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The Power in a Husband and Wife Holding Property by the Entirety

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THE POWER IN A HUSBAND AND WIFE HOLDING PROPERTY BY THE ENTIRETY

The estate of tenancy by the entirety is a joint tenancy as modified by the common law theory that a husband and wife are one person. This common law theory has acted upon the tenancy to create a mutation in law which has resulted in the development of certain rules which are peculiar to this estate. The following material is meant to point out and explain various concepts to be found evident in this tenancy by Pennsylvania law in relation to either spouse's power or authority to act in respect to property so held.

In Pennsylvania a tenancy by the entirety may arise only where property is transferred to a man and woman who are in fact husband and wife.[1] There is required, in this form of concurrent ownership, the four unities essential to any holding in joint tenancy.[2] Ownership as tenants by the entirety in Pennsylvania, unlike some other jurisdictions,[3] may be of both real and personal property.[4] Although entirety holdings at common law could only be created by a deed or will, the passage of the *Intestate Act of* 1917,[5] and later the *Intestate Act of* 1947,[6] extended the possible methods of creation to a taking by a husband and wife of an interest in property by descent. This necessarily will only include a taking by the parents or grand-parents of the deceased.

Where a husband and wife hold an interest in property by the entirety, each is said to be seized of the whole and not by the share, or "per tout et non per my".[7] The position that a husband and wife are seized by the whole and not by the share is based upon the ancient common law theory that the marriage relationship creates a unity as to the holding of property, in addition to the four unities essential to a joint tenancy, and neither spouse has any individual interest therein other than the right to share possession and all rights and enjoyments which arise therefrom.[8]

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1 Maxwell v. Saylor, 359 Pa. 94, 58 A.2d 355 (1948); Frederick v. Southwick, 165 Pa. Super. 78, 67 A.2d (1949); Richard R. Powell, The Law of Real Property, vol. 4, p. 653, (1954).

2 Madden v. Gosztonyi Savings and Trust Co., 331 Pa. 476, 200 Atl. 624, 117 A.L.R. 904, (1938); Richard R. Powell, The Law of Real Property, vol. 4, p. 653 (1954); Herbert T. Tiffany, A Treatise on Modern Law of Real Property and Other Interests in Land, New Abridged Edition, p. 290.

3 Franklin Square National Bank v. Schiller, 202 Misc. 576, 119 N.Y.S.2d 291 (1950); Brown v. Havens, 17 N.J. Super. 235, 85 A.2d 812 (1952); Richard R. Powell, The Law of Real property, vol. 4, c. 52 (1954).

4 Hamm v. Meisenhelter, 9 Watts 349 (Pa. 1840); O'Boyle v. Home Life Insurance Co., 20 F. Supp. 33 (1937). The estate of tenancy by the entirety is recognized in twenty states besides Pennsylvania. They are: Arkansas, Delaware, Florida, Indiana, Kentucky, Maryland, Massachusetts, Michgan, Missouri, New Jersey, New York, North Carolina, Oklahoma, Oregon, Rhode Island, Tennessee, Vermont, Virginia, Wisconsin and Wyoming. Richard R. Powell, The Law of Real Property, vol. 4, p. 655, § 621 (1954).

5 Act of 1917, 20 P.S. 132, repealed by Act of 1947, 20 P.S. 1.4 (6).

6 Act of 1947, 20 P.S. 1.4 (6).

7 Fairchild v. Castelleox, 1 Pa. 176, 44 Am. Dec. 117 (1844); Gillan v. Dixon, 65 Pa. 395 (1870); William F. Walsh, Commentaries on the Law of Real Property, vol. 2, § 121, (1947).

8 U.S. v. 246 Acres of Land, More or Less, 78 F. Supp. 377 (1948); C.I.T. Corporation v. Flint, 333 Pa. 350, 5 A.2d 126, 121 A.L.R. 1022, rev'd 32 Pa. D. & C. 390 (1939), Herbert T. Tiffany, A Treatise on Modern Law of Real Property and other Interests in Land, New Abridged Edition, § 290, p. 290 (1940).

In keeping with the theory of the husband and wife being seised of the whole because of the marital unity, there exists the right of survivorship where the survivor of this marital unity remains seised of the whole estate, just as each was prior to the death of the other spouse, but no longer bound to respect another's equal title thereto.[9]

The tenancy by the entirety has always been terminated by the death of one of the spouses, as has been noted above. Today, it is also possible in Pennsylvania to terminate an estate by the entirety when the husband and wife are legally divorced, provided the estate was created subsequent to May 13, 1925, as provided in the *Act of* 1927 and as amended in the *Act of* 1949. The estate thereby changes to a tenancy in common.[10] Another method of terminating a tenancy by the entirety is by an agreement between the husband and wife.[11]

Although the wife was under various contractual incapacities at common law in relation to her property, whether owned separately, jointly or by the entirety, with the husband having a general control thereof,[12] she is no longer burdened with these incapacities. The passage of various general and special statutes in Pennsylvania, beginning in 1848, has given the married woman the powers of a femme sole, consequently increasing her contractual powers and limiting her spouse's control of her property so as to give the wife a very effectual control over her own property interests.[13] These married women's acts have not affected the common law estate of tenancy by the entirety, although they have affected the incident of the husband's control.[14]

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9 French v. Menan, 56 Pa. 286 (1867); Haeter v. Lucas, 367 Pa. 296, 80 A.2d 749 (1951); Richard R. Powell, The Law of Real Property, vol. 4, p. 669 (1954).

10 Where the tenancy was created prior to May 13, 1925 there was no compulsory partition allowed, even though the tenants were divorced. Christner v. Christner, 366 Pa. 41, 76 A.2d 361 (1950). The Act of May 10, 1927, P.L. 884, § 1, 68 P.S. 501, provided that when any husband and wife acquiring property after May 13, 1925, by the entirety, shall be divorced, either party may bring a suit in a court of common pleas, sitting in equity, against the other to have the property sold and the proceeds be divided equally between them, as amended by the Act of May 17, 1949, which provides the entirety estate is to automatically become a tenancy in common the moment the divorce is effective, each to hold a one half share in equal value, if the property be acquired after Sept. 1, 1949. Act of May 17, 1949, P.L. 1394, 68 P.S. 501.

11 This agreement may be executed by both parties with a writing or a deed by which the parties provide for a division, or a conveyance of the property to one or the other parties. Biehl v. Martin, 236 Pa. 519, 84 Atl. 953 (1912); There is dicta in Merritt v. Whitlock, 200 Pa. 50, 55, 49 Atl. 786, 787 (1901), to the effect that a parol partition would be valid, the Statute of Frauds being inapplicable hereto; see also Runco et al v. Ostroski et al, 361 Pa. 593, 65 A.2d 399 (1949); In Re Prichard, 359 Pa. 315, 59 A.2d 101 (1948); Herbert T. Tiffany, The Law of Real Property, vol. 2, (3d Ed.) p. 235 (1939).

12 Hackman v. Flory, 16 Pa. 196 (1851), where the husband was entitled to the earnings of the wife; Snevily v. Wagner, 8 Pa. 396 (1848), where the husband may accept land for the wife; Strawbridge v. Funstone, 1 W. & S. 517 (Pa. 1841), where the husband may take the proceeds of real estate; Benedict v. Montgomery, 7 W. & S. 238, 62 Am. Dec. 230 (Pa. 1844).

13 Act of April 11, 1848, P.L. 536, 48 P.S. 64; Act of June 3, 1887, 48 P.S. 64; Act of June 8, 1893, P.L. 344, 48 P.S. 32; see also William F. Walsh, Commentaries on the Law of Real Property, vol. 2, § 122 (1947). None of these acts have given the spouse the power to convey her real property alone.

14 Diver v. Diver, 56 Pa. 106 (1867).

If an estate by the entirety is held by the husband and wife under one single title and by the whole, with neither having a separate estate therein, the question arises as to what legal powers, if any, either spouse has to act upon or in relation to this property interest without a joint action on the part of the other.

It is a general rule of agency that the relation of principal and agent does not arise from the marital relationship.[15] It is also generally held essential that in order for either spouse to bind the other by acting in the capacity of agent there must be a previously existing authority, either express or implied, or subsequently, with knowledge of the transaction, there must have been a ratification or adoption of such acts by the other spouse.[16] But it is a general rule in Pennsylvania that the marital relationship may be convincing evidence in determining the question of agency, where it is in issue, and in such cases, the agency may more readily be inferred than where a stranger was a party to the alleged agency.[17] So although the marital relationship will not give rise to the agency, it will raise an inference, where in similar circumstances with the same evidence, but without a marriage, such an inference would not arise. These elements of an agency power are generally to be applied to holdings by the entirety.

Next we should consider the rights of husband and wife that are peculiar to a tenancy by the entirety. It is generally held in Pennsylvania that either spouse has the power to act for both in relation to property owned by the entirety, so long as the marriage exists, without any specific authorization, provided the proceeds of such action inure to the benefit of both.[18] This principle might seem to repudiate the previous rule of agency, that the relationship of principal and agent does not arise from the marital relationship, but this is not the case. Just what the relationship is which allows this acting by one on behalf of the other to bind both spouses, and under what circumstances the courts will find that a benefit has not inured to the non-acting spouse, will be considered by the following material.

In *O'Malley v. O'Malley*,[19] a husband and wife were separated and the husband refused to share the rents and profits from a property held by the entirety with the wife. The wife brought an action in assumpsit for an accounting and the court said:

> "Because of the unity of person and estate existing during marriage, either spouse may lease it and collect the rent; but this is not so because the right to do it is an incident of the estate, but on the contrary only

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15 Rodgers v. Saxton, 305 Pa. 479, 158 Atl. 166, 80 A.L.R. 280 (1931); Higgins v. Shenango Pottery Co., 99 F. Supp. 522 (1951); Shay v. Schrink, 335 Pa. 94, 6 A.2d 522 (1939); Floyd R. Mechem, Mechem on Agency, vol. 1, (2d ed.), § 161 (wife) and § 169 (husband).

16 Floyd R. Mechem, Mechem on Agency, vol. 1, (2d ed.), §§ 161 and 167 (wife) and § 169 (husband).

17 Hepburn v. Schwartz, 151 Pa. Super. 393, 30 A.2d 146 (1943); McGill v. Pacher, 62 Montg. 33 (1946); Yezbak v. Croce et al., 370 Pa. 263, 88 A.2d 80 (1952); see also 30 C.J. 619 and 623.

18 O'Malley v. O'Malley, 272 Pa. 528, 116 Atl. 500 (1922); Gasner v. Pierce et al., 286 Pa. 529, 134 Atl. 494 (1926); Schweitzer v. Evans, 360 Pa. 552, 63 A.2d 39 (1949).

19 See n. 18, supra.

flows from an incident thereof. While the marriage subsists it is a matter of indifference which of the parties leases the property, or which of them obtains the rents; presumptively the moneys received will be expended for the benefit of both of them."

The theory behind this presumption created by the court seems to be contained in the following sentence:

"The unity of the relation of the parties results in a unity of the estate; the leasing by either is for the benefit of them in that relation, and the rents paid to either is to him or her, in that relation only."[20]

Here the court has found the right of one spouse to bind both in the leasing of an estate held by the entirety, and the collection of rents, ". . . flows from an incident . . ." of the estate. They subsequently find that the marital relation plus the joint estate creates so strong a relation that there arises a persumption that any act of leasing the estate or receiving rents is done with the authority of the non-acting spouse. The court seems to be guilty of double talk when it refers to this power as not being an incident of the estate, but only as flowing from an incident thereof.

Thus we find in *Gasner v. Pierce,*[21] a payment of rent to a wife by a tenant of property held by a husband and wife as tenants by the entireties was a satisfaction of a claim for rent, though the lease was signed by the husband alone. The husband had leased the property on a monthly rental in his own name, although it was property held by the entirety. The tenant had paid two month's rent to the wife and the husband caused a warrant of distress to be issued for the unpaid rent, insisting that he alone was entitled thereto, having given no express authority to his wife to make the collection. He was denied recovery.

This theory is not restricted by the courts to the leasing of property and collection of rents. In *Madden v. Gosztonyi*[22] the court held that when a husband and wife hold a joint savings account payable to either husband or wife, there is an immediate expression of authority or agency of each to act for both. The fact that one spouse can withdraw all of the funds on deposit, does not prevent the tenancy by the entirety from arising. The court found that to the four unities of a joint tenancy, there is added the unity of the husband and wife as one person in law, and ". . . 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". After citing various authorities,[23] the court continued:

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20 See n. 18, supra. It is to be noted that there is not allowed an accounting for collection of income on property held by the entirety in Pennsylvania during the marriage, the theory being that the unity of the relation and the presumption that the benefits accrue to both spouses; also the inability of either spouse to sue the other at common law. But this restraint did not apply after the divorce was acquired. In the O'Malley case there was a divorce and the court allowed the accounting to the wife. A similar problem would not arise today, probably because the divorce renders the parties tenants in common.

21 See n. 18, supra; also, Wakefield v. Wakefield, 149 Pa. Super. 9, 25 A.2d 841, (1942); Madden et al. v. Gosztonyi Savings and Trust Co., 331 Pa. 476, 200 Atl. 624, 117 A.L.R. 904 (1938).

22 See n. 21, supra.

23 See n. 18, supra; Berhalter v. Berhalter, 315 Pa. 225, 173 Atl. 172 (1934).

> "The authorities thus cited would seem to show that either spouse *presumptively* has the power to act for both, so long as the marriage subsists, in matters of entireties, without any specific authorization, provided the fruits or proceeds of such action inures to the benefit of both and the estate is not terminated. But neither may by such action destroy the true purpose of the estate by attempting to convert it or a part of it in bad faith, into one in severalty."

The theory of a "presumption" of authority or power to act can be found in many cases.

It is to be noted that the court expressly states that had the account been in the name of "husband and wife", instead of "husband or wife," there would be no implication of agency by a singular act on the part of either spouse. The courts find that "husband or wife" is an immediate expression of authority of agency to act for both. While use of the conjunction "and" requires a joint withdrawal or express authority to act as an agent, you cannot imply an authority in this case.[24] Although the court allowed a withdrawal of all the money in the savings account, apparently allowing one spouse to terminate the estate, it is to be noted that a withdrawal does not terminate the true purpose of this estate. The money withdrawn is, ". . . impressed with the entirety provision that it is the property of both".[25] We will see later, however, that such a withdrawal may be accepted by the other spouse as a voluntary partition of the estate.

An interesting result was reached in *Kaufmann v. Kaufmann*[26] where either "husband or wife" had power to withdraw funds deposited in a joint savings account. The husband brought an action to require the wife to account for the entire amount in the bank account which she had withdrawn for her own use. The court found that the wife did not withdraw the money held by the entirety for any fraudulent or improper purpose, but for the purpose of providing for the cost of her maintenance, when the husband had left her without any other means of support. The court held that because the husband had failed in his duty to support her as provided by law, her withdrawal was within the rights of a person holding by the entirety and that since the fund spent for her support, for which he was liable in law, was expended for domestic and family purposes, it benefited the husband as well as the wife.

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24 Madden et al. v. Gosztonyi Savings and Trust Co., 331 Pa. 476, 200 Atl. 624, 630 (1938).
25 Madden et al. v. Gosztonyi Savings and Trust Co., 200 Atl. 624, 631 (1938). Just what the end result will be of this theory that the money is impressed with the incidents of the entirety relation, is not quite clear. But when a husband and wife sell property owned by the entirety the proceeds thereof is regarded as property by the entirety. Brambery's Estate 156 Pa. 628, 27 Atl. 405 (1893). It would seem to follow that any property purchased with the corpus of such proceeds so impressed with the incidents of the entirety estate would also be property owned by the entirety, each being entitled to equal enjoyment thereof.
26 166 Pa. Super. 6, 70 A.2d 481 (1950).

The theory involved in joint banking accounts has also been extended to include joint possession of war bonds[27] and joint checking accounts[28] made payable to either husband or wife. Here either spouse presumptively has the authority to act in relation to these interests without the joinder or express authority of the other spouse, provided such acts inure to the benefit of both spouses.

So the general rule of a presumed authority or power has been applied in Pennsylvania where the husband and wife hold property by the entirety in cases of

> (1) the making of leases, (2) the receipt of rents,[29] (3) holdings in joint savings accounts[30] and checking accounts,[31] (4) holdings in war bonds[32] and (5) numerous other situations.[33]

As seen in the general rule, where the act of one spouse does not result in a benefit to both spouses, the presumption of an authority to act may be rebutted by a complaining spouse. Thus there are various circumstances where the presumed power or authority of one spouse to act for the other may be denied. When either tenant holding property by the entirety has separately disposed of any part so as to work a severance or termination of the estate, or has encumbered the property, or has conveyed any interest without the other's consent, or has performed any act to make any contract respecting the property which would prejudicially affect the other, the presumption will fail.[34]

Treating these restraints on the presumption of power independently, we will first consider the right of a conveyance or termination of the entirety estate.

Although at common law property held by the entirety was deemed to be under the ownership of both spouses, it was in fact in the control of the husband, subject only to the right in the wife to acquire the property if she survived the

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27 In Re Smulyan, 98 F. Supp. 618 (1951), where U.S. Savings Bonds, Series E, which were payable to "Husband or Wife" were found to be held by the husband and wife as tenants by the entirety, the husband's trustee in bankruptcy was not entitled to the bonds.

28 Werle v. Werle, 332 Pa. 449, 1 A.2d 244 (1938), where evidence showed there was no oral understanding that funds in a joint checking account were to remain those of the husband, to whom they belonged before the deposits, the court was warranted in finding the funds which the husband had withdrawn were to be held as tenants by the entirety, so as to entitle the wife to an accounting of the checking account after the separation.

29 See n. 18, supra.

30 See n. 21, supra.

31 See n. 28, supra.

32 See n. 27, supra.

33 Wickerman v. Vitori,, 345 Pa. 111, 25 A.2d 801 (1942), where the court held that all the husband did in creating and discharging an obligation to a plumbing and heating contractor for the improvements of the property held by the entirety, was done on behalf of both husband and wife, and the agency is presumed; Williams v. Barbaretta, 359 Pa. 488, 59 A.2d 161 (1948), where the court held that where the husband and wife as tenants by the entirety, contract to sell their land on or before a specified date, and the agreement provided that time was of the essence, the husband's action in making repeated requests for delay in settlement which was agreed to by the purchasers, did not amount to a change in the terms of the agreement of sale, or result in the making of a new contract, and the husband could not put the purchaser in default on the grounds that there was no specific authority by the wife of the husband's waiver, or of her ratification.

34 Biehl v. Martin, 236 Pa. 519, 84 Atl. 953 (1912); Schroeder v. Gulf Refining Co. of Port Arthur, Texas, 300 Pa. 397, 150 Atl. 663 (1930); Walleasa v. Walleasa, 174 Pa. Super. 192, 100 A.2d 149 (1952).

husband.[35] In Pennsylvania this concept has been changed by the married women's acts.[36] The courts have construed these acts as giving the husband and wife equal rights and duties as to the whole of the property held in the entirety.[37] Today the general rule in Pennsylvania is that neither spouse alone can convey property held by the entirety, nor any interest therein, except by authority of an actual or apparent agency.[38] This proposition was stated in the case of *McCurdy and Stevenson v. Canning*[39] and has since been followed by the courts of Pennsylvania.[40] In an action of ejectment, the court held that the plaintiffs, as holders of the deed to property purchased at a sheriff's sale of the husband's interest in property held by the entirety, could not recover possession of any part of the property identified by the deed.

The court said in its opinion:

> "If the husband might convey or mortgage it for the period of his own life, it would seem to follow necessarily that it might be taken in execution and sold by the sheriff for the same period, and that a purchaser of such interest would be entitled to recover the possession during the life of the husband by ejectment."

But the court goes on to say that the *Act of* 1848[41] interposes a bar to such an action. The law thus forbids either spouse to terminate the other's interest in an estate by the entirety without the other's consent.

There are authorities on property law who indicate a conveyance by only one of the tenants, although void without the authority of the other, may become valid upon the theory of estoppel, in the event the spouse executing the instrument survives the other spouse.[42] The case of *In Re Myers Estate (Weiss Appeal)*[43] refers to the interest of a purchaser or grantee or one claiming under either spouse as a "contingent" interest, which would be destroyed if the grantor predeceased

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35 Richard R. Powell, The Law of Real Property, vol. 4, § 623 (1954).

36 See n. 13, supra.

37 Cases construing the effect of the Married Women's Act of 1848; The interest of the husband and wife in property held as tenants by the entirety is not abolished by this act. Gasner v. Pierce, 286 Pa. 529, 134 Atl. 494 (1926). This act enables a married woman to hold property not as a femme sole, but as if it were settled to her use, as a femme covert. Bear's Admr. v. Bear, 33 Pa. 525 (1859). Married women shall own and enjoy their separate estate and this act secures to the wife her title and right to possess the same, which equity will recognize and protect and she may maintain a bill in equity against the husband for protection of such estate against his fraud or other wrong doings. Heckman v. Heckman, 215 Pa. 203, 64 Atl. 425. A married woman may contract by her husband as agent, in regard to her separate property. Murphey v. Bright, 3 Gr. 296 (1859). The married woman has ceased to be considered as one person along with her husband in law, and the woman has now full property rights, independent of the husband. In Re Vandergrift's Estate, 105 Pa. Super. 293, 161 Atl. 898 (1932).

38 Schweitzer v. Evans, 360 Pa. 552, 63 A.2d 39 (1949); In Re Meyer's Estate—(Weiss Appeal), 232 Pa. 89, 81 Atl. 145 (1911).

39 McCurdy & Stevenson v. Canning, 64 Pa. 38 (1870).

40 O'Malley v. O'Malley, 272 Pa. 528, 116 Atl. 500 (1922); In Re Meyer's Estate — (Weiss Appeal), see n. 39, supra; Schweitzer v. Evans, see n. 18, supra.

41 Act of April 11, 1848, P.L. 536, 48 P.S. 64.

42 William F. Walsh, Commentaries on the Law of Real Property, vol. 2, § 122, p. 35; Herbert T. Tiffany, A Treatise on Modern Law of Real Property and Other Interests in Land, (new abridged ed.) § 290, p. 292, and § 768, p. 814.

43 In Re Meyer's Estate, see n. 38, supra; see also Klopfenstein et ux., Appellants v. Chadbourne, 105 Pa. Super. 530 (1932).

the other spouse holding by the entirety. In *Fleek v. Zillhaver,*[44] a husband and wife, tenants by the entireties, mortgaged the land so held. After the wife's death it was sold under a judgment that had been entered against the husband prior to the mortgage. The court held the wife's estate terminated at her death, and the purchaser took good title as against the mortgage. The judgment bound all the husband's interest, including the inchoate right of survivorship.

There is an exception to the rule that neither spouse may convey or terminate an estate by the entirety alone. Under the common law a person could not create a tenancy by the entirety by direct conveyance to himself and his spouse, nor could such an estate be terminated by conveyance to one or the other, without the inclusion of a third person. A recent amendment to the *Inter-Party Agreemeent Act*[45] has cured this defect. This act as amended in 1951, provides that a conveyance of an interest in real property may be made by either husband or wife, holding by the entireties alone, to the other without that other joining in the deed of conveyance. Prior to the enactment of this amendment, the courts had created a fiction, saying that there was actually a joinder of parties in this conveyance. When one spouse conveys to the other and the latter accepts the deed of conveyance terminating the entirety, he is in effect joining the conveying spouse.[46] Thus the courts were allowing under the *Inter-Party Agreement Act of* 1927, that which the amendment of 1951 has expressly provided.

The next point to be considered, is the power one spouse may have to subject the entirety estate to an incumbrance.

As previously noted, the estate by the entirety is an indivisible whole, each spouse owning by the whole and not by the share. It is this peculiarity of the entirety holding which operates to exempt it from execution and sale by a creditor of either. Since neither spouse has any separate interest in the property, there is nothing upon which a creditor might attach a lien, or levy execution.[47] For the same reason, tenants by the entirety may alien the property without infringing upon the rights of their individual creditors, and all claims by those individual creditors against either the husband or wife are subject to extinction if the husband and wife join to alien the property, or if the debtor spouse predeceases the

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44 Fleek v. Zillhaver, 117 Pa. 213, 12 Atl. 420 (1887).

45 Inter-Party Agreement Act, P.L. 631, 3 June, 1911, 69 P.S. 541, amended Aug. 17, 1951, P.L. 1275 § 1, 69 P.S. 541.

46 Michalski, Executor, et al., Appellants v. Kruszewski et al., 330 Pa. 62 (1938), where a tenant conveying property held by the entirety to the other tenant, now divorced, without the joinder of these parties as grantors to the one spouse, was held to be a valid conveyance. It was not necessary for both husband and wife to join in the deeds exchanged; Runco et al v. Ostroski et al, 361 Pa. 593, 65 A.2d 399 (1949), where a husband's deed, conveying his interest in land owned by the entirety to his wife, who accepted the conveyance, terminated the estate by entirety. Also it was not necessary that both husband and wife join as grantors in the deeds.

47 McCurdy v. Canning, 64 Pa. 39 (1870); Biehl et ux. v. Martin, 236 Pa. 519, 84 Atl. 953 (1912).

other spouse.[48] The creditor with a judgment against one of the tenants by the entirety is said to have only an expectant interest which may be terminated.

This rule of protectioin surrounding a tenancy by the entirety as to creditors of one of the spouses also extends to personalty, as is seen in *Bostrom v. National Bank of McKeesport.*[49] Here, the court held, in a wife's suit against the bank for a savings account owned by the wife and her deceased husband by the entirety, that the bank could not set off the husband's personal debt against the account, which became the wife's by survivorship upon the husband's death.

As both spouses are said to be seised by the whole in the estate, a debt incurred jointly by the husband and wife will subject their property held by the entirety to the incumbrances normal to any other property.[50]

There are exceptions to the rule that a creditor may not execute on a judgment against only one of the tenants by the entirety. Pennsylvania has two acts allowing a wife to execute on any property which she held with her husband by the entirety.[51] The *Act of* 1913 provides that whenever an order is made against a husband for support of his wife or children or both, in any action of separation or other action for support, the court may enforce compliance with the order by issuing an appropriate writ of execution against any real property held by the husband and wife by the entirety. It further provides that any purchaser at a sheriff's sale will be vested with good title, and the proceeds thereof are to be divided between the husband and wife equally, after satisfaction of the judgment.

The *Act of* 1923 is substantially the same, but is restricted to a court order for support. It does not provide for a judgment on a contract or an action for separation. It stipulates that the wife must get the order certified by a court of common pleas in any county in which the real estate held by the entirety is located, after which such order is effective to have a valid execution made against property held by the husband and wife by the entirety.

It thus is a well established rule in Pennsylvania, subject to the exceptions noted, that an estate by the entirety can only be terminated by the joint acts of the

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48 Biehl et ux. v. Martin, see n. 47, supra; Murphey et al. v. C.I.T. Corporation, 347 Pa. 591, 33 A.2d 16 (1943); In Biehl et ux. v. Martin, the court states that, "Fleek v. Zillhaver stands as authority to what it expressly rules, viz., that the interest of husband and wife, where they hold by the entirey may be the subject of a lien, and that upon the death of either, the lien against the survivor may be enforced. But there can be a severance in ownership only by the death of one or the other, or by a voluntary alienation by both."

49 Bostrom v. National Bank of McKeesport, 330 Pa. 65, 198 Atl. 644; Wylie v. Zimmer, 98 F. Supp. 298 (1951).

50 Hanover Trust Co. v. Keagy, 335 Pa. 356, 6 A.2d 786 (1939); Tiffany, § 434, p. 231; see n. 42, supra.

51 The Act of June 11, 1913, P.L. 468 § 1, 48 P.S. 133; The Act of May 24, 1923, P.L. 446 § 1, 48 P.S. 137-141.

husband and wife and not by one alone, unless an agency power is expressly granted.[52]

There is an interesting situation in the recent decision of *Evans v. Evans*.[53] The court held:

> "Where the husband and wife created a joint savings account, each contributing different sums thereto, and where the husband withdrew all of the funds and appropriated the same to his own use, this action of the husband was an offer to terminate the estate by the entirety, and the filing of a Bill in Equity (for an accounting of her separate property) by the wife, was an acceptance of that offer resulting in a termination. The estate being terminated, the parties are entitled to equal shares in the distribution of the proceeds thereof, even though the husband and wife each contributed different sums thereto."

It is quite evident that the courts have taken the facts of this case and created a fiction as to the intent of the parties in their separate acts. This fiction has been used by the courts on other occasions.[54]

In *Magee et ux. v. Morton Building and Loan Assn.*[55] the court applied the rule as to a spouse's right to protection from termination of the estate by the other spouse. The husband, without his wife's consent, received payment on stock owned by them in the entirety. The association was liable for the repayment of the stock upon a subsequent demand by both the husband and wife jointly. The question arose as to the propriety of this action by the wife to recover for the value of the stock withdrawn by the husband without the wife's consent, in *Gasner v. Pierce*[56] where the court would not allow a husband to maintain an action against his tenant for rents paid by the lessee to the plaintiff's wife. The general rule seems to be that while it is proper for one spouse to receive the income from property held by the entirety, there is no right in one spouse to bind the other by terminating an estate, whether it be by a conveyance of the estate, or the receipt of payment for the corpus thereof, in the absence of an express or apparent provision of authority to so act. Here again the presumption is found to apply the income received to the

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52 Gasner v. Pierce, 286 Pa. 529, 134 Atl. 494 (1926); Madden v. Gosztonyi Savings and Trust Co., 331 Pa. 476, 200 Atl. 624, 117 A.L.R. 904 (1938). Applying this rule, the court held, in the case of In Re Gallaghers Estate, 352 Pa. 476, 43 A.2d 132 (1945), that a husband's attempt to terminate the estate by the entirety in a savings account after his wife was committeed to an institution for mental patients, by having her name stricken from the account without her knowledge or consent, was ineffectual. The incident of survivorship remained and upon the husband's death the estate passed to the wife as survivor, requiring an award of the deposit to the trust company as the wife's guardian, rather than as executor of the husband's estate, where the bank had been serving in both capacities.

53 Evans v. Evans, 59 Dauph. 198 (1947); see also, Berhalter v. Berhalter, 315 Pa. 225, 173 Atl. 172 (1934).

54 Berhalter v. Berhalter, see n. 53, supra.

55 Magee v. Morton Building and Loan Asso., 103 Pa. Super. 331, 158 Atl. 647 (1931); See also Milano et ux. v. Fayette Title and Trust Co., 96 Pa. Super. 310 (1929).

56 Gasner v. Pierce, see n. 52, supra.

benefit of both spouses. But this presumption can not be extended to provide for a power to act where such action will result in the termination of the estate.

Another element of a tenancy by the entirety is the power of either spouse to compel the other to join him or her in an action at law. This right of compulsion is provided in Pennsylvania's *Rules of Civil Procedure.*[57] Where the action sued on is joint, the rules provide that neither spouse is entitled to bring an action without the joinder of the other, and the rules give the complaining party the right to compel the joinder of the other spouse. These rules have an editorial note which expressly includes tenants by the entireties.

The *Magee* case poses this particular problem of joinder in actions at law, where the husband or wife must bring suit to protect their interest in the entirety. The court held that a wife suing to recover a withdrawal value of stock held by the entirety, where her husband had withdrawn without her consent and without any benefit going to her, could join her husband involuntarily, and that any attempts made by him to discontinue the action were ineffective. The court concludes:

> "We are therefore of the opinion that the wife had a right to bring this action in the name of her husband as well as her own; by virtue of the nature of the tenancy either had a right to act for both in preservation, as against the association, of the estate. . . . It follows that the husband had no right to discontinue, and the court below should have treated this attempt as a nullity."

In *Pastore v. Forte,*[58] it was held that in a suit by a wife as tenant by the entirety to avoid liability on a mortgage given by her husband without her consent or knowledge, the husband may be joined with her as a plaintiff, even though the husband was in fact a party to the wrongful act. In *Sielecki et al. v. Sielecki et al.,*[59] the husband and wife held real property by the entirety and the husband had sold his interest in timber thereon to a third party without the consent or knowledge of the wife. The wife was allowed to compel her husband to join in an action in equity to prevent removal of the timber since the third person had acquired no interest in his attempt to purchase from the husband alone and since no benefit had accrued to the wife.

The rule as to the preservation of the estate is in keeping with the theory that the tenancy by the entirety is held by the whole, and one spouse alone has a right to protect this interest. It also complies with the general rule that either spouse may act in relation to property held by the entirety providing the proceeds inure to the benefit of both.[60] It may include improvements to property,[61]

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57 Pa. R.C.P. No. 2227, adopted June 7, 1940, Effective Feb. 5, 1941.
58 Pastore v. Forte, 104 Pa. 55, 158 Atl. 649 (1932).
59 Sielecki v. Sielecki, 107 Pa. Super. 291, 163 Atl. 375 (1932).
60 See n. 60, supra.
61 Wickerman v. Vitori, 345 Pa. 111, 25 A.2d 801 (1942).

a suit to protect the entirety interest from acts of the other spouse[62] or suits to protect the property from the acts of third persons.[63]

In conclusion it has been shown that the power of the husband and wife to act for one another regarding a tenancy by the entirety does not arise as a natural consequence of the marriage, but rather such power or authority in the spouses is presumptively present as an incident to or flowing from the entirety estate. The presumption of power allows either spouse to act in property matters for both of them, where the marriage relation exists, providing the benefits of this action inure to the benefit of both and there is no termination of the estate by such acts. This presumption seems to be absolute where one spouse receives payment of income from the property, but is rebuttable where one spouse receives payment of the corpus of the property held by the entirety, or attempts to make a conveyance of any interest therein without the other's authority or consent. The courts usually find an act has not resulted in a benefit to the non-acting spouse where it is disadvantageous to or completely ignores his or her interests in the property. In many cases this presumed authority might be explained on the grounds of simple agency principles or equitable estoppel. Whatever title might be ascribed to this power, the courts of Pennsylvania do recognize it as inherent in our tenancy by the entirety.

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Member of the Middler Class

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62 Magee et ux. v. Morton Bldg. and Loan Asso., 103 Pa. Super. 331, 158 Atl. 647 (1931).
63 See n. 60, supra.