

It appears, therefore, that in this case the LeFevres clearly fall within the general rule. Their deed made reference to the alley as a boundary and didn't, on its face, transfer any interest in the alley. We don't think *Stark* applies because in that case, unlike the present case, the courses and distances in the deed description included the disputed land even though it was otherwise described as being bordered by a road; the grantor testified that he did in fact intend to convey the land in dispute and from his point of view, the grantees owned it. As a further indication of the grantor's intent to convey all his interest regardless of the boundary description, it is notable that grantee was the grantor's son. In addition, *Stark* dealt with an appeal from a denial of a motion for judgment n. o. v. after a jury had returned a verdict finding adverse possession.

None of these facts have been alleged in the present case, so there is nothing which establishes or tends to establish an intention on the part of LeFevre's grantors to convey more than the land described in the deed. For the most part, the facts alleged by LeFevres prove that nothing more was conveyed than that within the boundaries of the conveyance. These are not facts which go to show the open and notorious nature of the adverse possession. None of the facts, except for the continued possession and like use, show privity. Consequently, we find that the plaintiff's preliminary objections in the nature of a Demurrer to LeFevres assertion of adverse possession must be sustained.

#### ORDER OF COURT

NOW, November 22, 1976, it is ordered that the plaintiff's Demurrer to the defendants new matter is sustained. Exception granted to the defendants.

COMMONWEALTH OF PENNSYLVANIA v. WRIGHT, C.P.  
Fulton County Branch, C.A. No. 5 of 1977

*Criminal Law - Burglary and Theft by Unlawful Taking - Tenancy by Entireties Property*

1. A tenant by the entirety is licensed and privileged to enter property owned by the actor and his or her spouse as tenants by the entirety.
2. A tenant by the entirety cannot be convicted of the taking of movable property of another when that property is owned by the actor and his or her spouse as tenants by the entirety.

Gary D. Wilt, Esq., District Attorney, Attorney for Commonwealth

Lawrence C. Zeger, Esq., Attorney for Defendant

#### OPINION AND ORDER

KELLER, J., July 7, 1977:

Gerald E. Wright filed a private criminal complaint before Justice of the Peace Don Knepper on November 3, 1976 accusing Peggy D. Wright of having between 9:00 o'clock A.M. and 12:00 Noon on October 28, 1976 committed the crimes of burglary and theft in the following language:

"Burglary and Theft by unlawful taking or disposition in that she did then and there unlawfully and knowingly break into the home of Gerald E. Wright and did take the following household property: Bedroom suite, Living room suite, colored television, stereo, tape player, record player, chairs, table, china closet (which was given to Gerald Wright by his mother, this being an heirloom), and numerous other items from the home of Gerald Wright with the intent to deprive him thereof."

District Attorney Gary Deane Wilt on November 11, 1976 approved the complaint. The defendant posted cash bail of \$1,000.00 and in due course the matter was forwarded by the issuing magistrate to court and a criminal information filed by the District Attorney alleging Count 1 Burglary, and Count 2 Theft by Unlawful Taking or Disposition. On February 14, 1977 the defendant waived arraignment and entered a plea of not guilty. Subsequently, the defendant waived trial by jury. The case was tried by the undersigned without jury on February 18, 1977, and February 24, 1977. At the conclusion of the Commonwealth's evidence, counsel for the defendant demurred to the Commonwealth's evidence on both counts contending that:

1. The evidence as to the crime of theft established only that the defendant had taken movable property of the parties owned as tenants by the entireties and, therefore, she had not unlawfully taken or exercised unlawful control over movable property of another as provided under Sec. 3921 of the Crimes Code.

2. The evidence of the Commonwealth only established that the defendant entered a building owned by the parties as tenants by the entirety and, therefore, she was licensed or privileged to enter the said building.

After hearing oral arguments of counsel the Court overruled the demurrer on the grounds that the evidence before the Court indicated that the house that was entered was the house of Mr. Wright, and in his possession. The demurrer was sustained as to the theft charge as it applied to all movable property other than the china closet on the grounds that that property was owned by the defendant and the prosecutor as tenants by the entirety, and there could not be a theft of the property owned as tenants by the entirety by one of the tenants. Exceptions were noted for the Commonwealth and the defendant.

At the conclusion of the trial and after closing arguments of counsel, the Court found:

1. The defendant not guilty of the crime of burglary on the grounds that the evidence established that the building entered by the defendant was, in fact, real estate owned by the defendant and the prosecutor as tenants by the entirety; and the Court concluded that as one of the tenants by the entirety the defendant, Peggy D. Wright, was licensed or privileged to enter the home in which she was an owner along with her husband.

2. The defendant guilty of the crime of theft by unlawful taking, a misdemeanor of the third degree.

On March 14, 1977, the District Attorney of Fulton County filed his notice of appeal to the Superior Court of Pennsylvania. The Commonwealth appeals from the Court sustaining the defendant's demurrer to the Commonwealth's evidence as above related, and from the Court's finding the defendant not guilty of burglary as above set forth.

The defendant filed post trial motions for a new trial and in arrest of judgment on March 2, 1977. Argument on the post trial motions is scheduled for June 21, 1977, and counsel for the defendant has indicated a likelihood that the defendant will appeal if post trial motions are dismissed.

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*Every man owes some of his time to the upbuilding of the profession  
to which he belongs.*

—THEODORE ROOSEVELT

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## LEGAL NOTICES

### IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT OF FRANKLIN COUNTY, PENNSYLVANIA, ORPHANS' COURT DIVISION

The following list of Executors, Administrators and Guardian Accounts, Proposed Schedules of Distribution and Notice to Creditors and Reasons Why Distribution cannot be Proposed will be presented to the Court of Common Pleas of Franklin County, Pennsylvania, Orphans' Court Division for CONFIRMATION: August 4th, 1977.

- Clugston First and Final Account, Statement of Proposed Distribution and notice to the creditors of Helen R. Clugston, executrix of the estate of John C. Clugston, late of Chambersburg, Franklin County, Pennsylvania, Deceased.
- Strickler First and Final Account, Statement of Proposed Distribution and notice to the creditors of Helen S. Hawbaker and Mary S. Hentzleman, executrices of the estate of Mary Erma Strickler, late of the Borough of Chambersburg, Franklin County, Pennsylvania, Deceased.
- Hawbaker First and Final Account, Statement of Proposed Distribution and notice to the creditors of Karl Eugene Hawbaker, administrator of the estate of John S. Hawbaker, late of Peters Township, Franklin County, Pennsylvania, Deceased.
- Keller Second and Final Account, Statement of Proposed Distribution and notice to the creditors of The Valley Bank & Trust Company, successor to National Valley Bank & Trust Company, executor of the estate of Frank R. Keller, late of St. Thomas Township, Franklin County, Pennsylvania, Deceased.
- Keefe First and Final Account, Statement of Proposed Distribution and notice to the creditors of Hazel May Glouner, executrix of the estate of Clarence Lester Keefe, late of Montgomery Township, Franklin County, Pennsylvania, Deceased.

Glenn E. Shadle  
Clerk of Orphans' Court  
Franklin County, Penna.

(7-8, 7-15, 7-22, 7-29)

## CLASSIFIED ADS

### 1. Books for Sale —

For Sale: 3 Vol. set, Purdon's Statutes, Title 18, with 76-77 Supp., \$50.00. Zeger & Zeger, 32 E. Seminary St., Mercersburg, Pa. 17236. 717-328-5705.

(7-29, 8-5)

## LEGAL NOTICES, cont.

The following list of Trustees, Guardians of Minors, Guardians of Incompetents and Custodians Accounts will be presented to the Orphans' Court Division of the Court of Common Pleas, Franklin County, Pennsylvania, for Confirmation on August 4th, 1977.

Fry Second and Final Account and Schedule of Distribution of Michael D. Hanna, Marlin C. Sherbine, Lawrence Streets, Kurt G. Wenzing and the First National Bank and Trust Company, Waynesboro, Pennsylvania, Trustees of Charitable Trust under Paragraph SIXTH of the last will and testament of Leonard S. Fry, late of Montgomery Township, Franklin County, Pennsylvania, Deceased.

GLENN E. SHADLE  
Clerk of Orphans' Court  
Franklin County, Penna.

(7-22, 7-29)

NOTICE IS HEREBY GIVEN, Pursuant to the provisions of Act of Assembly No. 380, approved May 24, 1945, of intention to file in the office of the Secretary of the Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania, and in the office of the Prothonotary of the Court of Common Pleas of Franklin County, Pa., on or after Monday, the first day of August, 1977, a Certificate for the conduct of a business in Franklin County, Pennsylvania, under the assumed or fictitious name, style or designation of Waynesboro Skateland, with its principal place of business at R. D. 4, Waynesboro, Pa. 17268. The names and addresses of persons owning or interested in said business are R. Alton Walter and Ruth D. Walter, 215 Fairview Avenue, Waynesboro, Pa. 17268.

BRIDGERS & DOYLE, Solicitors  
114 Walnut Street  
Waynesboro, PA 17268

(7-29)

## CHARTER NOTICE

Notice is hereby given that a corporation, the name of which is "Fort Loudon Men of the Mountain," has been organized under the provisions of the Nonprofit Corporation Law of 1972, being Act No. 271 approved November 15, 1972; that the purposes of said corporation are to organize, maintain and operate community improvements and relations; to carry on programs for financing the same; to own real and personal property for said purposes; to conduct a recreational program and to receive gifts and bequests for the foregoing purposes and for any other lawful purpose or purposes; and that the Articles of Incorporation were filed in the Department of State, Commonwealth of Pennsylvania on June 8, 1977.

J. DENNIS GUYER, Attorney  
11 South Washington Street  
Greencastle, Pennsylvania 17225

(7-29)

## YOU MAY WISH TO NOTE:

—Subscriptions to the advance sheets of this journal are available to lawyers and any other persons or institutions interested. See the managing editor.

This opinion is written in support of the Court's action in sustaining the defendant's demurrer to the theft count as to all items of movable property other than the china closet, and the verdict of not guilty on the burglary count. Assuming that the defendant will also appeal her conviction, we will endeavor to include within this opinion support for the conviction of the defendant on the count of theft by unlawful taking of the china closet.

## FINDINGS OF FACT

1. The private prosecutor, Gerald E. Wright, and the defendant, Peggy D. Wright, were married on or about August 11, 1951, and remained married as of the date of the time of trial and verdict in this case.

2. Gerald E. Wright and Peggy D. Wright took title to the real estate upon which the building which is the subject of the alleged burglary was erected on June 12, 1971.

3. The husband and wife were both employed during the period of ownership of the real estate.

4. During the year 1976 but prior to June 10, 1976, Gerald E. Wright received a china closet from his mother's estate which had been in the Wright family for many years. It was understood that this china closet was to stay in the Wright family, and be passed on to Gerald E. Wright's sons. After the china closet was cleaned up, it was placed in the guest bedroom used by the sons of the parties and their wives.

5. The china closet was the sole property of the private prosecutor, Gerald E. Wright.

6. The bulk of the furniture and furnishings in the home with certain exceptions not here releveant was owned by the private prosecutor and the defendant as tenants by the entirety.

7. Marital difficulties arose between the parties and the defendant left their home on June 10, 1976 taking with her some of her clothing, cosmetics and a coffee pot. The defendant hoped that she and her husband would reconcile their difficulties and she could return to the marital home.

8. When the defendant left the marital home on June 10, 1976, she took with her a key to unlock the door to the house.

9. When the defendant left the home, she left various articles of clothing, furniture and furnishings considered to be her own property, and two snowmobiles.

10. At the time the defendant left the home her son, Jerry, and his wife, Karen, resided in a mobile home on the real estate of the parties and her son, Edgar, and his wife, Sue Ellen, resided in the second bedroom of the home.

11. The defendant visited with her children at the trailer on numerous occasions following the separation of June 10.

12. The defendant visited with her husband in their home on four occasions subsequent to the separation and prior to October 28, 1976.

12.1 On October 16, 1976, defendant's son, Jerry, and his wife moved from the mobile home to a trailer court in the Borough of McConnellsburg, Pa., and on October 20, 1976, the defendant's son, Edgar, and his wife moved from the guest room in the home of the parties to the mobile home on the real estate of the parties formerly occupied by Jerry and Karen Wright.

13. At some date subsequent to June 10, 1976, and prior to October 28, 1976, the private prosecutor changed the lock on one of the doors to the home.

14. Some time after June 10, 1976, the defendant purchased a trailer and installed it at Black's Trailer Court in the Borough of McConnellsburg, Fulton County, Penna., and she has continued to reside in the trailer since that time.

15. On October 18, 1976, the defendant arranged with E. L. Dinges Moving & Storage, Inc. for a moving van with two men to go to the marital home on October 28, 1976, for the purpose of picking up and transporting certain furniture, furnishings and other items to the company storage warehouse for storage.

16. On October 28, 1976, the defendant found she could not unlock the door to the marital home and she broke a pane of glass adjacent to the door knob, and entered the home prior to the arrival of the van and moving men.

17. At the time of entry into the home the defendant intended to remove articles of furniture and furnishings, including the china closet owned by her husband. The defendant intended to take her husband's china closet because he took her mother's dishes, and she intended to deprive him of the said china closet until such time as he returned the dishes to her. Allegedly, she removed the other items of furniture and furnishings because she feared her husband would damage or destroy them.

18. At the direction of the defendant, the movers removed various cartons, boxes, furniture and furnishings, including the china closet, from the marital home and transported them to the storage warehouse.

19. Clothing of the defendant was included in the cartons moved.

20. Other than the china closet above referred to, all items of furniture, furnishings and other movable property either belonged to the defendant and her husband as tenants by the entirety, or to the defendant.

21. With the exception of the defendant's clothing, a color television set and a sweeper being used by the defendant at her trailer, all other items remained in storage as the date of trial of this matter.

22. The defendant expressed the intention of using the items stored at some time in the future.

23. When the defendant left the marital home on October 28, 1976, she still left various items of personal apparel, the snowmobiles and other furniture and furnishings which she believed to be her personal property on the premises, together with items of furniture and furnishings and the private prosecutor's apparel and personal property.

24. The defendant claimed at trial the marital home is her home, and she did not give up her rights to it.

25. The Commonwealth failed to sustain the burden of establishing the market value or cost of replacement of the china closet, and its value was therefore deemed to be an amount less than \$50.00.

## DISCUSSION

Section 3502 of the Crimes Code provides inter alia:

“A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter.” 18 C.P.S.A. 3502 (underlining ours).

In the case at bar, we concluded that the defendant, Peggy D. Wright, as one of the tenants by the entirety, was licensed or privileged to enter the home in which she was an owner along with her husband within the language and meaning of Section 3502. We, therefore, found her not guilty of the crime of burglary.

Section 3901 of the Crimes Code provides inter alia:

“A person is guilty of theft if he unlawfully takes, or exercises unlawful control over movable property of another with intent to deprive him thereof.” 18 C.P.S.A. 3921 (underlining ours).

Section 3901 of the Crimes Code inter alia defines deprived as: “(1) to withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation.” We sustained the defendant’s demurrer as to the theft charge as it applied to all movable property other than the china closet on the grounds that the defendant was an owner of that property as a tenant by the entirety, and as such could not be guilty of the theft of property so owned because it was not “property of another”. We found the defendant guilty of theft by unlawful taking of the china closet on the grounds that that item of property was exclusively owned by the defendant’s husband, Gerald E. Wright.

At common law one spouse could not commit larceny of the other’s goods because larceny requires the taking of the property of another, and the common law view was that husband and wife were one person under the law. 50 Am. Jur. 2d Sect. 87. Under this “unity of husband and wife” the husband had a legal right to all of the wife’s

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### LEGAL NOTICES, cont.

#### NOTICE OF FILING OF ARTICLES OF INCORPORATION

Notice is hereby given that Articles of Incorporation were filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, on the 27th day of May, 1977, for the purpose of obtaining a certificate of incorporation.

The name of the proposed corporation organized under the Commonwealth of Pennsylvania Business Corporation Law approved May 5, 1933, P. L. 364, as amended, is The Gateway Cafe, Incorporated.

The purpose for which the corporation has been organized is: to engage in and to do any lawful act concerning any or all lawful business for which corporations may be organized under the Business Corporation Law.

WELTON J. FISCHER  
Attorney-at-Law  
550 Cleveland Avenue  
Chambersburg, Pennsylvania 17201

(7-29)

## SHERIFF'S SALES, cont.

to an iron pin at the corner of Lot No. 10, Section D; thence by the same north 82 degrees 51 minutes West 159.21 feet to an iron pin on the easterly side of Monta Vista Drive; thence with the same on a curve to the left having a radius of 225.0 feet; an angle of 71 degrees 06 minutes, and a distance of 69.21 feet to a point; thence north 13 degrees 01 minutes west 14.95 feet to an iron pin, the place of beginning. Being Lot No. 9, Section D, on a plan of lots laid out for Monta Vista Realty Company, Inc., by John H. McClellan R.S. dated March 10, 1969 and recorded in Franklin County Plat Volume 288A Page 118.

TRACT NO. 2 BEGINNING at an iron pin on the easterly side of Monta Vista Drive at the southwest corner of Lot No. 9, Section D; thence by the same south 82 degrees 51 minutes East 159.2 feet to an iron pin on line of lands of Baumgardner; thence by the same, South 19 degrees 00 minutes west 120.0 feet to an iron pin at the northwest corner of Lot No. 11, Section D; thence by the same, north 73 degrees 35 minutes west 152.05 feet to an iron pin on the easterly side of Monta Vista Drive; thence by the same on a curve to the left having a radius of 225.0 feet, an angle of 71 degrees 06 minutes, a curve of 261.65 feet, a distance of 95.0 feet to an iron pin, the place of beginning. Being Lot No. 10, Section D on a plan of lots known as Long Meadow Acres Estates and laid out for Monta Vista Realty Company, Inc., by John H. McClellan, R.S. dated March 10, 1969 and recorded in Franklin County Plat Volume 288A, Page 118.

Being the same real estate conveyed to the said Ernest L. Wells and Bonnie J. Wells, his wife, by deed of George M. B. Gillen, and Barbara J. Gillen, his wife, dated February 21, 1973 and recorded in Franklin County Deed Book Vol. 684, Page 393.

Further, being for Tract No. 1 herein all of the right title and interest in and to Tract No. 1 as conveyed by Deed of Monta Vista Realty Company, Inc., dated February 24, 1973 to the said Ernest L. Wells and Bonnie J. Wells, his wife, said deed being recorded in Franklin County Deed Book Vol. 684, Page 389.

Said real estate is under and subject to certain restrictions of record which appear in the chain of title to said real estate.

And having erected thereon a single family dwelling of Split Foyer design, having a concrete block foundation. Exterior walls are of frame construction, lower level of brick and upper of bevel siding, roof of asphalt shingles. Interior walls are of dry wall and is heated by Electric, is air conditioned and has a fire place.

Seized and taken in Execution as the real estate of Ernest L. Wells and Bonnie J. Wells, his wife, under Judgement No. A.D. 1977-302.

**TERMS:** The successful bidder shall pay 20% of the purchase price immediately after the property is struck down, and shall pay the balance within ten days following the sale. If the bidder fails to do so, the real estate shall be re-sold at the next Sheriff's sale and the defaulting bidder shall be liable for any deficiency including additional costs. Any deposit made by the bidder shall be applied to the same. In addition the bidder shall pay \$20.00 for preparation, acknowledgement and recording of the deed. A Return of Sale and Proposed Schedule of Distribution shall be filed in the Sheriff's Office on September 7, 1977, and when a lien credi-

## SHERIFF'S SALES, cont.

tor's receipt is given, the same shall be read in open court at 9:30 A.M. on said date. Unless objections be filed to such return and schedule on or before September 21, 1977, distribution will be made in accord therewith. July 28, 1977

FRANK H. BENDER, Sheriff of  
Franklin County, Pennsylvania  
(8-5, 8-12, 8-19)

## CLASSIFIED ADS

### 1. Books for Sale —

For Sale: 3 Vol. set, Purdon's Statutes, Title 18, with 76-77 Supp., \$50.00. Zeger & Zeger, 32 E. Seminary St., Mercersburg, Pa. 17236. 717-328-5705.

(7-29, 8-5)

property. However, Pennsylvania and practically all other jurisdictions now have a constitutional or statutory provision giving the wife exclusive control over her personal property, which has served to sever the unity of person and community of property between spouses and to subject each spouse to prosecution for larceny for stealing the separate property of the other. 50 Am. Jur. 2d Sect. 88. In *Commonwealth v. Gober*, 35 D&C 2d 709 (1966), the Honorable Judge Staudenmeier of the Court of Common Pleas of Schuylkill County concluded that a husband may be convicted of the crime of larceny for appropriating the separate property of his wife. The court noted that, "The mere fact that the statutory law now gives the wife the right to institute a civil action should not preclude her from instituting a criminal prosecution." (p. 714)

We accept the doctrine of *Commonwealth v. Gober* as a correct statement of the law in Pennsylvania; and by application of the 28th Amendment to the Constitution of the Commonwealth of Pennsylvania we also conclude a wife may be convicted of the crime of larceny for the theft of the movable property of her husband. Therefore, there was no error in finding the defendant guilty of the theft of the china closet of her husband. She knew it to be his sole property; and she knew it was to be kept in the Wright family; and she took it with the intent to deprive him of it until he gave her her dishes. All of the elements of the crime of theft by unlawful taking were proven beyond a reasonable doubt by the Commonwealth.

Neither the research of counsel nor our independent research has disclosed any case law in Pennsylvania on the issues whether burglary can be committed by the entry of a structure owned by the entireties by one of the tenants, or theft can be committed by the taking of movable property owned by the entireties by one of the tenants. As an apparent case of first impression our deliberations must begin with consideration of the essential elements and characteristics of a tenancy by the entireties.

A tenancy by the entireties is an interest peculiar only to husband and wives. While joint tenants are each seized of an undivided moiety of the whole, a husband and wife are each seized of the entire and undivided whole. The essential characteristic of an estate by entirety is that each spouse owns the whole of it, rather than a share, moiety, or divisible

part. *In Re: Zipperlein's Estate*, 367 Pa. 622, 80 A. 2d 87 (1951).

At common law the husband was, during coverture, entitled to full control of the land held by entirety. The Married Women's Property Acts altered this common law rule so that the husband can now neither assert an exclusive right to land held by the entirety, nor divest his wife of the right to share in the entirety property. "Nor can the husband forfeit or alien so as to sever the tenancy, because . . . the whole of it belongs to his wife as well as to him." *McCurdy v. Canning*, 64 Pa. St. 41 (1870).

The wife's interest in the property is not terminated by the fact of the couple's separation. While divorce terminates the tenancy by the entirety and renders the two owners as tenants in common under the Act of 1927, May 10, P.L. 884, Sect. 1 as amended 68 P.S. 501; a divorce from bed and board, a separation, does not terminate the estate, since the marital relation still exists. *Freeman v. Belfer*, 173 N.C. 581, 92 S.E. 486 (1917). A tenancy by the entireties cannot be severed without both spouses' consent. *Cobuzzi v. Parks*, 315 Mass. 199, 51 N.E. 2d 965 (1943).

The defendant did not sacrifice or abandon her co-ownership with her husband of the entire and undivided whole of the tenancy by the entireties property by reason of their separation and her act of moving out of the marital home. Gerald E. Wright could not lawfully exclude her from the use and possession of the entireties property. "Where husband and wife are separated but not divorced and where one of them is excluded from the exercise or enjoyment of the rights inherent in an estate held by the entireties, an accounting of the property so held may be ordered and the property or proceeds be divided equally between them." *Shapiro v. Shapiro*, 424 Pa. 120, 136 (1966). "The estate which the wife thereby took (tenancy by the entireties) was not changed by the Act of 1848 relating to married women, but it was, by its provisions, protected from the dominion and control of her husband." *Holcomb v. People's Savings Bank*, 92 Pa. 338, 343 (1879).

While the burglary and theft of property owned by the entireties by a tenant thereof, appears to be a case of first impression in Pennsylvania, the topic is addressed in 17 ALR

3rd 1394, and it is noted that, "In a number of cases the courts have held or recognized the rule that a cotenant generally cannot be held guilty of larceny of cotenancy property." The states of Alabama, Florida, Kentucky, Minnesota, New York, North Carolina, South Carolina and Texas have adopted that rule. No states are listed as holding to the contrary.

ALR 3rd, Larceny Sect. 20.3 states the general rule to be:

"A co-owner of property cannot be held guilty of larceny of the property, except when a second co-owner has a special property interest therein superior to that of the first co-owner . . . It is only under very exceptional circumstances that a person can be guilty of larceny of his own property--such as where the owner takes his goods from one who has a special property right in them and a legal right to withhold them from him; as a general rule, one can hardly steal his own goods, though he may be guilty of trespass in taking them under certain circumstances, and ordinarily, if he steals at all, it must be the goods of another. *Escobar v. State* (Fla. App.) 181 So. 2d 193, 17 ALR 3rd 1390 (1965), which adhered to this rule and stated that it is in accordance with the general authorities, citing 2 Wharton's Criminal Law & Procedure, Sect. 499, p. 473 (Anderson 1957); 2 Burdick Laws of Crime, Sect. 517, p. 283; Perkins on Criminal Law 201; Inbau and Soule, Criminal Justice, Cases and Comments (2d ed. 1964)."

In *Commonwealth v. Landres*, 84 Pa. Super. 119 (1924), the defendant was charged with felonious entry, having broken and entered a factory building with the intent to take some merchandise from inside. The defendant admitted committing the act with that intention, but defended on the grounds that he was a partner in the business carried on in the building and that he was a part owner of the merchandise. The issue was whether he was still a partner at the date of the breaking and entering. The Superior Court stated: "As the gist of the offense charged lies in the intent to commit a felony, it follows that there could be no conviction of the defendant if he was, in fact, a partner in said factory business and part owner and possessor of the goods contained in said building." (p. 121) We find this case clearly analogous to the case at bar and instructive as to the proper disposition of the issues here under consideration; for, if a business partner could not be guilty of the crime of larceny of merchandise that he owned in

partnership with others, then it surely must follow that a tenant by the entirety who is seized with his or her spouse of the entire and undivided whole, cannot be convicted of the taking of the same.

Considering the unique elements and characteristics of a tenancy by the entirety as it is recognized in Pennsylvania, and the essential elements of the crimes of theft and burglary as established by the legislature in the Crimes Code, we conclude that the correct rules of law in Pennsylvania are:

1. A tenant by the entirety is licensed and privileged to enter property owned by the actor and his or her spouse as tenants by the entirety.

2. A tenant by the entirety cannot be convicted of the taking of movable property of another when that property is owned by the actor and his or her spouse as tenants by the entirety.

We, therefore, conclude that Peggy D. Wright cannot as a matter of law be convicted of the crime of burglary for entering the home which she owned as a tenant by the entirety with her spouse. We also conclude that Peggy D. Wright as a tenant by the entirety cannot be found guilty of the theft of property owned by herself and her husband as tenants by the entirety in the absence of exceptional circumstances such as where the other tenant has a special property right to withhold them from the first tenant. No such exceptional circumstances exist in the case at bar and the defendant's demurrer was properly sustained as to the charge of theft of entireties' property.

Parenthetically, and in conclusion, we are constrained to observe that the primary issues here considered are probably unique in the annals of Pennsylvania Criminal Law, because the Criminal Justice System has traditionally refrained from becoming involved in disputes over marital property and has required the battling spouses to resolve their differences in the civil courts rather than expose one or the other to the penalties prescribed by the criminal law. With our Criminal Justice System overburdened as it is today, the two days taken in the trial of this case; the time expended in the research and preparation of this opinion; the time expended or to be expended by the District Attorney and defense attorney in the preparation of appellate briefs; and the time of the appellate

courts in ultimately disposing of these issues represents a very substantial expenditure of funds and time which the Commonwealth of Pennsylvania and the County of Fulton can ill afford. It would seem to us that the District Attorney of Fulton County would have been well advised to have researched with much greater care the law on tenants by the entirety before approving this private prosecution.

KING v. EBERLY, C. P. Franklin County Branch, Eq. Doc. Vol. 7, Page 119

*Real Property - Implied Warranty of Habitability - Sale of House by Builder - Basement Flooding - Pleading - Necessity for Pleading Occurrences giving rise to Breach - Assumpsit, not Equity, Action.*

1. A builder-vendor warrants, by implication, that a home he builds will be functional and habitable and in accordance with contemporary community standards.

2. Where a basement flooded on two occasions to about four feet rendering the water system inoperable, breach of implied warranty of habitability is properly raised where plaintiffs plead the occurrences giving rise to the breach, such as when and under what conditions the water appeared and the effect the water had on the habitability of the house.

3. Actions will be in law for damages and not equity for a deed rescission where breach of an implied warranty of habitability is raised by purchaser of a house from the builder-vendor.

*George E. Wenger, Jr., Esq., Attorney for Plaintiffs*

*David S. Dickey, Esq., Attorney for Defendants*

#### OPINION AND ORDER

EPPINGER, P. J., June 28, 1977:

Robert D. King and Gail I. King, husband and wife, (Kings), filed their complaint against Ronald E. Eberly and Nancy L. Eberly, husband and wife, (Eberlys) in equity to rescind a deed on the ground that Eberlys breached an implied warranty of Habitability. The Kings purchased a house built by Eberlys on a lot in a development and after Kings moved in, on two occasions, water flooded the cellar to a depth of about four feet rendering the water system inoperable. Because of