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JOINT TENANCIES AND TENANCIES BY THE ENTIRETY—WORDS OF SURVIVORSHIP—JOINT TENANCY OR TENANCY BY THE ENTIRETY IN FEE, OR "JOINT" LIFE ESTATE WITH CONTINGENT REMAINDER IN FEE IN SURVIVOR

§ 1. INTRODUCTION

The leading case of *Watson v. Muirhead*[1] held that a non-negligent, reasonably competent title examiner was not liable for errors in judgment even though his client suffered loss by reason of a defect in title. In that case the court, through Sharswood, J., said that "to hold [the title examiner] . . . responsible would be to establish a rule, the direct effect of which would be to deter all prudent and responsible men from pursuing a vocation environed with such perils."[2] The decision was advantageous to the title examiner in that it limited his liability, but the decision was to his disadvantage in that it was the immediate cause of title insurance as an alternative method of assuring title.[3]

From the title examiner's point of view, the most important property decision in 1958-1959 is *Hunter v. Hunter*,[4] and from *Watson v. Muirhead* the title examiner may derive some small comfort.

§ 2. HUNTER V. HUNTER STATED

Hunter v. Hunter arose as follows. The testatrix, in the hospital and facing a serious operation, executed the will in question in 1950. In part it provided

> I give and devise unto my mother, [M], and unto my sister, [S], *as joint tenants with the right of survivorship,* all the real estate which I may own at the time of my death. (Emphasis added.)

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*This Article contains a very complete discussion of the case Mr. Eckhardt considered most significant of all the cases reported in 313 S.W.2d through 322 S.W.2d.

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1. 57 Pa. 161 (1868).
2. *Id.* at 168.
3. See generally GAGE, LAND TITLE ASSURING AGENCIES 78-81 (1937).
4. 320 S.W.2d 529 (Mo. 1959).

[Note that a fee was not expressly limited.] The testatrix died sixteen months later owning the land in question.

Shortly before her death in 1956, *M*, one of the devisees, made a conveyance through a straw party to herself for life with remainer in fee to her granddaughter, *N*, a niece of the testatrix. *M*'s clear purpose was to turn a joint tenancy in fee with the incident of survivorship into a tenancy in common in fee without the incident of survivorship.

After *M*'s death *N* brought a suit to determine title, claiming an undivided one-half in fee, on the theory that the will created a joint tenancy in fee and that *M*'s deed turned the joint tenancy into a tenancy in common with no incident of survivorship. This theory was adopted by the trial court and judgment was entered for *N* for one-half. On appeal the court adopted *S*'s theory that the will created a joint tenancy for life in *M* and *S* [actually a tenancy in common for the life of the shorter liver, more of which later], with a contingent remainder in fee in the whole in the survivor, an interest which was not affected by *M*'s conveyance out in 1956.[5]

The actual intention of the testatrix may well have been that the survivor of *M* and *S* take the whole without any power to defeat survivorship, and in view of the respective ages this almost certainly would be *S*. The testimony as to intention is summarized by the appellant,[6] but the trial court apparently excluded from evidence all of the offered testimony as to actual intention,[7] and the respondent, of course, did not offer evidence as to intention in view of her position on appellant's evidence. It is not certain what actual intention might have been found

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5. The issue was not raised on appeal and apparently was not raised in trial court, but it should be noted that if contingent remainders are destructible in Missouri, *S* would have recieved only one-half under her theory, the theory adopted by the court. The residuary clause (Brief for Respondent, p. 3) ran in favor of *M*, and under this clause *M* would receive the reversion in the whole (there being a reversion following a contingent remainder in fee), in addition to the one-half for life *M* received under the earlier clause in issue. *M*'s 1956 conveyance would effect a merger and the contingent remainder in fee in *S* would be destroyed as to one half. Lewin v. Bell, 285 Ill. 227, 120 N.E. 633 (1918).

Hunter v. Hunter is another Missouri case holding in fact that contingent remainders are not destructible, but without noticing or discussing the problem.

See generally Eckhardt, *The Destructibility of Contingent Remainders in Missouri*, 6 Mo. L. Rev. 268-96 (1941); and Eckhardt & Peterson, *Possessory Estates, Future Interest and Conveyances in Missouri*, 23 V.A.M.S. § 49 (1952), and authorities cited therein.

6. Brief for Appellant, pp. 10-16.

7. Brief for Respondent, p. 1; 320 S.W.2d at 534.

had the issue been fully developed on both sides. The view of the court on appeal was that the intention of the testatrix should be determined from the will alone and not from extrinsic evidence of intention.[8]

In construing the clause in issue, the court emphasized that there were no words expressly indicating a joint tenancy in fee. The court held that Sec. 474.480, RSMo 1957 Supp., the section raising a presumption of a fee, was not applicable because there was a contrary intention.[9]

The court also emphasized that in interpreting a will it must give effect to every leading word in the will.[10] By finding a joint life estate, with remainder in fee in the whole in the survivor, the court felt that it was giving effect to the words "with right of survivorship" and that only by such construction are those words given any meaning. The court rejected the argument that the words were simply descriptive of the principal incident of a joint tenancy in fee.

It is respectfully submitted that the court failed to apply this same rule, that in construing and interpreting wills courts should give effect to every clause and portion of a will, to another key phrase in the will, viz., "as joint tenants." The court's construction left the words "as joint tenants" with no meaning or significance. A "joint tenancy" of a life estate for the life of the shorter liver of *two* persons is not a joint tenancy but is a tenancy in common. As between *two* persons, the words "as joint tenants" are given effect only if the estate is for a greater period than the life of the shorter liver.

The two cases principally relied on as precedents (there being, as the court recognized, no reported case directly in point) can and should be distinguished on the grounds that in each case there were more than two joint tenants and in each case there were words fairly susceptible of construction as creating a remainder in fee in the last survivor.

§ 3. QUARM V. QUARM STATED

In *Quarm v. Quarm*[11] there was a devise in 1843 to the testator's

8. 320 S.W.2d at 534.
9. *Id.* at 532.
10. *Ibid.*
11. L.R. [1892] 1 Q.B. 184, 40 Weekly Reporter 302 (Q.B. 1892), 66 L.T.R. (n.s.) 418 (Q.B. 1892) (the complete devise is set out verbatim at p. 418), 61 L.J.Q.B. (n.s.) 154 (1891) (this is the report quoted in the principal case). The facts are not fully stated in any of the four reports, but may be pieced together from the several different statements of facts. *Quarm v. Quarm* is considered at some length in 320 S.W. at 532-33.

widow for life, with remainder to the testator's brother for life, with remainder to seven named persons

> as joint tenants, and not as tenants in common, and to the survivor or longest liver of them, his or her heirs and assigns for ever.

In 1869 one of the joint tenants (who ultimately became the survivor) became a bankrupt and his interest under the devise was conveyed to the plaintiff. In 1883 the three "joint" tenants then alive partitioned among themselves. Two of these persons died in the period 1883-1889 and the last survivor of the seven died in 1889.

The plaintiff (successor to the last survivor) claimed the devise created a joint tenancy for life [of the next to the longest liver], with a contingent remainder in fee in the survivor, not subject to being cut down by severance. The defendants claimed the devise created a joint tenancy in fee and that the incident of survivorship had been defeated by severance; there also was a claim that the plaintiff was barred by adverse possession, apparently on the theory her rights arose in 1869 rather than in 1889 when the last two surviving "joint" tenants died. The court adopted the plaintiff's theory and held the devise created a joint tenancy for life with a contingent remainder in fee in the survivor.

It should be noted that the words "as joint tenants" have some meaning and effect where applied to a joint life estate in seven persons, measured by the life of the next to the longest liver. It should be noted also that there is not simply a descriptive recital "with right of survivorship" but rather express words easily construed as creating a remainder in fee in the whole, viz., "and to the survivor or longest liver of them" in fee. Even if *Quarm v. Quarm* were accepted as a sound decision (and this writer has considerable doubts as to its soundness), it is clearly distinguishable from the principal case, *Hunter v. Hunter*.

§ 4. Jones v. Snyder Stated

The other case cited by the court which is somewhat in point is *Jones v. Snyder*.[12] In 1905 an elderly childless widower, Root, asked his brother-in-law, Snyder, to move from Washington, D.C., to Bay City, Michigan, to take charge of Root's business, and (together with Snyder's wife and daughter) to live with him. Root conveyed the residence and

12. 218 Mich. 446, 188 N.W. 505 (1922). This case is cited in 320 S.W.2d at 534.

business property through a straw party to himself, Snyder, Snyder's wife, and Snyder's daughter

> as joint tenants and to their heirs and assigns, and to the survivors or survivor of them, and to the heirs and assigns of the survivors or survivor of them, forever.[13]

Difficulties arose and before two years had passed Root filed a bill to set aside the deeds; the conveyances were sustained, Root getting the whole use of the residence and one-third of the income from the business. In 1908 Root went to live with a cousin; in 1919 Root conveyed to her an undivided one-half interest in the residence and business. At the time of this litigation Snyder's daughter was the sole survivor.

The court construed the deed as creating a joint tenancy for life, with a contingent remainder in fee in the whole in the survivor. The court made this construction in order to give some effect to the words "survivors or survivor," and relied on *Quarm v. Quarm*, § 3 supra, and two earlier Michigan cases where the limitations prima facie created tenancies in common but where there were words of survivorship.[14]

It should be noticed that here, as in the *Quarm* case, there were more than two "joint" tenants, and consequently the words in the limitation "as joint tenants" have some significance as applied to a life estate for the life of the next to the longest liver of four persons. In addition,

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13. The deeds are set out in full in Root v. Snyder, 161 Mich. 200, 207, 126 N.W. 206, 209 (1910).

14. These two cases, cited in 320 S.W.2d at 534, are typical of many cases where a limitation is ineffective to create a joint tenancy in fee or a tenancy by the entirety in fee with the inherent incident of survivorship, but where the court nevertheless construed the limitation so that there was survivorship, often by finding a contingent remainder in fee in the survivor.

The defect in the original limitation usually results from a failure to use an essential formula such as "as joint tenants and not as tenants in common" (see § 442.450, RSMo 1949, as to the essential words in Missouri), or results from an attempted direct conveyance (no longer a problem in Missouri in view of § 442.025, RSMo 1957 Supp., effective in 1953; see Title Examination Standard No. 28, "Direct conveyances on or after August 29, 1953, Sec. 442.025, RSMo 1949," 23 V.A.M.S. ch. 442 App.).

See generally Annot., Creation of right of survivorship by instrument ineffective to create estate by entireties or joint tenancy, 1 A.L.R.2d 247-60 (1948).

Cases of this type where words of survivorship are given substantial effect are cases where the courts are carrying out the clear intention of the grantor or the testator as expressed on the face of the instrument. *Hunter v. Hunter* and related cases are in an entirely different category, because in the Hunter type of case the limitation is effective to create a joint tenancy or tenancy by the entirety, as the case may be, with the inherent incident of survivorship, and there is no need to take into account and give substantial effect to express words of survivorship.

as in the *Quarm* case, the express words "to the survivors or survivor of them" can be construed without violence as creating a remainder in fee in the whole. Even if *Jones v. Snyder* were accepted as a sound decision (and this writer has considerable doubts as to its soundness, unless one takes into account extrinsic evidence as to the situation of the parties and their intention), it is clearly distinguishable from the principal case, *Hunter v. Hunter*.[15]

It is submitted that neither *Quarm v. Quarm* nor *Jones v. Snyder* is persuasive when the limitation in the *Hunter* case is considered. The words "as joint tenants" are left without any meaning as applied to a life estate in *two* persons measured by the life of the shorter liver. "With right of survivorship" is a far cry from the words "to the survivor in fee."

§ 5. *To A and B as Joint Tenants with Right of Survivorship*—Liability of Title Examiner Who Has Passed Title as Joint Tenancy in Fee

The writer does not know how many title examiners have approved titles on a joint tenancy in fee construction where the limitations were essentially the same as in *Hunter v. Hunter*, but undoubtedly some such titles have been passed, and unless these titles are perfected by adverse possession "owners" may lose their land. It is believed that most, if not all, title examiners would have been of opinion that the limitation in *Hunter v. Hunter* created a joint tenancy in fee which was effectively severed by the conveyance out, and that the survivor would take only one-half of the fee. A title examiner who passed such a title was not negligent or incompetent, but rather made an error of judgment (or lacked clairvoyance) for which he is not liable.

It is significant that leading form books show a limitation substantially the same as in *Hunter v. Hunter* as the appropriate limitation for creating a joint tenancy in fee. For example, 4 Am. Jur. *Legal Forms Annot.* § 4:1129 (1953) is the only form given for creation of a joint tenancy by will. This form is as follows:

> I, __1__, give, devise, and bequeath to __2__ and __3__, as joint tenants with right of survivorship, and not as tenants in common, the following described property to wit: __4__.

15. The initial part of the limitation in *Jones v. Snyder* had sufficient express words to create a joint tenancy in fee. See § 9 below.

It will be noticed that the operative words in this form are identical with the operative words in *Hunter v. Hunter* except that the limitation in *Hunter v. Hunter* did not include the words "and not as tenants in common." These additional words are of no significance in the problem of construction; they are not necessary in Missouri but are required in some states to create a joint tenancy. There is no indication by annotation in the form book that the above form will have any effect other than to create a garden variety joint tenancy in fee. 4 AM. JUR. *Legal Forms Annot.* § 4:1123 (1953), a deed form, is almost identical.

In another widely used form book, MODERN LEGAL FORMS § 3236 (1938), a joint tenancy clause for use in a deed, is as follows:

> To ———— and ———— as joint tenants and not as tenants in common, with full right of survivorship.

Again there is no indication that the effect of this form will be other than to create an ordinary joint tenancy in fee.

In still another widely used form book, NICHOLS, CYCLOPEDIA OF LEGAL FORMS ANNOT., the first joint tenancy form for use in a will is section 5.1675(A), and provides as follows:

> To ———— and ————, as joint tenants, with full rights of survivorship.

As in the other form books, there is no caveat.

Certainly there is a reasonable basis for a title examiner to assume that these three substantially identical forms from widely used form books would be construed by a court to effect their obvious purpose, particularly where there was no reported case to the contrary.

§ 6. *To H and W as Tenants by the Entirety with Right of Survivorship*—CONSTRUCTION

If the doctrine of *Hunter v. Hunter* were confined to joint tenancies the problem would not be so serious. Although there are joint tenancy limitations in substantial number in Missouri, they are not too common, and only infrequently is there an attempt to turn a joint tenancy into a tenancy in common and do away with the incident of survivorship.

It would seem however that the doctrine of *Hunter v. Hunter* would apply equally to entireties limitations and that a limitation creating a tenancy by the entirety would receive the same construction as a cor-

responding limitation creating a joint tenancy. Thus a limitation running

to *H* and *W* as tenants by the entriety with right of survivorship;

or to *H* and *W* with right of survivorship

would seem to create a tenacy by the entirety for the life of the shorter liver with a contingent remainder in fee in the survivor.

If the husband and wife join in a conveyance out there is no problem. If they do not convey out and the marriage relationship subsists until one of them dies the survivor takes the whole and there is no problem. If the parties are divorced and if there is a properly drawn property settlement, the interests of the parties will be clear after the divorce. If the parties are divorced and if there is no property settlement, then by Missouri common law the tenancy by entireties becomes a tenancy in common. This creates no particular problem if the entireties estate is in fee. But if the construction of the limitation is that there is a tenancy by entireties only for the life of the shorter liver with a contingent remainder in fee to the survivor, it would seem that the effect of the divorce would be to turn the life estate into a tenancy in common but not to affect the contingent remainder in fee in the survivor. Thus, title is uncertain until either the ex-husband or the ex-wife dies and it can be determined which one is the survivor.

Under the construction that the limitation creates a tenancy by the entireties in fee, a creditor can not reach the property to satisfy the separate debt of one of the spouses. The two spouses joining together can convey out and defeat a federal tax lien for the obligation of one of the spouses, and in like manner could defeat a judgment lien for the debt of one of the spouses.[16] Under the life estate and remainder construction, a creditor of one of the spouses could reach the contingent remainder, subject to the condition precedent of the debtor surviving.

The incident of survivorship in the case of a tenancy by the entirety cannot be extinguished by a conveyance out by one of the spouses during coverture; the entireties estate has the characteristic of durability. The separate conveyance by one spouse of entireties property is said to be void but his deed nevertheless may become effective on an estoppel

16. See Hutcherson v. United States, 92 F. Supp. 168 (W.D. Mo. 1950), *aff'd*, United States v. Hutcherson, 188 F.2d 326 (8th Cir. 1951), Kelly, *Real Property—Tenancy by the Entirety—Conveying Free of Income Tax Lien Against Husband*, 16 Mo. L. REV. 183 (1951).

by deed theory if the spouse who conveys out survives. Under the construction that the limitation creates a tenancy by the entirety in fee, it is probable that a conveyance out by one spouse would not disable that spouse from later joining with the other spouse in conveying out the fee, as noted with reference to extinguishing liens in the paragraph next above, thus circumventing perfection of the original conveyance on the theory of estoppel by deed. Under a life estate and remainder construction, either spouse could convey freely his or her contingent remainder without joiner of the other spouse.

Inasmuch as the form of limitation considered in this section is exactly parallel with the one construed in *Hunter v. Hunter,* the limitation probably will be construed as creating a tenancy by the entirety for the life of the shorter liver, with contingent remainder in fee in the survivor. On the other hand, the court may confine the life estate and remainder construction to joint tenancy limitations, in which case the entireties limitation under consideration in this secton would create a tenancy by the entirety in fee. The title examiner must assume the construction most unfavorable to the title.

§ 7. *To A and B as Joint Tenants, Their Assigns, the Survivor of them and the Heirs and Assigns of the Survivor*—CONSTRUCTION

A common limitation for creating a joint tenancy in fee, if respectable form books are good evidence of practice, is the following, often with slight but immaterial variations in wording:

> to *A* and *B* as joint tenants, their assigns, the survivor of them and the heirs and assigns of the survivor.

Probably the explanation for the popularity of this basic form is the fact that a limitation running "to A and B and *their* heirs and assigns" is not strictly accurate because in the usual course of events one party will survive to the whole and only his heirs and assigns will take. Consequently conveyancers have developed a type of limitation which indicates with more precision the usual course of devolution of the property, viz., to *A* and *B* as joint tenants, their assigns (if they assign), the survivor of them (if they have not assigned), and the heirs and assigns of the survivor. This form is used without any intention of limiting or doing away with the usual incidents of a joint tenancy in fee, including the power of one joint tenant to turn the estate into a tenancy in common and to extinguish the right of survivorship.

4 AM. JUR. *Legal Forms Annot.* uses substantially the above type of limitation in three different sections, §§ 4:1121, 4:1122 and 4:1126. For example, § 4:1126 shows an habendum provision as follows:

> To have and to hold the above described premises, with the appurtenances, unto the said grantees as joint tenants, and not as tenants in common, and to their assigns, or to the heirs and assigns of the survivor of them, forever.

McCune Gill's books should be persuasive as to accepted Missouri practice. GILL, MISSOURI REAL ESTATE FORMS § 347 (2d ed. 1931), in extract is as follows:

> the premises name "———— and ————, as joint tenants and not as tenants in common . . . parties of the second part"; the grant runs "unto the said parties of the second part, and to the survivor of them"; and the habendum and warranty clauses run "unto the said parties of the second part, and to the survivor of them, and to the heirs and assigns of such survivor forever."

In 1 GILL, REAL PROPERTY LAW IN MISSOURI 272 (1949), there is a "Form Creating Joint Tenancy" which is very similar to the form next above, and in extract is as follows:

> the premises name "John Smith and George Smith, as joint tenants and to the survivor of them, and not as tenants in common . . . parties of the second part"; the grant runs "unto the said parties of the second part, as joint tenants and to the survivor of them, and not as tenants in common"; and the habendum and warranty clauses run "unto the said parties of the second part, as joint tenants and to the survivor of them, and not as tenants in common, and to the heirs and assigns of such survivor forever."

The above forms of limitation are much more susceptible of a life estate and remainder construction than was the limitation in *Hunter v. Hunter*. "To the survivor" can be construed as creating a contingent remainder in fee in the survivor without doing violence to the language much more easily than can a recital "with right of survivorship." The writer always has been a little skeptical of this type of limitation, not because he thought a court would construe it as creating a life estate and contingent remainder in fee, but because someone might contend for a contingent remainder construction and there would be a possibility of litigation with at least nuisance value.

In view of *Hunter v. Hunter* it is believed that a title examiner must now assume that the above form of limitation may create a joint tenancy in fee, or in the alternative may create a tenancy in common for the life of the shorter liver of two grantees with a contingent remainder in fee in the survivor, or if there are more than two grantees, a joint tenancy for the life of the next to the longest liver with a contingent remainder in fee in the last survivor.

Where there is any substantial doubt as to the construction which a court may make a title examiner must assume the construction most unfavorable to the title. With this form of limitation a title examiner must get a judicial construction of the instrument or must get deeds from everyone who would have an interest under either possible construction of the limitation.

It is probable that this form of limitation will be construed as creating a joint tenancy in fee, because *Hunter v. Hunter* probably will be confined as narrowly as possible, but a title cannot be passed on such a probability.

§ 8. *To H and W as Tenants by the Entirety, Their Joint Assigns, the Survivor of Them and the Heirs and Assigns of the Survivor*—CONSTRUCTION

A common limitation for creating a tenancy by the entirety in fee, if respectable form books are good evidence of practice, is the following, often with slight but immaterial variations in wording:

> to *H* and *W* as tenants by the entirety, their joint assigns, the survivor of them and the heirs and assigns of the survivor.

The reason for the popularity of this basic form is discussed in the section next above in connection with joint tenancies. The form simply indicates the usual course of devolution of the property and is used without any intention of limiting or doing away with the usual incidents of a tenancy by the entirety, including the disability of either spouse to convey by separate deed and including the conversion into a tenancy in common in fee upon absolute divorce.

The forms in GILL, MISSOURI REAL ESTATE FORMS § 346 (2d ed. 1931) and in 1 GILL, REAL PROPERTY LAW IN MISSOURI 271 (1949) are substantially the same and in extract are as follows:

> the premises name "John Smith and Mary Smith, his wife, as

> tenants by the entirety and to the survivor of them . . . parties of the second part"; the grant runs "unto the said parties of the second part, as tenants by the entirety and to the survivor of them"; and the habendum and warranty clauses run "unto the said parties of the second part, as tenants by the entirety and to the survivor of them and to the heirs and assigns of such survivor forever."

The same conclusions must be drawn with reference to the use of such entireties forms as were drawn in § 7 next above as to similar joint tenancy forms, viz., that such a limitation is much more susceptible of a life estate and remainder construction than was the limitation in *Hunter v. Hunter,* and such a limitation may create a tenancy by the entirety in fee, or in the alternative may create a tenancy by the entirety for the life of the shorter liver of *H* and *W* with a contingent remainder in fee in the survivor.

§ 9. *To A and B in Fee as Joint Tenants with Rights of Survivorship,* OR *To H and W in Fee as Tenants by the Entirety with Right of Survivorship*—CONSTRUCTION

The limitation in *Hunter v. Hunter,* "to *M* and *S,* as joint tenants with right of survivorship," did not expressly limit a fee. The problem arises as to what construction would be put on a similar limitation in a deed or will where there are additional words expressly indicating a fee, such as

> to *A* and *B* in fee (*or* and their heirs) as joint tenants with right of survivorship; *or* to *H* and *W* in fee (*or* and their heirs) as tenants by the entirety with right of survivorship.

The court in *Hunter v. Hunter* emphasized that in that case there were no words expressly creating a joint tenancy in fee, and that by reason of contrary intent the statutory presumption of a fee did not apply; the court gave substantial effect to the words "with right of survivorship."

Where there are express words sufficient to create a fee, the case can be clearly distinguished from *Hunter v. Hunter,* but nevertheless the court may insist on giving substantial effect to the words "with right of survivorship," and find a conflict of repugnancy within the limitation; conceivably this conflict might be resolved in favor of a life estate and remainder construction. In the Michigan case of *Jones v. Snyder,* discussed in § 4 above, the initial gift was made to four persons "as joint

tenants, and to their heirs and assigns" (*i.e.*, as joint tenants in fee) with added words "to the survivor." In spite of the initial limitation as joint tenants in fee, the court reached a life estate and remainder in fee construction.

The problem considered in this section is further complicated in the case of a deed where the interests granted may be expressed in three or four different places and where there is often an inconsistency between the different parts of the deed, typed and printed. For example, in extract an actual deed on a printed form might run as follows:

> the premises [typed execpt for the words "parties of the second part"] name "*A* and *B* as joint tenants with right of survivorship, parties of the second part"; the grant [printed] runs "unto the said parties of the second part"; and the habendum and warranty clauses [printed except for the word "their"] run "unto the said parties of the second part, and to their heirs and assigns, forever."

In such case the typewritten premises would indicate a life estate and remainder construction under *Hunter v. Hunter*. The printed habendum and warranty clauses would be sufficient to create a fee. Ordinarily the typewritten portions would prevail over the printed portions, but a court probably would hold that the deed as a whole created a joint tenancy in fee. There being some doubt as to what a court might do, a title examiner must resolve doubts against the title and assume that the deed may be construed either to create a life estate and remainder in fee or to create a joint tenancy in fee.

There are essentially the same doubts as to the construction of an entireties limitation in the form considered in this section.

§ 10. Conclusions as to Construction where "with Right of Survivorship" or "to the Survivor" is Used in a Joint Tenancy or Entireties Limitation

This much is clear. Unless and until *Hunter v. Hunter* is clearly confined by subsequent decisions, a draftsman in creating a joint tenancy in fee or a tenancy by entireties in fee in real estate in Missouri should omit completely the words "to the survivor" and the words "with right of survivorship," or the substantial equivalent of either.

It is not so clear what should be done with reference to existing transactions. In many cases of course the ensuing course of events will be such that it is immaterial whether the construction be one of a joint

estate in fee or of a life estate with a remainder in fee. Where the construction does make a difference the effect of *Hunter v. Hunter* must be considered from two different points of view: first, whether titles based on such transactions are good in fact; and second, whether such titles are marketable of record.

As to whether a title is good in fact, *Hunter v. Hunter* of course will control as to the joint tenancy limitation there used. §§ 2-5 above, and will be difficult to get around in the case of parallel entireties limitations, § 6 above. The real explanation of *Hunter v. Hunter* may be that it is one of those hard cases which makes bad law. If this was a hard case in which the court felt impelled to let *S* survive to the whole in fee, the court had two ways in which to reach this end result: first, by construction, the method adopted; and second, by admitting extrinsic evidence of intention, the method rejected (wisely, because to admit extrinsic evidence would open a Pandora's box). If this was a hard case, then the court may be expected to confine its rule to the limitation there considered, and not to extend it to the other types of limitations discussed in §§ 7-9 above. In this event, very few titles under such limitations will be upset and most of such titles will be good in fact.

Even if such titles are considered to be good in fact and defensible, it is believed that there is enough possibility of litigation to make the titles, or most of them, unmarketable of record until the court has spoken further. It is believed that the only completely safe course for the individual title examiner who is considering a joint tenancy or entireties limitation including words of survivorship is to get a judicial construction of the particular limitaton or to get deeds from all persons who might have an interest under either the fee construction or the life estate and remainder construction. A title insurance company which can take some business risk might well be justified in insuring certain of these titles under an assumed fee construction where the risk of a life estate and remainder construction is very slight and for practical purposes the title might be considered marketable.

It is suggested that lawyers who have occasion to brief problems raised by *Hunter v. Hunter* study the briefs in the *Hunter* case. These briefs, prepared by experienced counsel, are the result of very extensive research and are exceptionally able briefs. They should be very helpful and save considerable research time in dealing with the ramifications of *Hunter v. Hunter.*