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Tenancies by the Entireties-Maintenance and Support

TENANCIES BY THE ENTIRETIES—MAINTENANCE AND SUPPORT—Appellee brought an action against appellant in the Clay Circuit Court for support; obtained service on the appellant by publication; the Court rendered judgment, making an allowance to appellee "in the nature of alimony" in the sum of $2,000, and ordered land held by the husband and wife as tenants by

the entireties sold by a Commissioner, and one-half the proceeds, after payment of expenses of sale, attorneys, etc., be paid appellee, "and the other half, or appellants interest" be paid to the Clerk, by him paid over to appellee "for her maintenance and support on order as above made." Pursuant to this order, said land was sold. Subsequent to the Clay Circuit Court action, the wife obtained a divorce and remarried. Appellant brought the present action to determine title to said real estate. *Held*, that the sale was invalid. *Baker v. Cailor*, 176 N. E. 854.

A tenancy by the entirety is essentially a joint tenancy, modified by the theory of the common law that the husband and wife are one person. *Pray v. Stebbins*, 141 Mass. 219, 4 N. E. 824. By reason of the common law fiction, husband and wife, being one person in law, were each incapable of holding any separate interest in any estate so acquired. "They were said to hold such estate *per my et per tout* (sic) * * * and neither owns any severable interest therein." *Sharpe v. Baker*, 51 Ind. App. 547; *Davis v. Clarke*, 26 Ind. 424; *Chandler v. Cheney*, 37 Ind. 391. In order to hold property by the entireties, the parties must have been married at the time of the conveyance to them, and an honest belief in an illegal ceremony is not sufficient. *Morris v. McCarty*, 158 Mass. 11. A crop raised on land held by the entireties is held in the same manner and subject to the same law as the land itself. *Patton v. Rankin*, 68 Ind. 245. The most important incident of a tenancy by the entireties is that the survivor of the marriage is entitled to the whole, and that this right cannot be defeated by a conveyance by the other to a stranger, as it can be in the case of joint tenancy. *Pray v. Stebbins*, supra; *Hiles v. Fisher*, 144 N. Y. 306; *Ketchum v. Walsworth*, 5 Wis. 95, 68 Am. Dec. 49; *Simpson v. Pearson*, 31 Ind. 1; *Chandler v. Cheney*, supra. Nor by a sale under execution against such other. *Hiles v. Fisher*, supra; *In re Meyer's Estate*, 232 Pa. 89, 81 Atl. 145; *Simpson v. Pearson*, supra; *Chandler v. Cheney*, supra; *Jones v. Chandler*, 40 Ind. 588; *Thornburg v. Wiggins*, 135 Ind. 178; *Mercer v. Coomler*, 32 Ind. App. 533, 69 N. E. 202. By common law, when land was conveyed to the husband and wife, the husband could, during the joint lives, for his own benefit, use, possess and control the land, and take all the profits thereof, and he could mortgage and convey any estate to continue during their joint lives, but he could not make any disposition of the land that would prejudice the right of his wife if she survived him. *Burtles v. Nunan*, 92 N. Y. 152. The various state statutes abolishing joint tenancy, or declaring that two or more grantees shall take an estate in common, have, as a rule, been held not to apply to tenancies by the entireties, *Ketchum v. Walsworth, supra; Dotson v. Faulkenburg*, 186 Ind. 417, though some such statutes have been so worded or so construed. *Stewart v. Thomas*, 64 Kan. 511, 68 Pac. 70; *Louisville v. Coleburn*, 108 Ky. 420, 56 S. W. 681. Likewise, what are known as the Married Women's Property Acts are usually held not to abolish the tenancy by the entireties. *Hulett v. Inlow*, 57 Ind. 412; *Carver v. Smith*, 90 Ind. 222; *Fisher v. Provin*, 25 Mich. 350. Where real estate is conveyed to a husband and wife and another person jointly, the husband and wife will take an undivided one-half of the premises as tenants by the entireties. *Anderson v. Tannehill*, 42 Ind. 141. When a tenant by the entireties dies, the survivor holds the entire estate by virtue of the original grant or device, * * * and therefore on the death of one, the survivor, being already seized of the whole, can acquire no new or additional

interest by virtue of his survivorship. *Sharpe v. Baker, supra.* The spouse surviving acquires the whole, and, at common law, even tho the wife surviving accepted dower out of the estate as if it had been her husband's. *Falls v. Hawthorn,* 30 Ind. 444.

In applying the doctrine of election, the Indiana courts have created some confusion, which has had its effect on tenancies by the entireties. The wife is said to be estopped from claiming title as surviving tenant by the entirety because the provisions of the will were in lieu of her statutory rights and her acceptance of such provisions precluded her from claiming such statutory rights. *Young v. Biehl,* 166 Ind. 357. Where a husband devised property, including property held by the entireties, in trust for the wife, and she accepted the provisions of the will, she took by devise which was subject to transfer and inheritance tax. *In re Arp's Estate,* 147 N. E. 297, 148 N. E. 427. These decisions may be justified, however, under other considerations than the law of tenancies by the entireties if the court worked on the theory of *Moore v. Baker,* 4 Ind. App. 115, in which it was held that when the wife elected to avail herself of the benefits of her husband's will, she was estopped to deny his right to dispose of the property, although title was in her. In citing authorities in the foregoing decisions, the courts ignored the distinction between the facts of these cases, and those wherein the wife elected to take under a statute of descent. In these cases the wife could not take by descent as she already had a vested interest. There are a number of both English and American decisions that justify the holding in *Moore v. Baker, supra.* However, in the light of the generally accepted elements necessary to have a waiver or an estoppel, this doctrine, initiated in the English courts of equity, and applied to situations such as *Moore v. Baker, supra,* is not sound. For further discussion, see Pomeroy, *Equity Jurisprudence,* Vol. 1, 4th Ed. Sec. 461ff. The language of these cases cannot be reconciled with that of *Cameron v. Parrish,* 155 Ind. 329, in which it was said that such an instrument does not present a case requiring the wife under the equitable doctrine of election, to decide whether she would accept the benefits therein, and thereby adopt the will as an entity, and by such acceptance impliedly consent that property owned by her * * * should be subjected to the provisions of her husband's will. Any question arising out of such cases concerning inheritance taxes, however, is now governed by statute, under the Acts of 1929, in which the word "transfer" was defined as including the exercise of the right of survivorship.

In the principal case, the support statute under which the appellee sought to enforce the sale of property held by the entireties for the wife's support, provides: "Sale of real estate in proceedings under this act shall be of the entire fee, and shall direct (divest) the wife's *inchoate* right thereto." An *inchoate* right thereto is not a present estate therein. *Rupe v. Hadley,* 113 Ind. 416. A wife's interest in her husband's real estate is an inchoate right simply. *McCormick v. Hunter,* 50 Ind. 187; *Paulus v. Latta,* 93 Ind. 34; *Snoddy v. Leavitt,* 105 Ind. 357; *Geisendorff v. Cobbs,* 47 Ind. App. 573, 584; *Rupe v. Hadley, supra.* In estates by the entirety each party has a vested estate. Neither may be said to have merely an inchoate interest therein. *Chandler v. Cheney, supra; Sharpe v. Baker, supra.* The decision in the principal case is an orthodox affirmation of attributes long recognized in tenancies by the entireties. L. H. W.