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creditors of the deceased (including the Government). The court first held that, under the rule of the *Stern* case, the limits of the Government's right to recover in *any* action initiated against a transferee under section 311 are established by state law. Since the Michigan statute⁴⁰ specifically provided that, in the absence of fraud, proceeds from contracts of annuity are exempt from the claims of creditors of the purchaser, where payable to someone other than the debtor, the court concluded as a matter of law that the Government was barred from any recovery of the proceeds of the annuity contracts.

(2) The Court could impose a uniform system of transferee liability based on the reasoning of the dissent in the *Stern* case. This would insure that the result of the *Ott* case would not be reached in other similar cases. Since all claims of the Federal Government have long received preferred treatment over the claims of ordinary creditors,⁴¹ and since enforcement and collection of the Federal income tax is a matter of peculiarly national concern, the Court would have both precedent and policy behind it should it adopt this solution.

John T. Bondurant

REAL PROPERTY—JOINT TENANCY—COMMENT—EFFECT ON RIGHTS OF MORTGAGEE AND SURVIVING JOINT TENANT OF MORTGAGE EXECUTED BY DECEASED JOINT TENANT

Appellant and her now deceased husband owned real property in fee simple as joint tenants with right of survivorship. The deceased husband, without the consent or knowledge of his wife, executed a mortgage upon the property to the respondents. The state commenced an action to condemn the property, alleging that the appellant owned the property and respondents were the mortgagees thereof. Appellant answered that she was the sole owner of the property and that respondents had no right, title, or interest therein. Respon-

⁴⁰ Mich. Comp. Laws § 522.24 (1948).

⁴¹ Rev. Stat. § 3466 (1875), 31 U.S.C. § 191 (1952), provides:

Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied. . . .

Unpaid taxes have been held to constitute "debts due to the United States" within the meaning of this section and are entitled to be first satisfied in case of the taxpayer's insolvency. *Massachusetts v. United States*, 333 U.S. 611 (1948). However, under § 64 (a) (4) of the Bankruptcy Act, 30 Stat. 563 (1898), as amended, 11 U.S.C. § 104 (a) (4) (1952), the United States has only a fourth priority in bankruptcy for its unsecured tax claims, along with other unsecured tax claimants; moreover, by virtue of § 64(a) (5) of the same Act, 30 Stat. 563 (1898), as amended, 11 U.S.C. § 104 (a) (5) (1952), it has only a fifth priority for unsecured non-tax claims.

dents claimed that they were the owners and holders of the mortgage executed by the deceased husband and asked that the note executed by the deceased husband, secured by the mortgage, be satisfied from the proceeds of the condemnation award. The trial court by memorandum ruling found that the value of the note was owing to respondents and ordered this sum plus interest paid out of fifty per cent of the fund remaining in the hands of a trustee after payment of certain liens concededly a charge upon the joint estate. *Held*: Reversed. The wife was entitled to the entire condemnation award, less the conceded liabilities. *People v. Nogarr*, 330 P.2d 858 (Cal. 1958).

The effect of a mortgage executed by only one joint tenant upon real property held in joint tenancy with the right of survivorship depends on the legal theory of the mortgage in the particular jurisdiction. In jurisdictions where a mortgage effects a conveyance of the property, it severs the joint tenancy.¹ Severance converts the joint tenancy² into a tenancy in common,³ and destroys the right of survivorship.⁴ The severed interest of the then tenant in common secures the mortgage after the death of the mortgagor.⁵ In jurisdictions which consider a mortgage as nothing more than a mere lien or charge upon the interest of the joint tenant, the apparent technical effect is that the unities of joint tenancy are unbroken by the execution of the mortgage, and the interest of the mortgaging joint tenant passes at his death to the survivor by virtue of the right of survivorship, leaving nothing to secure the mortgage. Thus, in effect the death of the mortgaging joint tenant terminates the mortgage lien.⁶

¹ *York v. Stone*, 1 Salk. 158, 91 Eng. Rep. 146 (Ch. 1709); *In re Pollard's Estate*, 3 De. G.J. & S. 541, 46 Eng. Rep. 746 (Ch. 1863); *Lawler v. Vyrne*, 252 Ill. 194, 96 N.E. 892 (1911) (dictum); *McPherson v. Snowden*, 19 Md. 197 (1862); *Eder v. Rothamel*, 202 Md. 189, 95 A.2d 860, 863 (1953) (dictum); 2 *American Law of Property* 9 (Casner ed. 1952); 2 *Tiffany, Real Property* 210 (3d ed. 1939); 2 *Walsh, Commentaries on Real Property* 12 (1947).

² Obviously if there are more than two joint tenants only the interest severed becomes a tenancy in common. The remaining joint tenants hold their respective interests in joint tenancy with right of survivorship in relation to all the property except the severed interest.

³ *McDonald v. Morley*, 15 Cal. 2d 409, 101 P.2d 690, 129 A.L.R. 810 (1940); *Partridge v. Berliner*, 325 Ill. 253, 156 N.E. 353 (1927); *Morgan v. Catherwood*, 95 Ind. App. 266, 167 N.E. 618 (1929); *Smith v. Smith*, 290 Mich. 143, 287 N.W. 411, 124 A.L.R. 215 (1939); *Grieger v. Pye*, 210 Minn. 71, 297 N.W. 173 (1941); 2 *Walsh*, op. cit. supra note 1, at 12.

⁴ *Morgan v. Catherwood*, supra note 3; *Anson v. Murphy*, 149 Neb. 716, 82 N.W. 2d 271 (1948); *Steinmetz v. Steinmetz*, 130 N.J. Eq. 176, 21 A.2d 743 (1941); *In re Cossitt's Estate*, 204 App. Div. 545, 198 N.Y.S. 560 (1923); *Campbell v. Drozdowicz*, 243 Wis. 354, 10 N.W.2d 158 (1943).

⁵ *Z. V. Pate, Inc. v. Killock*, 202 S.C. 522, 25 S.E.2d 728 (1943). (by implication).

⁶ 2 *Tiffany*, op. cit. supra note 1, at 210-211; 2 *Walsh*, op. cit. supra note 1, at 12.

The principal case seems to be the only one squarely supporting the rule that death of the joint tenant mortgagor destroys the mortgage lien. Interestingly enough, in the principal case the case authority relied upon involved judgment liens,⁷ and an old age assistance lien,⁸ not a mortgage lien. The principle involved where a mortgage is considered a lien is the same as in the case of judgment liens or old age assistance liens. The judgment lien or old age assistance lien attaches only to the joint tenant's interest.⁹ By virtue of the right of survivorship a joint tenant's interest exists only during his lifetime. When he dies, his interest passes to the surviving joint tenant at the instant of death in the sense that it ceases to exist. If the lien attaches only to his interest, and that interest ceases to exist upon his death, it necessarily follows that when the interest to which the lien attached is terminated, and there is nothing remaining for the lien to attach to, the lien in effect is terminated also and consequently unenforceable.¹⁰ It is conceded that the theory of the lien underlying the result in the principal case is consistent with accepted legal principles concerning joint ownership with right of survivorship. However, as discussed more fully later, one may question the practical effect of this result and contend that the theory of the lien should be rationalized differently in relation to the legal doctrine controlling the right of survivorship.

At least two "lien theory" states, in order to avoid the loss of old age assistance liens upon interests of joint tenants, have enacted statutes on the matter. These statutes specifically provide that the application for and acceptance of old age assistance payments under the law providing for a lien results in a severance of the joint tenancy,¹¹ or that the lien does not sever the joint tenancy but the lien is enforceable after the death of the recipient.¹²

⁷ *Zeigler v. Bonnell*, 52 Cal. App. 2d 217, 126 P. 2d 118 (1942); *Power v. Grace*, (1932) 1 D.L.R. 801 (1931).

⁸ *Gau v. Hyland*, 230 Minn. 235, 41 N.W. 2d 444 (1950).

⁹ *Zeigler v. Bonnell*, 52 Cal. App. 2d 217, 126 P. 2d 118 (1942); *Gau v. Hyland*, supra note 8.

¹⁰ *Zeigler v. Bonnell*, supra note 9; *Van Antwerp v. Horan*, 390 Ill. 449, 61 N.E. 2d 358, 161 A.L.R. 1133 (1945); *Peoples Trust & Savings Bank v. Haas*, 328 Ill. 468, 160 N.E. 85 (1928); *Wood v. Logue*, 167 Iowa 436, 149 N.W. 613, 1917 B. Ann. Cas. 116 (1914); *Gau v. Hyland*, 230 Minn. 235, 41 N.W. 2d 444 (1950); *Musa v. Segelke & Kohlhaus Co.*, 224 Wis. 432, 272 N.W. 657, 111 A.L.R. 168 (1937).

¹¹ Neb. Rev. Stat. § 68-215.09 (1958) provides in part:

[T]he application for and acceptance of such old age assistance, when the lien is properly recorded, shall result in the severance of the joint tenancy and the creation of a tenancy in common giving the county and the State of Nebraska an enforceable old age assistance lien. . . .

¹² Wis. Stat. § 49.26(5) (a) (1957) provides in part:

Such lien shall not sever a joint tenancy nor affect the right of survivorship except that the lien shall be enforceable to the extent that the beneficiary had an interest prior to his decease.

A different result from that of the principal case has been reached in a case involving a mortgage executed by a joint tenant in a lien theory state. In the case of *Wilken v. Young*,¹³ the Supreme Court of Indiana held that a mortgage lien after the death of the joint tenant mortgagor was valid to the extent necessary for security and that the right of survivorship had effectively passed the equity of redemption to the surviving joint tenant.

There is respectable authority supporting the proposition that the joint tenancy may be suspended during the temporary alienation of a part of one of the joint tenant's interest and revived when the alienation is terminated.¹⁴ The Supreme Court of California has recognized the temporary suspension of a joint tenancy effected by the conveyance of an interest for life, the joint tenancy reviving upon the termination of the life interest.¹⁵ This approach, so far as can be determined, has never been used in relation to the mortgaging of a joint tenant's interest in real property.

Conceding that the result of the principal case is sound in principle, it is felt that the practicality of such a rule is questionable. The necessary implication of this result is that a joint tenant is indirectly deprived of the right to mortgage his interest because lenders will not accept security that can be defeated upon the death of the mortgagor by the right of survivorship.

The Indiana Supreme Court in the *Wilken* case reached what is believed to be a desirable result, although it must be agreed that the court's theory was incorrect.¹⁶ One authority, however, has suggested that the result is "impossible and unthinkable,"¹⁷ the author expresses his belief in terms of the choice that must be made: "[E]ither that a mortgage is a mere lien, like a judgment lien, in which case it is subject to be defeated by survivorship in case the mortgagor die before his cotenants, or else the technical legal title passes under a mortgage, the unities are broken, and the joint tenancy is at an end in so far as the interest mortgaged is concerned."¹⁸ It is felt that such strict adherence to either of these two diverse principles is not altogether necessary. In the first place, as suggested previously, if a mortgage is merely a lien the joint tenants are in-

¹³ 144 Ind. 1, 41 N.E. 68 (1895).

¹⁴ *Napier v. Williams*, [1911] 1 Ch. 361; *Roe v. Lonsdale*, 12 East 39, 104 Eng. Rep. 16 (K.B. 1810); Challis, *Real Property* § 367 (3rd ed. Sweet 1911); 2 *Walsh*, op. cit. supra note 1, at 14; 2 *Tiffany*, op. cit. supra note 1, at 209.

¹⁵ *Hammond v. McArthur*, 30 Cal. 2d 512, 183 P. 2d 1 (1947).

¹⁶ For a joint tenancy to exist there must be unity of time, title, interest and possession. If at the time of death the deceased's interest consisted only of an equity of redemption, while his co-tenant's interest was in fee, there could be no unity of interest.

¹⁷ 2 *Walsh*, op. cit. supra note 1, at 12.

¹⁸ *Ibid.*

directly deprived of their right to mortgage their respective interests. Certainly if a person owns an interest in property which he has a right to convey, he should also be able to mortgage it in order to secure his debts without the indirect interference of the law. If the mortgage is treated as a conveyance, on the other hand, and the mortgage is executed with no desire to sever the joint tenancy and the mortgaging tenant survives, he will lose the benefit of survivorship since the interest of the other tenant will descend to that tenant's heirs by virtue of the severance. Moreover, the non-mortgaging joint tenant is deprived of his right of survivorship even if the mortgage is satisfied during the lifetime of both of the joint tenants. It would be better not to penalize both of the joint tenants to this extent merely because one of them desires to exercise one of his most valuable property rights. This undesirable penalty results from too strict adherence to aged principles.

Both the California Court in the principal case and Walsh, in his commentaries on real property, assail the result of the *Wilken* case on the ground that the mortgaging joint tenant gains an unfair advantage regardless of which one survives. The basis of their argument is that if the non-mortgaging joint tenant is the survivor he receives an encumbered one-half while if he predeceases the mortgaging joint tenant, the latter receives an unencumbered one-half.¹⁹ This consequence, however, is entirely within the control of the non-mortgaging joint tenant. If he desires to avoid the possibility of his co-tenant receiving his unencumbered one-half, he has every right to sever the joint tenancy and destroy the right of survivorship by the execution of a trust deed,²⁰ or by outright conveyance,²¹ which will prevent the cotenant from obtaining his interest. Such an action on his part will also destroy his right of survivorship. If he chooses to preserve his right of survivorship, there is no valid reason why he should receive his cotenant's interest unencumbered in the event the mortgagor dies first without having satisfied the mortgage. The choice is his, and the law should not repudiate his choice thereby forcing the loss upon the mortgagee. This can hardly be called an unfair advantage. At most it is only a possibility, and the non-mortgaging joint tenant has the exclusive control of the possibility.

¹⁹ *People v. Nogarr*, 330 P. 2d 858, 862 (Cal. 1958); 2 Walsh, *op. cit. supra* note 1, at 13.

²⁰ *Partridge v. Berliner*, 325 Ill. 253, 156 N.E. 353 (1927); *Hardin v. Wolf*, 318 Ill. 48, 148 N.E. 868 (1925) (dictum); *Wolf v. Johnson*, 157 Md. 112, 145 Atl. 363 (1929).

²¹ *Szymcack v. Szymcack*, 306 Ill. 541, 138 N.E. 218 (1923); *Morgan v. Catherwood*, 95 Ind. App. 266, 167 N.E. 618 (1929); *Campbell v. Drozdowicz*, 243 Wis. 354, 10 N.W. 2d 158 (1943).

Conclusion

There is a very practical solution to this problem, which does not offend the principles of joint tenancy, permits joint tenants to mortgage their interests with assurance to their creditors that the lien will not be defeated by the right of survivorship, and does not destroy the right of survivorship through severance. This solution is based on the temporary suspension of the joint tenancy which has been recognized by the courts.

If the mortgage were conceived to merely suspend the joint tenancy at the time of the execution of the mortgage, it would be revived by the redemption of the mortgage and there would be no destruction of the unities of joint tenancy. The right of survivorship could not defeat the mortgage lien because it would be inoperative to pass the interest of the deceased to the survivor until the mortgage had been redeemed, to the extent of the interest of the joint tenant mortgagor. This solution permits the non-mortgaging joint tenant, if he is the survivor, to obtain the complete interest, if he so desires, by satisfying the mortgage to the extent of the deceased's interest, but does not deprive him completely of his right of survivorship as would a complete severance. The mortgaging joint tenant would not be deprived of his right of survivorship, if he is the survivor, and the deceased cotenant has chosen not to defeat that right by severance of the joint tenancy. Neither of the joint tenants are deprived of the right of survivorship as they would be by complete severance, in the event the mortgage is satisfied during both of their lifetimes, since upon redemption of the mortgage the joint tenancy is revived exactly as it was prior to the execution of the mortgage. The greatest advantage of such a solution would be that joint tenants would be able to freely exercise a valuable property right, that of mortgaging their respective interests to secure their debts.

William A. Logan

CRIMINAL LAW—HABITUAL CRIMINAL STATUTE—INSTRUCTIONS TO JURIES. Defendant was convicted of storehouse breaking and his punishment fixed at imprisonment for life under the Habitual Criminal Statute.¹

¹ Ky. Rev. Stat. § 431.190 (1959).

Conviction of felony; punishment on second and third offenses . . . if convicted a third time of felony, he *shall* be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty unless the jury finds, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state. (Emphasis added.)