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TENANCIES BY THE ENTIRETIES IN PENNSYLVANIA AS AFFECTED BY SEPARATION OF HUSBAND AND WIFE.

The effect of separation on the tenancy by the entireties is a comparatively modern problem and it is difficult to discuss it, without first discussing the nature and history of the estate and the earlier — although also modern — analogous problem of the effect of divorce on the estate; for all three of these subjects are closely related. For this reason, a short discussion of the nature of the estate and of the effect of divorce on it are apropos before taking up the main problem: the effect of separation on the estate.

I. THE NATURE AND HISTORY OF THE TENANCY BY THE ENTIRETIES

An estate or tenancy by the entireties is the usual form of co-ownership of property, either real or personal, by husband and wife in the common law jurisdictions of the United States, including Pennsylvania. Of the three common law types of co-ownership existent today: tenancy in common, joint tenancy, and tenancy by the entireties, only the tenancy by the entireties depends, and always has depended, for its creation on the existence of a status between the co-owners, and the status required is marital status. Thus the basis of the tenancy by the entireties is the common law fiction that husband and wife are, in law, one person and that this legally created person holds the estate. The various Married Women's Acts have done much to destroy the common law fiction. However, where the spouses are living together and mutually enjoying property which they hold by the entireties, the theory still prevails.

Mr. Chief Justice Kephart, discussing the nature of the tenancy by the entireties with its basis, the marital unity of husband and wife, says:

"As a consequence of this relation many incidents flow therefrom quite different from those arising from a joint tenancy or any other form of co-ownership."

Contrasting the entirety tenancy with the joint tenancy and the tenancy in common in a few instances emphasizes the point.

Both the tenancy by the entireties and the joint tenancy have present the four unities of interest, time, title, and possession, while the tenancy in common may lack any one of these unities except the fourth, possession. In addition

\[2\] Ibid.
\[6\] Ibid.
\[7\] Ibid.
\[8\] 2 BLACKSTONE COMM. 191.
to these four unities, the entirety tenancy may be said to have the added unity of the husband and wife as a person in the law, this added feature clearly distinguishing it from both the other cotenancies. These unities are the bases for the theories by which co-owners hold the common property according to which particular co-tenancy is involved. In a joint tenancy, the co-owners hold by the part and by the whole; in a tenancy in common, the co-owners hold by the part and not by the whole; in a tenancy by the entireties, the husband and wife unity holds by the whole and not by the part. On the particular type of a co-owner’s hold on the property held in cotenancy depends: (1) the right to dispose of his interest; (2) his creditors’ right to get at his interest; (3) the right of his heirs or co-tenants to his interest on his death; (4) the right to presently enjoy the interest and protect it from abuse by co-tenants and third persons.

For example, consider the disposition of a cotenant’s interest on his death and during life. In the joint tenancy, each of the co-owners has a separate one-half interest of the whole property; on the death of one of the joint tenants, the survivor acquires the deceased’s share and then holds a new estate. During his life, either joint tenant may alienate his interest or subject it to the claims of his creditors, thereby severing the joint tenancy. This is not so with the tenancy by the entireties. Because of marital unity, the co-owners take title as one person and so hold it; on the death of either, the survivor takes no new estate but merely holds the whole estate as an individual instead of as a part of the unity. Since neither spouse has a separate share but both as a unity own the whole, neither has any share which can be alienated or separated, or which can be reached by the creditors of either. The tenant in common may readily dispose of his interest without affecting even the nature of the tenancy; his creditors may reach his interest; and on his death, the share goes not to his cotenants but to his heirs, devisees, or legatees.

In an early Pennsylvania case, Mr. Chief Justice Lewis in contrasting tenancies in common with tenancies by the entireties at common law, said:

"Tenants in common may sell their respective shares. They are compellable to make partition. They are liable to reciprocal actions of waste and of account; and if one turns the other out of possession, an action of ejectment will lie against him. These incidents cannot exist in an estate held by husband and wife.

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10Ibid.
11Ibid.
12Ibid.
13Tiffany, Real Property, Chapter 7 (2d, ed.)
14Stuckey v. Keefe’s Executors, 26 Pa. 397 (1856), perhaps the leading case on tenancies by the entireties in Pennsylvania.
No action of partition, or waste, or account, or ejectment can be maintained by one against the other... It is evident, therefore, that the estate, during the lives of the grantees, or during the continuance of the marriage bond, would have none of the chief incidents of a tenancy in common."

The above contrasts are sufficient to point out that property held by the husband and wife by the entireties is to be enjoyed by them and by them alone from the creation of the estate until the death of one of the spouses, for neither claims of creditors nor of one spouse alone could disturb the mutual and exclusive enjoyment until by death the marital unity was broken and survivor became individual owner, free to do as he pleased. In view of the sanctity of marriage, the desirability of encouraging it, and the need for financial protection of the survivor, frequently old and unable to provide for her or himself, the reason for the origin and growth of this device by which husband and wife could mutually hold property safe from outside and separate claims and with survivorship are readily apparent.

II THE EFFECT OF DIVORCE ON THE TENANCY BY THE ENTIRETIES

At common law, the only divorce granted was the divorce *a mensa et thoro* which amounted only to a legal separation and this did not destroy the marital unity entirely. This did not affect the property rights of the parties and had no effect therefore on the tenancy by the entireties. It was not until divorce statutes were passed that the problem arose.

An absolute divorce, or a divorce *a vinculo matrimonii*, dissolves the marriage, changing the status of the parties; it destroys the matrimonial relation by act of law and creates a new and different legal status for both husband and wife; it operates in the future but not retrospectively as regards the relationship of the parties.

As to the effect of an absolute divorce on the tenancy by the entireties, the weight of authority in the United States is that an absolute divorce decree severs the estate by the entireties and makes the divorced spouses tenants in common. The reason given for this rule is that the marital unity being destroyed and the title vesting in two individuals instead of in the legal unity of husband and wife, the estate by the entireties is destroyed. The English rule since the Divorce Act of 1857 is that the estate by entireties is severed by divorce and becomes a joint tenancy.

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16 The husband's right at common law to his wife's share of the rents, etc. and control over her realty, even her interest in a tenancy by the entireties, is not discussed since the reason for that was the husband's right arising from the marriage, not from the nature of the entirety.
1840 L.R.A. 355 (1895).
19bid.
Pennsylvania takes a different view. In *Alles v. Lyon*, the court held that after a divorce the estate by the entireties continues. The reason for the Pennsylvania rule is this:

"... if a subsequent unity of person cannot change a tenancy in common to one by entireties, ... a subsequent severance of the unity of person ought not to change a tenancy by the entireties to one in common."

The rule today is the same.

What are the policies behind these seemingly inconsistent rules and reasoning? In *O'Malley v. O'Malley*, Mr. Justice Simpson says this for the policy behind the weight of authority:

"... when the cases elsewhere are examined it will be found that this ancient estate is treated as converted into a tenancy in common, largely because it is believed this will solve some if not most of the difficulties which would otherwise arise in regard to it after a divorce."

He continues, taking up the Pennsylvania policy, saying in effect that great weight is to be given to the intentions of the parties at the time of the creation of the estate, that such intentions must not be destroyed merely because difficulties arise in upholding it, and that the difficulties can be disposed of easily enough without destroying the estate and its incidents.

But in the same case, the court held that as to the enjoyment of the rents and profits after divorce, one divorced spouse could recover from the other in assumpsit an equal share of the net rents received from the real estate held by them as tenants by the entireties. Here the ex-husband was collecting the rents from entirety property and appropriating them to his own use, refusing to share them with his ex-wife or use them for their mutual benefit. A later case extended this decision and held that where one of the divorced spouses takes complete possession of the entirety property, the other may recover from him one-half of the rental value of the property.

In both the above cases, the court admitted that so far as the rents and profits were concerned, the divorced spouses were, between themselves, tenants in common. The reasoning behind these holdings is based on equitable grounds. In the *O'Malley* case, the court clearly explains this and points out
that with a contrary result not only would equity not be done but the mutual benefit incident of the estate would still be lacking: 29

"Indeed it might as well be said that since each takes all for the benefit of both while the unity of person continues, when, after that unity is destroyed by the act of law, one takes the entirety and denies all right in the other, an incident of the estate is destroyed . . ."

From the cases involving divorce it is evident that the Pennsylvania courts wish to maintain the tenancy by the entireties after divorce but will make its function a practical one nonetheless. There are several possible explanations for the Pennsylvania rule: (1) to preserve the intentions of the parties at the time of the creation of the estate; (2) to preserve the survivorship incident; (3) to leave the problem to the legislature as regards changes from the common law and to conform to the already enacted legislation, namely the Act of 1927, 30 which permits a sale of the entirety property on petition of one of the divorced spouses, which statute is not automatic in operation but requires the act of one of the parties to make it effective. The courts will interfere where one of the divorced spouses destroys the incident of mutual enjoyment of the property; all the courts then do is to call for an equitable division instead of the injustice that would result from one's retaining complete enjoyment for himself.

III. THE EFFECT OF SEPARATION ON THE TENANCY BY ENTIRETIES

A separation means the husband and wife are not living together either by mutual agreement or by virtue of a limited divorce, the divorce a mensa et thoro, or as a result of one spouse leaving the other. By a separation, the marriage unity is only temporarily and in a limited sense severed; the separation is subject to the complete restoration of the marital status by reconciliation. In general, it may be said that the only element of marriage always lacking where there is a separation is cohabitation, the remaining rights and duties of both spouses remaining. 31

Although it would seem that the problems that might arise from separation would be fewer than those arising after absolute divorce, the fact is there are just about the same problems in both cases. As for the answers to the problems, the particular facts of each case are usually more than ample to show that the complainant's grievance is sufficient to warrant a remedy rather than the dismissal of the action that would have occurred at common law. The problems can be brought under two incidents of the tenancy by the entireties: (1) the survivorship incident; (2) mutual enjoyment of entirety property—rents, profits, possession.

29272 Pa. 528, at 532, 116 A. 500 (1922).
30 Act of May 10, 1927, P.L. 884, § 1, 23 PS 94; and see Mertz v. Mertz, 139 Pa. Super. 299, 11 A. (2d) 514 (1940).
The first situation having to do with this incident that comes to mind is that suggested by statutes. The problem the statutes solve is this: Suppose the spouses to be separated and possessed of some realty by the entireties. Assume that the income from the property is very small even if it be further assumed that the wife collects it. The husband refuses to support his wife and/or children. Has the wife any method by which she can get money from the entirety property?

The Act of 1913 provides:22

"Whenever hereafter an order shall be made against any husband by any court of quarter sessions, or other court of competent jurisdiction, for the support of his wife or children, or both, or whenever, a judgment shall be rendered by any court of common pleas in favor of any wife against her husband in any action brought upon any articles of separation conditioned for the support of such wife, it shall be lawful for such court to enforce compliance with said order, or in execution of said judgment, to issue its appropriate writ of execution against any real property owned by said husband and wife by entireties and the purchaser at the Sheriff's sale of such estate shall be vested with the title theretofore held in entirety by said husband and wife. The proceeds of such sale after the satisfaction of such order or judgment shall be divided between husband and wife equally."

Similar to Act of 1913 is the Act of 1923:88

"Whenever a husband and wife shall hold real estate by entireties and the wife has secured a sentence, order, or decree of court against the husband for the support of herself and children and the order has been certified to any court of common pleas of any county of the Commonwealth in which the real estate so held by entireties is situated, the order shall be entered as if the same had been recovered as a judgment of the latter court; and it shall be lawful to issue execution on such judgment against such real estate so held by the entireties. The sale shall convey to the purchaser a good and valid title and shall vest in him the entire title of both the husband and wife in the same manner and to the same effect as if both husband and wife had joined in the conveyance of same."

These two statutes provide for the extinguishment of the survivorship incident if the terms of the statute are met. Essentially, the statutes are methods of enforcing a support order. But either or both of them would be available

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22Act of June 11, 1913, P.L. 468, ¶ 1, 48 PS 133.
88Act of May 24, 1923 P.L. 446, ¶ 1, 48 PS 137; and see 48 PS 138-140.
to a wife separated from her husband. In the sense that the survivorship incident may be destroyed by the operation of the statutes, they are analogous to the Act providing for sale of entirety property after divorce.

A problem for which one can arrive at the correct answer from a knowledge of the common law rule is this: May either spouse, when the parties are separated, compel partition of the entirety estate? In *Kerchenthal v. Kerchenthal* the husband and wife were living separately and owned by the entireties a stock certificate for thirty shares in a corporation. The husband brought a bill in equity asking for a decree that would require the wife to indorse the certificate so that the corporation could issue new certificates of fifteen shares each in the respective names of the parties. The court said that the husband was merely asking a partition of personality, and in dismissing his bill said:

"There being no legislation which confers on the courts, law or equity, power to partition or divide an estate by the entireties held by undivorced persons, the bill presents a matter in which we can grant no relief."

In the *Kerchenthal* case, the parties would not agree to the partition. May separated parties agree to a partition or disposition of the entirety property? If there is an agreement between the parties, their concurrence in disposing of entirety property is all that is necessary and the separation makes no difference for tenants by the entireties acting together may do as they wish with their jointly owned property.

May such agreement between separated spouses be implied from their acts so as to destroy the survivorship incident? The answer seems to be "Yes" at least in the bank account cases. In the leading case in point in Pennsylvania, the facts were these: The husband and wife for many years had maintained a bank account which was held by the entireties. Then the wife withdrew $6000 from the account, leaving a balance of $18, and deposited the amount withdrawn elsewhere in her own name, all this being done in the husband's ignorance. Several years later, the husband learned that from all appearances she was going to leave him and was going to take the $6000 with her. He then brought a bill in equity asking for an account and to restrain the wife from withdrawing the money from her separate account. The court, in allowing the accounting and affirming the lower court's holding dividing the fund, said that the wife's acts violated the terms of the entirety agreement and amounted to an offer to her husband to destroy the estate, which offer was accepted by the bringing of the bill in equity by the husband. Thus the entirety

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84 D.&C. 116 (1929).
85 Ibid., at 117.
87 Ibid.
property became severalty property by an implied agreement and the survivorship incident was destroyed. The spouse's right to an accounting was followed in a similar situation where the spouses were actually separated in a later case involving the problem.\textsuperscript{88}

The bank account cases because of their very nature are in a class by themselves; they must be adapted to practicality. The above holding is justifiable and logical; it is fair and equitable. The result, however, seems new to the tenancy by the entirety, for ordinarily, one would have expected the court to compel the wife to return the $6000 to the entirety account on the theory that one spouse by his acts may not disrupt the estate. It is likely that for the reason just mentioned and because of language in the Berhalter \textit{opinion itself},\textsuperscript{39} this holding will be restricted to the bank account cases and will not be extended to entireties involving disposition of real estate. The theory behind the holding is useful, however, in the situations where one spouse takes complete dominion of personalty, for example, rents, and refuses to use it for the mutual benefit of both co-owners - i.e. the following situation.

\textbf{(2) Mutual Enjoyment Of Entirety Property Rents, Profits, Possession}

The typical problem arises under circumstances similar to the following: The husband and wife are separated and a reconciliation for some time is impossible. One spouse (more often than not the husband) collects the rents and refuses to give anything to the other spouse. Can the latter get an accounting and/or a share of the rents? Or, one spouse takes complete possession of the entirety property, keeps part of it for himself, and rents the rest to a third person. May the other obtain in this situation his proportionate share of the rental value of the premises from the spouse in possession? May the other eject him? It has been said that it makes no difference which spouse leases or collects the rents, since, \textit{presumptively}, the moneys received will be expended for the benefit of both the tenants by the entireties,\textsuperscript{40} but in these situations the presumption is rebutted. Does that make any difference?

Perhaps the earliest case raising the problem is \textit{Hahn v. Hahn}.\textsuperscript{41} In that case, the husband and wife owned property by the entireties. The husband deserted the wife, effecting a separation. The wife then brought a bill in equity for a share in the rents of the realty involved. The court held that this was proper and ordered a division of rents equally between the parties.

\textsuperscript{88} Werle \textit{v. Werle}, 332 Pa. 52, 1 A. (2d) 244 (1938).
\textsuperscript{40} O'Malley \textit{v. O'Malley}, 272 Pa. 528, 116 A. 500 (1922).
\textsuperscript{41} Erie Co. 2 (1920).
That case was followed by Aaron v. Aaron.⁴² Under similar facts (except that here the parties were living together) the wife alleged that her husband was taking all of the income from the entirety property and asked that the income be sequestered and applied to carrying charges. Defendant-husband demurred. The court overruled the demurrer and directed an answer, saying:

"If the husband is to be allowed to do what the demurrer admits he intends and is attempting to do, the wife will be deprived of property which is certainly in a sense her separate estate, and as she is empowered by the Acts of Assembly on the subject to maintain an action against her husband to protect her separate estate, we see no reason why she should not maintain it merely because the estate is one by entireties."  

There is no doubt that the decision would have been the same had the parties been separated instead of living together.

A case analogous to these is Zwolski v. Zwolski.⁴³ The husband there retained the entire proceeds from the sale of the entirety property. The wife brought a bill for an accounting to which the defense was that part of the money was spent for maintenance of the family. The court allowed the bill and held the wife entitled to one-half the proceeds, denying the defense on the theory he was personally obliged to do this anyway. The theory used by the court to support its holding was that the husband by appropriating the fund to his own use thereby became a trustee of the wife's interest. Although this is merely an analogous case since by the sale the entirety was ended, the case is especially noteworthy for the theory it suggests in support of making the appropriator account; this theory may well be used where the husband appropriates the rent.

One of the clearest cut and best reasoned cases is Krizovenisky v. Krizovenisky.⁴⁴ Here the wife brought a bill in equity asking a decree that her husband and his agent, whom she joined as defendants, pay her one-half of their present and future collections of rents from the entirety property. The defendants demurred. The remaining facts deduced from the plaintiff's allegations were that because of the husband's cruelty, she has been forced to withdraw from the entirety property, a home, to the purchase price which both had contributed. Since then the parties had lived separately. The husband after paying taxes and water rent refused to share the balance of the rentals with plaintiff. The court overruled the demurrer, saying:

"The rule where the parties are separated but not divorced has not been explicitly laid down by the appellate courts of Pennsylvania. The same practice and equitable considerations

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⁴²⁴ Pitts, L. J. 384 (1924).
⁴³⁷ Pitts. L. J. 534 (1927).
⁴⁴¹ D.&C. 608 (Berks, 1929).
which the Supreme Court in the O'Malley case set forth as a basis for permitting a suit by one against the other after divorce to recover rentals would seem to apply to a case where the parties are separated but not divorced.\(^5\)

In the course of this opinion, the court examined various aspects. It pointed out the distinction between these facts and those of the O'Malley case: bill in equity and separated parties here; assumpsit and divorced parties there. It indicated the possibility of relief under the support order statute.\(^4\) Then it discussed Meyer's Estate (No. 2)\(^{46}\) which said in part:

"Being an estate by the entireties, neither husband nor wife under any circumstances could require an accounting by the other; nor could either restrain the other against consuming more than an equal part."

The case pointed out that this dictum is to be limited to its precise facts as was said in the O'Malley case.\(^47\) Both the O'Malley case and the later Gasner v. Pierce\(^{48}\) contain contrary dicta and take up the problem much more thoroughly than the Meyer's Estate (No. 2) case.

The court concluded that although the O'Malley and Gasner v. Pierce cases were not on all-fours with the facts before it, those cases by their discussion of broad principles furnished adequate authority for the decisions in Hahn v. Hahn, Aaron v. Aaron, and Zwolski v. Zwolski.\(^{49}\) It is understandable that this decision also relied on them.

Stevens v. Stevens\(^{50}\) presented these facts. The parties were married but separated (because of the husband's cruelty said the wife, the wife's desertion said the husband) with no evidence to prove either story. Since the separation the husband occupied one of the apartments composing the entirety property and rented the other; he collected all the rents and rendered no account to the wife. She brought a bill in equity for an accounting. The court held that the wife was entitled to one-half the rents collected on the theory that a married woman may bring a bill in equity against her husband to protect or gain possession of her separate property notwithstanding the cause of their separation and that her share of the rents from property held by the entireties is her separate property.\(^{51}\) The court denied the wife her proportionate part of a fair rental value of the property occupied solely by the husband on the theory that each was entitled to possession until after a divorce partition is had. As to this

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\(^{45}\) See note 36 and discussion, supra.

\(^{46}\) 232 Pa. 93, 81 A. 147 (1911).

\(^{47}\) See note 40, supra.

\(^{48}\) 286 Pa. 529, 134 A. 494 (1926).

\(^{49}\) See notes 41, 42, and 43 and discussion above.

\(^{50}\) 22 D.&C. 696 (Phila. C. P. No. 1, 1935).

\(^{51}\) Act of March 27, 1913, P.L. 14, P. 1, 48 PS 111.
latter point, this case can be distinguished from the \textit{Cornelius} case on the basis of divorce there, separation here.

As to this latter point, a recent Supreme Court case reaches the same conclusion.\textsuperscript{52} There the spouses were divorced and the former wife sued her ex-husband. The entirety property had been bought by mutual contributions. Some years later, the husband had the wife placed in an insane asylum, and on her leaving there, the husband, who had remained in complete possession of the premises during the interim, refused her admission to the home, still maintaining complete possession himself. Subsequently, after the parties were divorced and the property had been sold by agreement of the parties, the wife received as the proceeds of the sale slightly more than her total investment in the property; her ex-husband received the property since the sale was a straw man transaction. In a bill in equity the wife sought to have the whole transaction set aside. She also asked that the husband be made to account for his exclusive use and occupancy from the time she was refused admittance until the divorce was granted, i.e. while the parties were separated. The court held on this point that until they were divorced they were tenants by the entireties, each being seized of the whole and entitled to possession and that plaintiff could not have demanded an accounting for the rental value of the premises during the marital period. Added to this sufficient reason was the plaintiff's delay in bringing her action.

If a party separated from his spouse may not recover a proportionate share of the rental value of the property from the spouse in complete possession, on the same reasoning ejectment should not lie, as at common law. This would seem to be the result, although no case has arisen. The proper way to solve this particular problem is to attempt a reconciliation; if that is impossible, nothing will be gained by ejecting one and allowing the complainant complete possession. When that stage is reached, the best remedy is divorce and a petition for sale. On the other hand, there is logic in the complainant's request for a proportionate share of the rental value, particularly where he has contributed to the purchase price and has been driven from the entirety property through no fault of his own.

In \textit{Futer v. Futer},\textsuperscript{63} the parties bought property and took it by the entireties, paying part of the purchase price and giving a mortgage for balance. Later they separated, the wife alleging cruelty and the husband, desertion. The husband leased the premises and collected the rent. This he applied to plumbing, papering, and payments on the mortgage. On these facts set out in the pleadings, the wife sought a rule for want of a sufficient affidavit of defense. The

\textsuperscript{52}Stimson v. Stimson, 346 Pa. 68, 29 A. (2d) 679 (1943).

\textsuperscript{63}12 D.&C. 805 (Lanc. 1929).
court discharged the rule on the theory that defendant's use of the rents collected had been proper. The court stated that the wife's action was not maintainable at common law nor under the Act of 1913 providing that a wife may sue her husband if he has abandoned her or driven her from home on any action except . . .; that the statute is not to apply to destroy the right of survivorship as to land conveyed to husband and wife. This latter statement amounts to a dictum only since the wife is denied here because the husband applied the rent collected for their mutual benefit and did not appropriate it to his own use; in other words, the presumption of expenditure for mutual benefit is not rebutted here.

Recently, the problem as to rents arose squarely in an appellate court. These were the facts: Wife brought a bill in equity for an accounting by her husband of rents which accrued after separation from realty held as tenants by the entireties. The cause of separation was not indicated. Since the separation, the husband had leased the real estate and collected the rents, but refused to pay over to plaintiff any portion of the net income. The wife did not allege, the court carefully pointed out, that: (1) there was an intent to defraud; (2) the husband was using the funds so derived for his individual use; (3) the husband was not supporting the plaintiff; (4) the plaintiff contributed her own funds for the purchase of the property. The court affirmed the lower court's dismissal of the plaintiff's bill, stating:

"Consequently, it being admitted that plaintiff and defendant are still wife and husband, under the circumstances set forth in the bill, neither could require an accounting by the other of the rents from the real estate owned by them as tenants by the entireties," (Citing Meyer's Estate (No. 2) and the O'Malley case.)

Giving the lower and upper courts the benefit of the doubt raised by the facts, since with the parties and the record respectively before them they were well aware of the equities involved, the result reached was probably consistent with, e.g. the Futer case, because the presumption that the rents were (going to be) used for the mutual benefit of the co-owners was not sufficiently rebutted. In other words, the decision was based on the peculiar facts of the case; it is entitled to just that weight. Even on the facts as presented by the opinion of the upper court, the result is questionable. As to the last two of the allegations plaintiff did not make: (3) The fact that the husband was not supporting the plaintiff. The Krizovenisky case did not indicate that this fact must appear, but suggested a remedy if it did. The presence or absence of this fact should

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54 Act of May 1, 1913, P.L. 146.
56 See note 53, supra, and discussion.
57 See note 44 and discussion supra.
not weaken plaintiff’s bill; had plaintiff wanted to proceed under the support statute, no doubt she would have. (4) The fact that plaintiff contributed her own funds for the purchase of the property. The court suggests the absence of this allegation is a factor against her. It may be a factor, but a very slight one. Entirety property is owned by the unity, not by the one advancing the purchase money. As to the first two allegations plaintiff did not make: Both these amount to the same thing—the husband did not appropriate to his own use the rents collected. It is admitted he refused to pay to plaintiff any portion, hence her bill. What did defendant do with the rents collected? It seems that, this fact not being indicated, the burden of making a defense is on the defendant to show a proper use. For if the use made were proper, why is it not revealed? The fact that the plaintiff received none should rebut the presumption, at least partially.

It is in the discussion of the problem that the unfortunate conclusions are reached or at least suggested. To begin with, the above quoted holding suggests that one spouse may not have an accounting from the other even though the parties are separated. Why the O’Malley case is cited for this proposition is especially questionable. Not only did that case limit the Meyer’s Estate (No. 2) dicta to its own facts—totally different from these—but also it and the subsequent Gasner v. Pierce,78 the Werle,79 the Berhalter60 cases, and the lower court cases have all allowed the accounting. But these are not even mentioned, a fact which is unfortunate since the lower court cases discuss the problem from all the possible angles.

In the second place, the court’s discussion of the theory behind the plaintiff’s bill is both inadequate and, seemingly, unaware of the implication arising therefrom. The court pointed out that plaintiff relied on the Act of 191361 which provides that the wife (husband)

"may not sue her husband (his wife), except in a proceeding for divorce, or in a proceeding to protect and recover her (his) separate property."

The court flatly stated that plaintiff’s action was not within the exception of the Act and gave as a reason that the Married Women’s Acts have not changed the incidents and characteristics of an estate by the entireties. This reasoning is hardly consistent with the O’Malley and Gasner v. Pierce decisions. Nor does it adequately answer the theories of Zwolski v. Zwolski62 and the other lower court cases. The court overlooks the fact that one of the co-owners is destroying the incident of mutual benefit and that its decision permits such acts. The

68See note 48, supra.
69See note 38, supra.
70See note 39, supra.
61Act of March 27, 1913, P.L. 14 1, 48 PS 111
62See note 43, supra.
sum total of this narrow construction of the statute and the other incorrect dicta
is to question the practical and fair results reached by the cases which examined
the problem. It is to be hoped that this case will be overruled.

CONCLUSIONS

It may be stated that the fact of separation in itself does not change the
nature and incidents of the tenancy by the entireties. On the other hand, irre-
concilably separated parties want nothing to do with each other,—except to
injure the other, and so the marital unity of action is severed and the incident
of mutual enjoyment of entirety property, no doubt the primary and controlling
incident of this tenancy, is destroyed. Separation results then in individual
desires on the part of husband and wife to take complete possession of the
entirety property, or to appropriate its rents to individual use, or for division
into individual shares. When such desires arise and are attempted to be or are
carried out, the incident of mutual enjoyment being destroyed by individual
dominion, a remedy for the injured spouse must be provided to prevent in-
justice. That this remedy is often in form a division or a tenancy in common
between husband and wife cannot be helped; for if no remedy is provided
there is no co-tenancy at all but a complete ownership by one spouse. As to
third persons, separation does not destroy the entirety concept so that the sur-
vivorship incident is not removed except by mutual agreement either express
or, as in the bank account cases and support statute instances, implied. It is
this survivorship incident that keeps partition from being compellable.

The Pennsylvania cases have solved the problems arising from separation
adequately with few exceptions. They have not, however, sacrificed equity for
the sake of form. But the decisions show the desire of the courts to uphold
the tenancy by the entireties and its incidents where such is possible in the
separation cases. Since, in most of these cases it is impossible to uphold the
device equitably because the primary factor behind it, mutual enjoyment, is
lacking, they have not hesitated to be practical and have refused to carry out to
an illogical conclusion a purposeless form. Is new legislation necessary to aid
the courts in these situations? Perhaps to make the law certain it would be
helpful. In two situations, the right to compel partition, and the right to a
proportionate share of the rental value of the property for the spouse out of
possession, statutes would be advisable since the courts seem reluctant to grant
relief to separated parties in absence of legislation and since some relief is
called for. But by upholding the tenancy by the entireties and its incidents and
keeping it as a presently practical device by which husband and wife may hold
property for their mutual benefit, the courts have shown they can get along
very well with the common law and existing legislation.

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