UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 37 | Number 3 Article 11

4-1-1959

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Recommended Citation

Roberty L. Lindsey, *Husband and Wife -- Tenancy by the Entirety -- Surviving Spouse's Right to Contribution on Paying Debt Secured by Mortgage on Entireties Property*, 37 N.C. L. Rev. 333 (1959).
Available at: http://scholarship.law.unc.edu/nclr/vol37/iss3/11

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the *apparent* intention of the parties, or (2) that, as a matter of public policy, where it is not otherwise clearly expressed to the contrary, an alimony award will not be diminished by the defendant's subsequent remarriage in a community property state.

It is submitted that the decision seems sound from the standpoint of public policy. Since the prime purpose of an alimony award is to provide support for a defendant's wronged wife and family, he should not, by the simple expedient of remarrying in a state where community property laws obtain, be allowed thereby to divest his first wife and family of a large part of their support.

Many variations of the *Kinross-Wright* situation might arise in the future. If the *Kinross-Wright* decision be considered as a judicial expression of public policy, it seems likely that the North Carolina court, in interpreting the term "gross income" in separation contracts or alimony judgments, will continue to disregard the community property laws of other states, absent a specific provision to the contrary.

ROBERT C. SOLES, JR.

Husband and Wife—Tenancy by the Entirety—Surviving Spouse's Right to Contribution on Paying Debt Secured by Mortgage on Entireties Property

H and W hold a house and lot as tenants by the entireties.[1] The property has a market value of $20,000. Part of this value is due to recent improvements on the property, for which H and W jointly executed notes and a mortgage. H dies when there is still $8,000 owing. W succeeds to the entire fee and petitions H's executors for $4,000, claiming that amount as H's share of the joint debt. Under these facts, the Supreme Court of Delaware recently held in *In re Keil's Estate*,[2] that the claim should be allowed.

The recovery was allowed on the principle of equitable contribution. The rationale of the principle is that where parties are under a common burden or liability, one joint debtor who pays the whole debt, or more than his share, is entitled, in equity, to contribution from his co-obligors.[3]

[1] "'Estates by the entireties are creatures of the common law created by legal fiction and based wholly on the common-law doctrine that husband and wife are one, and, therefore there is but one estate, and in contemplation of law, but one person owning the whole. . . . By reason of their legal unity by marriage, the husband and wife together take the whole estate as one person. Neither has a separate estate or interest in the land, but each has the whole estate. Upon the death of one the entire estate and interest belongs to the other, not by virtue of survivorship, but by virtue of the title that vested under the original limitation.'" Woolard v. Smith, 244 N.C. 489, 493, 94 S.E.2d 466, 469 (1956), quoting 4 THOMPSON, REAL PROPERTY § 1803 (perm. ed. 1940).

[2] —Del.—, 145 A.2d 563 (1958).

[3] 13 AM. JUR., *Contribution* § 3 (1938).

The *Keil* case, and other cases[4] in accord, hold that the right to contribution flows from the fact that both parties were primarily liable as joint makers of the notes, paying no attention to the characteristics of the tenancy under which the security property was held.

Lopez v. Lopez,[5] illustrates a line of authority[6] contra to the holding in the *Keil* case. There the Florida court disallowed the claim of the surviving entireties tenant, saying that the doctrine of equitable contribution applies only to prevent one debtor from having to bear more than his share of a common burden, or to prevent unjust enrichment of a non-paying debtor where his co-obligor paid the whole amount. Applying this standard, the court held that no common burden existed, because each was obligated for the whole debt, since each held the whole fee in the mortgaged property. The court further pointed out that there could be no unjust enrichment if the survivor were made to pay the entire debt, since the decedent's estate succeeded to no interest in the redeemed property.

The two lines of authority can be summarized as follows: Where the survivor gets contribution the courts emphasize that it was a joint obligation, stressing the notes, and playing down the tenancy by the entireties in the mortgaged property. Courts that deny contribution emphasize the nature of the tenancy, and hold that the debt takes on similar characteristics, at least as between the debtors. Both lines of authority leave the liability of the parties to the mortgagee unchanged.

North Carolina first ruled on the question presented in the principal case in *Wachovia Bank and Trust Co. v. Black*,[7] where it was held, with no authority cited, that the survivor was entitled to contribution. The reason given was the same as that of the Delaware court in the *Keil* case, that "the unity of person is an incident of the estate, . . . it is not incident to the note."[8]

[4] Magenheimer v. Councilman, 76 Ind. App. 583, 125 N.E. 77 (1919); Cunningham v. Cunningham, 158 Md. 372, 148 Atl. 444 (1930); Nobile v. Bartletta, 109 N.J. Eq. 119, 156 Atl. 483 (Ct. Err. & App. 1931) (partly based on local rule that entireties tenants hold as tenants in common during their joint lives); Wachovia Bank and Trust Co. v. Black, 198 N.C. 219, 151 S.E. 269 (1929); *In re* Dowler's Estate, 368 Pa. 519, 84 A.2d 209 (1951) (vigorous dissent); Newson v. Shackleford, 163 Tenn. 358, 43 S.W.2d 384 (1931) (*Magenheimer* case, *supra*, relied upon, no contra authority coming to attention of court).

See Brown v. Hargraves, 198 Va. 748, 96 S.E.2d 788 (1957), where contribution was allowed against the estate of the deceased member of a joint tenancy with right of survivorship.

[5] 90 So. 2d 456 (Fla. 1956).

[6] Ratte v. Ratte, 260 Mass. 165, 156 N.E. 870 (1927); Robinson v. Bogert, 187 Misc. 735, 64 N.Y.S.2d 152 (1946); *In re* Dell's Estate, 154 Misc. 216, 276 N.Y.S. 960 (1935); Geldart v. Bank of N. Y. and Trust Co., 209 App. Div. 581, 205 N.Y.S. 238 (1924).

See also, *In re* Keil's Estate, (Mr. Justice Bramhall's dissent), —Del.—, 145 A.2d at 566; *In re* Dowler's Estate, (Mr. Justice Bells' dissent), 368 Pa. at 525, 84 A.2d at 211.

[7] 198 N.C. 219, 151 S.E. 269 (1929).

[8] *Id.* at 221, 151 S.E. at 270.

In *Underwood v. Ward*,[9] the North Carolina court seems to have considered the character of ownership of the security by holding that since the deceased's estate holds no interest in the mortgaged entireties property, the estate's liability to the widow for contribution is not such a claim as would qualify for preference as a secured claim under G.S. § 28-105[10] thus, the estate being insolvent, the widow had to share pro-rata with the general creditors.

In *Montsinger v. White*,[11] the husband alone had executed the note and mortgage and had later conveyed the property to himself and his wife as tenants by the entireties. After the husband's death the widow paid the entire debt, and filed a general claim against the deceased's insolvent estate. The court held that by paying the debt she became subrogated to the claim of the mortgagee. The mortgagee's rights under G.S. § 28-105 are limited to a general claim against the insolvent estate only to the extent of any deficiency resulting after he has first proceeded against the security. Since here the security was sufficient to satisfy the debt, the mortgagee would have had no right of action against the estate, thus the widow, being subrogated, had no such right.

Thus, in North Carolina the rather anomalous situation exists that where the survivor pays the *joint* debt he may receive contribution from the deceased's estate. If, on the other hand, he pays the deceased's *sole* debt, he is merely subrogated to the mortgagee's claim and if the decedent's estate is insolvent, can collect nothing unless the security is worth less than the amount of the debt.

The North Carolina court has not gone into the ramifications of the doctrine of equitable contribution in the entireties cases. The court, however, has generally cited with approval, American Jurisprudence's[12] statement: "In other words, when any burden ought, from the relationship of the parties or in respect of property held by them, to be equally borne and each party is *in aequali jure*, contribution is due if one has been compelled to pay more than his share. The doctrine is founded not upon contract, but upon principles of *equity*."[13] (Emphasis added.) Applying this equitable standard where the obligation is joint and one tenant dead, neither the "relationship of the parties" nor the nature of the security property ownership would seem to require that the "burden" be "equally borne." The entire equity of redemption, formerly owned by the marital unit, is now owned by the surviving spouse alone and the

[9] 239 N.C. 513, 80 S.E.2d 267 (1954).
[10] "The debts of the decedent must be paid in the following order: First class. Debts which by law have a specific lien on property to an amount not exceeding the value of such property. . . ."
[11] 240 N.C. 441, 82 S.E.2d 362 (1954).
[12] See note 3 *supra*.
[13] Nebel v. Nebel, 223 N.C. 676, 685, 28 S.E.2d 207, 213 (1943).
See also Bunker v. Llewellyn, 221 N.C. 1, 18 S.E.2d 717 (1942).

decedent's estate has no interest in the security property. From the unjust enrichment standpoint, it seems that *equity* is not accomplished by allowing the windfall which results when the survivor redeems the whole mortgagor interest and is allowed to recover half the amount paid. Conversely, if contribution is not allowed there is no unjust enrichment because, having no further interest in the property, the decedent spouse's estate acquires no unpaid-for benefit. Granted that his estate is liable to the mortgagee jointly and severally with the survivor, this should not be the primary consideration in determining the liability of the parties as between themselves.

When a mortgagor pays off the secured indebtedness, he redeems his equity in the property.[14] When one of several joint mortgagors pays the whole debt, the other principal obligors must redeem their respective shares from the one who has paid the whole debt.[15] The amount of contribution that can be claimed against the obligors who have not yet paid is in direct proportion to the share in the security owned by each debtor.[16] Thus, the doctrine of contribution, in the case of tenants in common or their estates, works to prevent the unjust enrichment of those who did not share in the payment of the mortgage debt. But, in the case of tenants by the entireties, this doctrine causes unjust enrichment because the decedent's estate had nothing to redeem by contributing.

If X buys a house and executes a mortgage and notes for the purchase money, and gets his friend, Y, to sign the notes, as an accommodation party, we have a similar situation to that where one of the entireties tenants has died. Both X and Y are liable,[17] but as between the parties, if X is made to pay, since he got the entire benefit of the transaction, he cannot force Y to contribute.[18] Likewise, if Y is made to pay he would have a right of action for the whole amount against X since the entire benefit went to X.[19] Also, where X owns a fee subject to a mortgage, and sells his interest to Y, who assumes the mortgage, X becomes a surety for Y, who is primarily liable.[20] Y, who receives the entire benefit, cannot make X contribute, and if X is called upon by the mortgagee for payment, he can look to Y for reimbursement.[21] In the principal case situation the tenancy by which the mortgaged

[14] Riddick v. Davis, 220 N.C. 120, 16 S.E.2d 662 (1941); Stevens v. Turlington, 186 N.C. 191, 119 S.E. 210 (1923).

[15] Bain v. Howell, 247 Ala. 514, 25 So.2d 167 (1946); 86 C.J.S., *Tenancy in Common* § 61 (1954). *Cf.* Raynor v. Raynor, 212 N.C. 181, 193 S.E. 216 (1937).

[16] *Ibid.*

[17] Dry v. Reynolds, 205 N.C. 571, 172 S.E. 351 (1933).

[18] ". . . There is no obligation between the maker and the accommodation endorser that the latter shall pay the debt. . . ." First and Citizens Nat'l Bank v. Hinton, 216 N.C. 159, 160, 4 S.E.2d 332, 333 (1939).

[19] N.C. GEN. STAT. § 26-3 (1953).

[20] State-Planters Bank and Trust Co. v. Randolph, 207 N.C. 241, 176 S.E. 561 (1934).

[21] *Ibid.*

property was held results in the payor's receiving—as in the above illustrations—the benefit of his payment. Therefore, it would seem that equity would require that the nature of the security ownership, rather than the nature of the obligation, be the controlling factor and that contribution should not be allowed.

ROBERT L. LINDSEY

Sales—Implied Warranty of Title—When Cause of Action for Breach Accrues after Purchase of Precarious Title

In the recent case of *Henry Vann Co. v. Barefoot*,[1] plaintiff and defendants traded motor vehicles. Defendants' automobile had previously been used for illegal transportation of whiskey, and after the trade it was confiscated by federal agents. Plaintiff sued for the reasonable value of the vehicle it had traded to the defendants on the ground of total failure of consideration. *Held,* plaintiff had stated a cause of action for breach of an implied warranty of title, but that in order to recover it must prove that by legal proceedings the defendants' title to the vehicle was divested as of a time prior to the trade.

The Supreme Court, reversing the court below, held, inter alia, that plaintiff need not prove the offense which made the car subject to confiscation. Accordingly, there is left open the question whether if the offense prior to the trade had been proved, but not that the title of defendants had been divested by legal proceedings, plaintiff could have recovered. This necessarily depends on the answer to the following question: If the vendor has committed some act or knows of circumstances which make his title precarious,[2] and he fails to inform his purchaser of this fact, may the purchaser immediately sue him for breach of an implied warranty of title, or must he wait until he has been dispossessed?[3] In attempting to answer the hypothetical question posed, it is necessary to consider the scope of an implied warranty of title, and what constitutes a breach thereof.

Implied warranty of title is a well established doctrine in the United States. The seller of personal property is held to warrant impliedly

[1] 249 N.C. 22, 105 S.E.2d 104 (1958).

[2] The principle of transfer of a precarious title may be illustrated by this anecdote: John owes Robert ten dollars. John and Robert are riding together on a train. It is held up. The robbers are coming down the aisle of the car relieving the passengers of their purses. Just before the robbers get to them John hands Robert a bill and says, "Here is the ten dollars I owe you."

[3] It should be noted at this point that fraud of the seller inducing the sale of personal property may entitle the purchaser to rescind the contract and recover the consideration he has paid, even though the paramount title holder has not recovered the property nor the vendee suffered any actual damages. Case v. Hall, 24 Wend. 102 (N.Y. Sup. Ct. 1840). However, the difficulties of proof presented by this remedy would make it highly desirable from the buyer's point of view to be able to sue for breach of the implied warranty of title.