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## LEGISLATION

### EFFECT OF THE MARRIED WOMEN'S ACTS ON RIGHTS OF CREDITORS OF TENANTS BY THE ENTIRETIES

The so-called Married Women's Property Act of 1945<sup>1</sup> provides that a married woman shall have the same contractual capacity as an unmarried woman, except that she may not convey her property without the joinder of her husband.

The obvious purpose was to remove those contractual disabilities of a married woman which had existed under the previous laws relating to her capacity to convey and to contract. Nevertheless, some of our lower courts still are refusing to accept bonds executed by a husband and wife, where it appears they are sureties or accommodation makers, whose sole property is held as tenants by the entireties. It also has been pointed out that some attorneys have advised banks or other clients not to accept notes on which a husband and wife sign as anomalous or accommodation indorsers when it appears that the bulk of their property is held in an estate by the entireties. Our purpose here is to determine whether this reluctance can be justified in the light of existing law.

The doubt as to the legality of instruments, wherein the wife signs in a capacity which supposedly has been opened to her under the Act of 1945, can be traced to three possible reasons:

(1) The peculiar nature of an estate by the entireties, (2) the possible construction of the Married Women's Property Act of 1945 and (3) the law of commercial instruments.

\* \* \* \* \*

The concept of property held as tenants by the entireties is unique in the law. Any conveyance of property to a husband and wife presumptively creates a tenancy by the entireties, and such an estate can exist only where the parties are in fact husband and wife.<sup>2</sup> The estate may exist in both real and personal property.<sup>3</sup> In contrast to a joint tenancy and tenancy in common, each spouse in a tenancy by the entireties is seized of the whole or entirety and not of any part. It is held *per tout et non per my*.<sup>4</sup> Thus, it rests on the legal unity of husband and wife. On the death of either spouse, the whole of the estate passes to the surviving spouse.<sup>5</sup> Other than by a joint conveyance of the property, the estate ordinarily

<sup>1</sup> Act of May 17, 1945, PL 625, §§ 1 and 2, as amended, Act of May 31, 1947, PL 60; Act of August 24, 1951, PL 1416, 48 PS 31, 32.

<sup>2</sup> Branberry's Estate, 156 Pa. 628, 27 A. 405, 22 L.R.A. 594 (1893); David Young's Estate, 166 Pa. 645, 31 A. 373 (1895).

<sup>3</sup> Madden v. Gosztonyi Savings & Trust Co., 331 Pa. 476, 200 A. 624 (1938); Wilbur Trust Co. v. Knadler, 322 Pa. 17, 185 A. 319 (1936); Loesch's Estate, 322 Pa. 105, 185 A. 191 (1936); Klenke's Estate, 210 Pa. 572, 60 A. 166 (1905).

<sup>4</sup> 2 Blackstone, Commentaries 182; Madden v. Gosztonyi Savings & Trust Co., n. 3, *supra*; Meyer's Estate, 232 Pa. 89, 81 A. 145 (1911); McCurdy v. Canning, 64 Pa. 39 (1870).

<sup>5</sup> C.I.T. Corp. v. Flint, 333 Pa. 350, 5 A.2d 126, 121 A.L.R. 1026 (1939); Alles v. Lyon, 216 Pa. 604, 66 A. 81 (1907); Boyertown Nat. Bank v. Hartman, 147 Pa. 558, 23 A. 842 (1892).

cannot be terminated during the lives of the parties, unless the marriage relationship itself is destroyed.<sup>6</sup>

Because of this concept of unity or entirety, it follows that a creditor of one spouse cannot execute on the property while both spouses are living. At most, a creditor of one spouse obtains a contingent expectancy, a potential lien which may be realized only if the debtor-spouse survives.<sup>7</sup> This potential lien is lost, however, if the parties alienate the estate during their lives, and such a conveyance is not fraudulent as to creditors of either spouse.<sup>8</sup>

The estate is liable for the joint debts of the spouses and hence is subject to execution by a judgment creditor, provided such judgment has been rendered against husband and wife jointly.<sup>9</sup> The reasoning was well stated by a North Carolina Court:

"Thus a judgment against the husband and wife jointly is a judgment by the entirety, and therefore a lien upon real estate held by them as tenants by the entireties."<sup>10</sup>

It follows that separate judgments against a husband and wife would not be a judgment by the entirety, and hence would not operate as a lien on an estate by the entireties. "In order to bind the land held by entireties, a judgment must include both of the parties."<sup>11</sup> Even where the separate judgments were based upon claims having a common origin, it was held the plaintiff did not obtain a lien on property which was held by the entireties.<sup>12</sup>

\* \* \* \* \*

It should be noted in passing that the courts seem generally agreed that the various Married Women's Property Acts<sup>13</sup> have had but little effect on estates by the entireties, other than to alter the common law rules on the control which the husband could exercise over such an estate.<sup>14</sup> The operation of such statutes generally has been limited to the separate property of married women, leaving unaffected and unaltered the basic characteristics of a tenancy by the entireties.

<sup>6</sup> C.I.T. Corp. v. Flint, n. 5, *supra*; Hetzel v. Lincoln, 216 Pa. 60, 64 A. 866 (1906).

<sup>7</sup> Fleeck v. Zillhaver, 117 Pa. 213, 12 A. 420 (1887); Biehl v. Martin, 236 Pa. 519, 84 A. 953, 42 L.R.A. (NS) 555 (1912); C.I.T. Corp. v. Flint, n. 5, *supra*; Mitchell v. Ruth, 30 Del. 446, 55 York 153 (1942).

<sup>8</sup> Biehl v. Martin, n. 7, *supra*; U.S. Nat. Bank in Johnstown v. Penrod, 354 Pa. 170, 47 A.2d 249 (1946); Mitchell v. Ruth, n. 7, *supra*.

<sup>9</sup> Phillips v. Krakower, 46 F.2d 764, C.C.A.4th (1931); Knoblauch v. Kissel, 13 D. & C. 41 (1929); Ades v. Caplan, 132 Md. 66, 103 A. 94, L.R.A. (1918D) 276 (1918); Martin v. Lewis, 187 N.C. 473, 122 SE 180, 35 ALR 155 (1924); Etling v. Pfeifer, 29 West. 73.

<sup>10</sup> Martin v. Lewis, n. 9, *supra*.

<sup>11</sup> Arch St. Bldg. & Loan Ass'n. v. Sook, 104 Pa. Super. 269, 158 A. 595 (1931).

<sup>12</sup> A. Hupfel's Sons v. Getty, 299 F. 939, 35 A.L.R. 155, (C.A.3d, 1924). However, the court seemed to indicate that, had the claims arisen out of the same transaction, the separate judgments might have operated as a lien on the estate.

<sup>13</sup> Pennsylvania statutes prior to the Act of 1945 were: Act of April 11, 1848, PL 536; Act of June 3, 1887, PL 332; Act of June 8, 1893, PL 344, 48 PS 31, 32.

<sup>14</sup> *In re Meyer's Estate* (No. 1), 232 Pa. 89, 81 A. 145 (1911); *Bramberry's Estate*, n. 2, *supra*; *Diver v. Diver*, 56 Pa. 106 (1867).

As affects rights of creditors, there is nothing in the Pennsylvania cases to indicate that such statutes would have any effect on the execution and sale of property held by the entireties.

Under the Act of June 8, 1893, PL 344, a married woman's contractual rights were enlarged considerably, but she still lacked the capacity to act as accommodation maker or indorser, or surety, or guarantor for another. While the statute was construed by the courts as putting the burden of proof on the wife if she asserted that she was acting in one of those capacities, nevertheless it was generally held that when she established such disability, her signature was void and of no effect.<sup>15</sup> But, where the obligation of the wife was incurred in connection with property held as a tenant by the entireties, such obligation was held to be binding on her, regardless of the capacity in which she signed; and, if the obligation was incurred jointly with her husband, their property owned by entireties was subjected to the judgment lien.<sup>16</sup> In such cases the courts have reasoned that the obligation was incurred to conserve the wife's own interest, and hence she is a joint maker along with her husband. "The fact that she was directly interested for her own purpose in the transaction is the controlling factor."<sup>17</sup>

It is apparent, then, that under the Act of 1893, if a married woman joined her husband in an obligation as an accommodating party or surety or guarantor, the creditor was unable to obtain an enforceable lien on property owned by them as entireties, except where the woman had acted to conserve her interest in such estate. Thus, where a husband and wife, who owned all their realty by the entireties, had signed as sureties on defendant's counterbond in a replevin action, the court correctly held that the bond was insufficient under the Act of 1893.<sup>18</sup>

However, in 1945 a new married women's statute was enacted.<sup>19</sup> This act provides:

"Hereafter a married woman may, in the same manner and to the same extent as an unmarried person, make any contract in writing, or otherwise, but she may not execute or acknowledge a deed. . .conveying her property, unless her husband joins in such conveyance."

This section should leave no doubt as to a married woman's power now to act as accommodation maker or indorser, or surety, or guarantor for another. There have been but few reported cases construing the act, but there is nothing in those cases to indicate any interpretation that a married woman would still have any

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<sup>15</sup> *Southwestern Nat. Bank v. Leibowitz*, 320 Pa. 410, 182 A. 695 (1936); *DeFeo v. DiBacco*, 162 Pa. Super. 608, 60 A.2d 597 (1948); *First Nat. Bank of Verona for Use of Laris v. Walsh*, 349 Pa. 241, 37 A.2d 130 (1944). But where the doctrine of laches would apply, the court held a wife's accommodation note voidable, and not void. *Wilkes-Barre Deposit & Savings Bank v. Herman*, 334 Pa. 560, 6 A.2d 496 (1939).

<sup>16</sup> *Archbald v. Hood*, 332 Pa. 434, 186 A. 791 (1936); *Penna. Trust Co. v. Koller*, 319 Pa. 249, 178 A. 814 (1935); *Morris v. Duers*, 90 Pa. Super. 285 (1927).

<sup>17</sup> *Morris v. Duers*, n. 16, *supra*.

<sup>18</sup> *Peoples Outfitting Co. v. Eckenrode*, 31 Luz.L.R.Rep. 362 (1937).

<sup>19</sup> Act of May 17, 1945, PL 625, as amended, Act of May 31, 1947, PL 60; Act of August 24, 1951, PL 1416, 48 PS 31, 32.

contractual disabilities. "The Act of 1945. . .empowered a wife to make any contract that could be validly made by an unmarried woman and removed the exception that she could not become an accommodation maker or endorser or surety for another."<sup>20</sup> This is in line with the liberal construction given the prior Married Women's Property Acts by the courts.<sup>21</sup>

There are some decisions, subsequent in date to the Married Women's Act of 1945, in which a married woman's defense to an obligation as accommodation indorser or maker, or surety or guarantor, has been recognized.<sup>22</sup> However, it will be noted that in each of these cases the obligation in question had been incurred prior to the act, so that the Act of 1893, and not the Act of 1945, was applicable.

On the basis of the foregoing, then, there is nothing about the peculiar nature of a tenancy by the entireties, nor are there remaining any contractual disabilities of a married woman (excepting the power to convey property without her husband's joinder) that would protect an estate by the entireties from a lien of a judgment against both husband and wife, when the husband and wife were accommodation parties, or sureties or guarantors to an instrument. It remains to be seen whether there is anything peculiar to the law of commercial instruments that would prevent a creditor from securing a lien on a tenancy by the entirety where its owners have executed or indorsed some instrument.

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Section 68 of the Negotiable Instruments Law<sup>23</sup> provides:

"As respects one another, indorsers are liable, prima facie, in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally."

Ordinarily, then, the liability of indorsers, in the absence of special agreement, is successive and not joint. It is difficult to believe that the framers of the Negotiable Instruments Law intended that this relationship could be proved only by agreement between the parties and not by circumstances. In a New York case it appeared that a mother, her son, and a third person signed as accommodation indorsers on a note of a corporation in which they owned most of the outstanding stock. The court said the circumstances were sufficient "at least to raise a question of fact, as to whether it was not the intention of the parties to become jointly liable as sureties for the corporation."<sup>24</sup>

<sup>20</sup> Palatucci v. Woodland, 166 Pa. Super. 315, 70 A.2d 674 (1950).

<sup>21</sup> Heitz v. Bridge et ux., 155 Pa. Super. 655, 39 A.2d 287 (1944).

<sup>22</sup> DeFeo v. DiBacco, n. 15, *supra*; Brubaker v. Brubaker, 53 D. & C. 463 (1945); Hucke v. McMullin, 66 Montg. 145 (1950).

<sup>23</sup> Act of May 16, 1901, PL 194, c. 1, Art. 5, § 68, 56 PS 159.

<sup>24</sup> Strasburger v. Myer Strasburger & Co., 167 App. Div. 198, 152 N.Y.S. 757 (1915).

The factual situation there was quite similar to that in a Pennsylvania case,<sup>25</sup> decided under the Negotiable Instruments Law. The Pennsylvania court pointed out that it is necessary to consider the relationship of the parties to the purpose of the note and to each other. It concluded that, from such relationship, the drawer and the several indorsers on the note in question were in a relationship of co-sureties and hence jointly liable.<sup>26</sup> "There is no impelling reason why parties who sign as indorsers for a common debtor should be deprived of some of the fruits of a matured law of suretyship merely because they happened to sign as indorsers of a negotiable instrument."<sup>27</sup> By analogy there is no reason why a husband and wife who indorse a note should not be regarded as assuming a joint obligation.

It would seem that the same argument could be developed by analogy to the second sentence of Section 68 of the Negotiable Instruments Act which states that "joint payees or joint indorsees who indorse are deemed to indorse jointly and severally." The circumstances of a husband and wife indorsing a note as anomalous or accommodation indorsers would seem to be analogous to where two or more payees indorse. The reasoning behind this provision must be that joint payees who indorse with the knowledge of each other do so with the intent of being jointly and severally liable.

This analogy is strengthened by the Uniform Commercial Code.<sup>28</sup> While Section 3-414 (2) substantially reenacts Section 68 of the Negotiable Instruments Law,<sup>29</sup> Section 3-119 (e) provides that "unless the instrument otherwise specifies two or more persons who sign in the same capacity and as a part of the same transaction are jointly and severally liable, even though the instrument contains such words as 'I promise to pay.'" In the framers' comment on Section 3-119 (e) of the Uniform Commercial Code, it is stated that the rule "applies to any two or more persons who sign in the same capacity, whether as makers, drawers, acceptors or guarantors."<sup>30</sup>

Certainly, where a husband and wife are accommodation makers on a non-negotiable instrument, as for instance on a replevin bond, (or, for that matter on a negotiable instrument) and where they own property as tenants by the entireties, there is no reason why a court should not be willing to take such a bond,

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<sup>25</sup> Marquardt's Estate, 251 Pa. 73, 95 A. 917 (1915). This case was cited and relied upon in a similar situation by the court in Reeder v. Union Trust Co. *et. al.*, 34 Lanc.L.R. 194 (1917).

<sup>26</sup> *Ibid.*

<sup>27</sup> Britton, HANDBOOK ON THE LAW OF BILLS AND NOTES, § 235, p. 965, (1943).

<sup>28</sup> A uniform code designed to replace, or at least supplement and clarify, the Uniform Negotiable Instruments, Sales, Bills of Lading, Warehouse Receipts, Stock Transfer, Conditional Sales and Trust Receipts Acts. It was proposed by the American Law Institute in joint session with the National Conference of Commissioners on Uniform State Laws May 20, 1950, adopted in final form in September 1951, and is presently being urged upon the various state legislatures for enactment.

<sup>29</sup> § 3-414 (2), Uniform Commercial Code: "Unless they otherwise agree, indorsers are liable to one another in the order in which they indorse, which is presumed to be the order in which their signatures appear on the instrument."

<sup>30</sup> Proposed final draft, Spring, 1950, p. 314.

provided, of course, their estate by the entireties offered adequate security. There is nothing in our statutes to support an opposite view. It is significant that the court in *Peoples Outfitting Co. v. Eckenrode*<sup>81</sup> merely declared the wife's signature void under the Act of 1893.

There was no intimation that, had her signature as a co-surety been valid, the bond would not have been acceptable. It seems probable that had the court felt that such a joint obligation, even if valid, would not have created a lien on their property by entireties, it would have mentioned such a view.

The conclusion is inescapable. When a husband and wife sign an instrument jointly as accommodation indorsers or otherwise, they have prima facie assumed a joint obligation. And when they have assumed a joint obligation, as already pointed out, the judgment creditor obtains a lien on their property held as tenants by the entireties.

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In summary, when either spouse has assumed a several obligation, but not joint, the creditor of such spouse cannot obtain execution on a tenancy by the entireties while both spouses are living. If the debtor-spouse survives the other, and if the estate has not been alienated, the creditor's lien on an expectancy of survivorship ripens into an enforceable lien, permitting him to execute on the estate.

Where the husband and wife have assumed a joint obligation, the creditor who reduces his claim to judgment thereby obtains a valid lien on property held by them as tenants by the entireties; and he does not lose such lien because the wife assumed the obligation for the accommodation of another, or as surety or guarantor for another. When the husband and wife have assumed a joint and several obligation, it must follow that the judgment creditor obtains a lien on property they may own by entireties as well as on their separate estates.

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Member of the Senior Class

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<sup>81</sup> N. 14, *supra*. It will be recalled that here the court refused to accept a counterbond in replevin, where it appeared that the wife was co-surety with her husband, and that the husband did not own property except with his wife by the entireties.