² It does not appear that in the principal case the husband was guilty of any wrongdoing or that it would be against equity to allow him to recover the full amount of the proceeds. The wife could have protected her own interest by insuring the property in her own behalf.

The supreme court in the instant case did not comment on the possibility that the insurance proceeds might have been impressed with real property characteristics or that the husband procured the insurance in trust for his wife. Rather it based the decision on the common law nature of the estate. Since the husband and wife were each seised *per tout et non per my*, there was no moiety of interest which the husband could insure for his sole benefit.⁴³ It seems both have an equal interest in the res, but that interest is not severable.⁴⁴ This distinguishes the instant case from the analogous insurance cases previously considered. Joint tenants are seised *per tout et per my*⁴⁵ and tenants in common are seised *per my et non per tout*.⁴⁶ In each instance there is a *per my* interest, a moiety, which one cotenant may claim as his own.

This apparently means that in North Carolina a husband must have a moiety of interest in order to insure for his separate benefit. Is this not contrary to accepted insurance theories?⁴⁷ The decision in the *Carter* case does not appear to rest on any presumption that the husband insures for the benefit of both spouses.⁴⁸ Rather the rationale of the court seems to be: (1) that the insurance policy as written and the loss benefits created thereby insured to the benefit of the *entire state* as owned by both husband and wife (2) that since the entire estate, as so insured, was severed by absolute divorce, it *necessarily* follows that the wife is entitled to half the proceeds of the policy. Though there was no express reference to the proceeds taking the characteristics of real property the rationale seems to imply that the court treated the proceeds as being endowed with the characteristics of an estate by the entireties before the divorce and necessarily taking the characteristics of tenancy in

⁴¹ *Teachey v. Gurley*, 214 N. C. 288, 199 S. E. 83 (1938).

⁴² *Atkinson v. Atkinson*, 225 N. C. 120, 33 S. E. 2d 666 (1945).

⁴³ *But see* *Ross v. Ross*, 35 N. J. Super. 242, 113 A. 2d 700 (1955). New Jersey has modified the common law and asserts that in a tenancy by the entirety the wife holds in her possession during their joint lives one half of the estate in common with her husband and as between themselves the respective rights of the parties are those of tenants in common.

⁴⁴ *Strauss v. Strauss*, 148 Fla. 23, 3 So. 2d 727 (1941); *New York Life Ins. Co. v. Oates*, 122 Fla. 540, 166 So. 269 (1936).

⁴⁵ 2 AMERICAN LAW OF PROPERTY § 6.1 (Casner ed. 1952).

⁴⁶ 2 AMERICAN LAW OF PROPERTY § 6.5 (Casner ed. 1952).

⁴⁷ See note 7 *supra*.

⁴⁸ *Cf.* 48 C.J.S., *Joint Tenancy* § 14 (1947) which says where the act of one joint tenant is beneficial to his cotenant, his act is regarded as the act of all so far as sharing in the benefit of the act is concerned.

common after divorce, thus enabling the wife to share in the proceeds. This might mean then that the wife could have recovered half the proceeds prior to divorce absolute.

It may be noted in the instant case that the policy was issued in the name of the husband. The question arises whether the result would have been the same had the policy specifically excluded the wife. Apparently this is the only further action which the husband here could have been taken to manifest an intention that payment should be made to him alone.⁴⁹

CONCLUSION

It is the opinion of the writer that by this decision the supreme court has placed a restriction on the tenancy by the entirety which has not before been judicially recognized. Just as neither spouse alone can have the estate partitioned and neither alone can alienate his interest, so likewise in North Carolina neither spouse can insure the property to the exclusion of the other. Thus it appears that it becomes another incident of the tenancy by the entirety which the parties accept when they choose to hold such an estate.

WILLIAM H. KIRKMAN, JR.

Joint Tort-Feasors—Contribution—Effects of Statute on Covenant Not to Sue

A recent New Jersey case, *Smootz v. Ienni*,¹ involved a problem which has not been decided in North Carolina. The plaintiff was a passenger in the defendant's cab and was injured in an accident between the cab and a vehicle operated by a third party. In the plaintiff's action, the defendant cab company filed a third party complaint against the other driver for relief under the New Jersey Joint Tortfeasors Contribution Law.² The other driver had obtained a covenant not to sue³ from the

⁴⁹ The equities of the instant case seem to be heavily in the husband's favor since: (1) he had paid all the premiums from his own funds; (2) he had the policy issued in his name alone; (3) the husband and wife were living separate and apart when the policy was issued; (4) the insurance covered the homestead in which the husband was residing.

¹ 237 N. J. Super. 529, 117 A. 2d 675 (1955).

² N. J. STAT. ANN. §§ 2A:53A-1 to -3 (1952): "For the purpose of this act the term 'joint tortfeasors' means two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them. . . . The right of contribution exists among joint tortfeasors. . . . [Where a joint tortfeasor pays all or part of a judgment] he shall be entitled to recover contribution from the other . . . joint tortfeasors for the excess so paid over his pro rata share; but no person shall be entitled to recover contribution under this act from any person entitled to be indemnified by him in respect to the liability for which the contribution is sought. . . ."

³ Where there are joint tort-feasors there can be but one recovery and a settlement with one is a release of the others. *Howard v. Plumbing Co.*, 154 N. C.