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Bankruptcy -- Distribution of Property Held by the Entirety upon Bankruptcy of One or Both Spouses

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NOTES AND COMMENTS

participate in major extracurricular activities unless he maintains a B average in his Law School work.

LAW SCHOOL NEEDS

The present Library collection is hardly more than an ordinary working unit. It is not yet adequate for research and investigation of University calibre. To the end that these minimum facilities may be adequately expanded, an endowment is required which, in addition to state appropriations for maintenance, will yield $2,500 a year for new books.

The Library is now confronted with a serious shortage of available space for expansion. When the Law Building was constructed, twelve years ago, arrangements were made for the housing of 25,000 volumes. We are now 7,000 volumes in excess of our capacity. We face the immediate necessity of converting a room in the basement, not connected with the present Library, into library service with special supervision. In the very near future we must plan for an addition to the building to house not only the expanding Library but to furnish also much needed seminar rooms and office space for research workers.

The amount of public work which the School is called upon to do is constantly growing. More research assistance is imperative. And scholarships and fellowships are vitally necessary if, in competition with other University Law Schools, we are to have in our student body the ablest students from the best Southern colleges.

NOTES AND COMMENTS

Bankruptcy—Distribution of Property Held by the Entirety upon Bankruptcy of One or Both Spouses.

Husband and wife were adjudicated bankrupts on the same day, and each listed all his property as held by the entireties. Nine days prior to the adjudication, a creditor who held a joint obligation against both spouses secured a joint judgment against them. Subsequently the bankruptcy proceedings of both husband and wife were consolidated by order of the court, but two days before consolidation the judgment creditor petitioned for execution against all the property of both bankrupts. Held, the estate by the entirety passed to the trustee since by consolidation he represented both husband and wife, and the joint judgment was a preference which should not prevail against the trustee.¹

¹*In re* Utz, 7 F. Supp. 612 (D. Md. 1934).
It is generally held that the creditors of an individual spouse cannot reach the estate by the entirety for the reason that each spouse owns the whole and to allow the debts of either to be satisfied out of the estate would in effect be permitting one person's property to be taken for the debts of another. A joint judgment against both spouses, however, can reach the estate, since they mutually own the property, and it should be liable for their joint obligations. The Bankruptcy Act gives to the trustee the right of a judgment creditor holding an execution returned unsatisfied. Thus a trustee in bankruptcy representing the husband and wife stands in the position of a creditor who holds a joint judgment unsatisfied against both spouses, and such trustee should be vested with the property held by the entirety. A judgment against an individual obtained within four months before he becomes a bankrupt (and while he is insolvent) constitutes a preference and such judgment cannot prevail against the trustee settling the bankrupt's estate. The same rule should apply where a joint judgment against both spouses, constituting a lien on the estate by the entirety, has been secured within four months before the legal entity of husband and wife is adjudicated bankrupt. The result of the instant case to the effect

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2 A judgment against one spouse is not even a lien on the estate. Hood v. Mercer, 150 N. C. 699, 64 S. E. 897 (1909). Such judgment will not prevent husband and wife, acting jointly, from passing good title to the estate. Winchester-Simmons Co. v. Cutler, 199 N. C. 709, 155 S. E. 611 (1930).

3 A. Huff's Son v. Getty, 200 Fed. 939 (C. C. A. 3rd, 1924); Southern Distributing Co. v. Carraway, 189 N. C. 420, 127 S. E. 427 (1925); Note (1925) 35 A. L. R. 147. But see: Zubler v. Porter, 98 N. J. L. 444, 120 Atl. 194 (1923) (A purchaser of the interest of one spouse at an execution sale procured the land as a tenant in common with the other spouse subject to the right of survivorship of either spouse. The Court declared that in New Jersey an estate by the entirety was the same as a tenancy in common with the right of survivorship attached); Marcum v. Marcum, 177 Ky. 186, 197 S. W. 655 (1917) (A purchaser of the interest of one at an execution sale received only that part of the estate as was proportionate to the portion of the purchase price paid by that particular spouse).

4 At common law the husband was entitled to the whole usufruct of the estate, and some courts held that this interest could be taken for his debts. Hall v. Stephens, 65 Mo. 670 (1877); Bennett v. Cheld, 19 Wis. 362 (1865). The Married Women's Acts, however, in many jurisdictions took away the husband's common-law right to the usufruct, and this is given as an additional reason for not allowing the estate or the income to be taken for the husband's debts. Otto F. Stiffet's Union Brewing Co. v. Saxy, 273 Mo. 159, 201 S. W. 67 (1918); Notes (1925) 35 A. L. R. 147, (1925) 9 MINN. L. REV. 673, (1931) 29 Mich. L. Rev. 778. In North Carolina the husband retains his common-law right to all the usufruct, but this income cannot be taken for his debts. Davis v. Bass, 188 N. C. 200, 124 S. E. 566 (1924).


6 11 U. S. C. A. §75 (a) 2 (1927); Imperial Assurance Co. v. Livingston, 49 F. (2d) 745 (C. C. A. 8th, 1931).

that the trustee in his dual capacity was vested with the property held by the entirety, and that a joint judgment obtained within four months constituted a preference is logically correct.\footnote{Only one case has been found dealing with this problem. In that case husband and wife were declared bankrupt on same day and X was made trustee for each individually, but no consolidation took place. Held, that X was not vested with property held by the entireties. Dickey v. Thompson, 323 Mo. 107, 18 S. W. (2d) 388 (1929) commented on (1929) 43 HARV. L. REV. 312.}

A joint creditor is faced with a different problem when only one spouse (say the husband) goes bankrupt. Where the joint creditor has not secured a judgment before the husband's discharge in bankruptcy, it is generally held that he cannot get a joint judgment after the discharge since the husband's debts have been stricken out and only the wife remains liable on the obligation.\footnote{Wharton v. Citizen's Bank, 223 Mo. App. 236, 15 S. W. (2d) 860 (1929); Note (1933) 82 A. L. R. 1235.} The joint creditor is then unable to reach the estate by the entirety since the obligation he holds is against only one spouse,\footnote{See Frey v. McGaw, 127 Md. 23, 95 Atl. 960 (1915) (A judgment was secured before husband went bankrupt and was satisfied after his discharge, but it was not necessary for the creditor to go into court and ask that the discharge be withheld as he had procured the judgment before bankruptcy proceedings were begun).} and the only way he may protect himself against such loss is to go promptly into the federal court before the husband's discharge and ask that the discharge be withheld until he, the joint creditor, can secure in the state court a joint judgment which will be a lien on the estate by the entirety.\footnote{Phillips v. Krakower, 46 F. (2d) 764 (C. C. A. 4th, 1931); Wharton v. Citizen's Bank, 223 Mo. App. 236, 15 S. W. (2d) 860 (1929). Contra: Edwards v. Pethick, 250 Mich. 315, 230 N. W. 186 (1930).} Such judgment may be satisfied out of the estate by the entirety after the husband's discharge.\footnote{Phillips v. Krakower, 46 F. (2d) 764 (C. C. A. 4th, 1931). But see Ades v. Chaplin, 132 Md. 66, 193 Atl. 94 (1918) (Joint judgment secured within four months before husband was adjudicated a bankrupt was set aside as a preference. This seems wrong since the trustee could not reach the estate by the entirety).}

The courts raise no question as to a preference in this situation.\footnote{An estate by the entirety and property held by partnership have been said to present analogous situations in bankruptcy. Dickey v. Thompson, 323 Mo. 107, 18 S. W. (2d) 388 (1929).} This seems correct since the trustee in bankruptcy has no access to the estate by the entirety.

The result of the principal case gives rise to the practical problem of distribution among creditors of an estate by the entirety in bankruptcy proceedings. In the solution of this problem an apt analogy might be drawn between an estate by the entirety and property held by a partnership.\footnote{Note (1933) 82 A. L. R. 1235.} Where a partnership and the individual partners are bankrupt at the same time, the funds of the partnership go first to pay the debts of the partnership, and if there is any surplus, it is divided
between the estates of the partners. By analogy the estate by the entirety should go first to pay the joint creditors. In some jurisdictions where the estate by the entirety is not recognized in personalty received from sale of realty held by entireties, it is suggested that the surplus should be divided between the estates of the spouses for payment of the individual debts. The surplus, however, in other jurisdictions would still be held by the entireties. In these jurisdictions the trustee of the estate of the individual spouse would not be vested with any part of the surplus since a judgment creditor of the individual spouse could not reach it, and the trustee has no more right than such creditor. The suggested distribution would protect joint creditors who make loans believing they will be satisfied out of the estate by the entirety and would allow the surplus to be used, when the law permits, in payment of the debts of the individual spouses.

ROBERT BOOTH.

Bankruptcy—Jurisdiction of Court Under 1933 Amendments.

A decision which will prove to be of unusual interest to the profession, and of far-reaching importance, is that of the Circuit Court of Appeals in In re Chicago, Rock Island & Pacific Railway Company. The railway company filed its petition in the Northern District of Illinois for reorganization under the new Section 77 of the Bankruptcy Act. More than four months prior to the filing of the petition, the railway company had borrowed an aggregate of more than $17,000,000 from the Reconstruction Finance Corporation, two New York banks, two Illi-