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W.H. Frederick Jr.

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ARE JUDGEMENT CREDITORS IN A BETTER POSITION NOW THAT DIVORCE CHANGES TENANCY BY ENTIRETIES TO TENANCY IN COMMON?¹

One of the traditional incidents of property held by husband and wife as tenants by entireties has been the exemption of this property from execution and sale by a judgment creditor of one or the other of the two tenants as individuals.² The reason generally given for this immunity is that the legal unity of husband and wife resulting from marriage gives this estate the peculiarity of being owned wholly by one individual in the eyes of the law. Practically, this means that the whole estate is vested in the husband and the whole estate is vested in the wife from its inception. Therefore, since both own the whole estate, enforcing the judgment against one tenant would be taking the property of one to pay the debt of another.³

It would seem that once this unity had been destroyed by divorce the tenancy by entireties would be changed to a tenancy in common. Hence, judgment creditors would be in a better position. The majority of courts have adopted this view,⁴ while the Pennsylvania courts have remained in the minority.⁵ The Pennsylvania courts have said⁶ that the tenancy by entireties continues because "the quality of the estate is determined at its inception. . . The divorce severed the unity of person for the future, but it could not avail retrospectively to sever the vested unity of title and possession." Under this interpretation the judgment creditor had no more chance of collecting from the two unmarried individuals than he had when the two were man and wife.

Act No. 412, General Assembly 1949,⁷ would seem to be an attempt by the legislature to remedy this situation. This act provided in part as follows:

¹ For effect of *separation* on tenancy by entireties, see 47 DICK. L. REV. 228.

² *McCurdy and Stevenson v. Canning*, 64 Pa. 39 (1870); *Myer's Estate* (No. 1), 232 Pa. 89, 81 A. 145 (1911); *Weiss v. Beihl*, 232 Pa. 97, 81 A. 148 (1911); *Beihl v. Martin*, 236 Pa. 519, 84 A. 953 (1912).

³ *Beihl v. Martin*, 236 Pa. 519, 522-3, 84 A. 953 (1912).

⁴ 27 C. J. S. 839; 10 ORB. L. REV. 206.

⁵ 27 C. J. S. 839, note 2; *Alles v. Lyon*, 216 Pa. 604, 66 A. 81 (1907); *O'Malley v. O'Malley*, 272 Pa. 528, 116 A. 500 (1922).

⁶ *Alles v. Lyon*, 216 Pa. 604, 607-8, 66 A. 81 (1907). The Pennsylvania courts have modified this rule in the case of rents, saying that after divorce for all practical purposes *between themselves* husband and wife are tenants in common: *O'Malley v. O'Malley*, 272 Pa. 528, 116 A. 500 (1922); *Stimson v. Stimson*, 343 Pa. 68, 29 A.2d 679 (1943); *Mertz v. Mertz*, 139 Pa. Super. 299, 11 A.2d 514 (1940).

⁷ Act No. 412, S. B. 781, "An act to amend the title and the act approved the tenth day of May, one thousand nine hundred twenty-seven (Pamphlet Laws 884), entitled 'An act modifying the common law rule relating to property hereafter acquired by husband and wife as tenants by entireties, where such husband and wife are subsequently divorced; providing for the sale of property held by husband and wife as tenants by entireties where they have been divorced; and directing the disposition of the proceeds of such sale,' by providing for the creation of a tenancy in common upon divorce." Approved 17 May 1949. Reported in *Purdons Pennsylvania Legislative Service 1949*, No. 5, pp. 1384-5. Effective 1 September 1949 as provided by 46 P. S. 504.

"Be it enacted that whenever any husband and wife hereafter acquiring property as tenants by entireties, shall be divorced, they shall thereafter hold such property as tenants in common of equal one half shares in value. . ."

Prior to the enactment of this statute the judgment creditor of either the divorced husband or the divorced wife could possibly have obtained satisfaction of his judgment, if at all, in one of three ways:

1. Should the two tenants sever the unity by voluntarily joining in a conveyance of the property to the one member who was the judgment debtor or by a partition of the property,⁸ each taking a separate interest, the judgment creditor could have execution and sale of that interest vesting in the judgment debtor. Such conveyance or partition would, of course, be highly unlikely in the face of a judgment lien.

2. Should one tenant die leaving the estate vested in the tenant who was the judgment debtor the creditor could have execution and sale of this estate in severalty. The Pennsylvania courts have held that the lien of a judgment against one tenant by entirety is limited to the tenant's right upon survivorship to succession to the whole estate. And this is an inchoate lien unenforceable until the expectancy of survivorship is a fact.⁹ Therefore, a creditor of one of two such divorced tenants, both of whom were living, couldn't be said to possess very much, if anything.

3. The third possibility the judgment creditor had for the satisfaction of his judgment was that situation arising by virtue of statute passed in 1927.¹⁰ This statute provides:

"Whenever any husband and wife *hereafter* acquiring property as tenants by entireties shall be divorced either of such tenants by entireties may bring suit in the Court of Common Pleas, sitting in Equity, of the county where the land is situate, against the other to have the property sold and the proceeds divided between them. . ."

And further provided,

"the amount of any liens entered of record against either of such tenants by entireties together with interest due and costs taxed thereon shall be deducted from the share of the tenant by entireties against whom such lien is filed, and paid by such trustee to the person or persons to whom the same is due and payable. . ."

Therefore, after divorce, on forced sale by one of the tenants the judgment creditor might recover the value of his lien. However, the creditor was dependent on action by one of the two tenants and had no standing following a divorce

⁸ Michalski v. Kruszewski, 330 Pa. 62, 198 A. 673 (1938).

⁹ C. I. T. Corporation v. Flint, 333 Pa. 350, 355, 5 A.2d 126, 166 A. L. R. 992 (1939).

¹⁰ P. L. 884, 68 P. S. 501-5, May 10, 1927—to which the statute under consideration is an amendment.

to institute proceedings himself for a public sale of the property.¹¹ Moreover, it must be noted that this act did not apply to all tenancies by entireties but only to those created after the effective date thereof, 1 September 1927. The benefit of this act to the judgment creditor of one of the divorced tenants of a tenancy by entireties is, therefore, quite limited.

The three possibilities which the judgment creditor had for the satisfaction of his claim against the divorced tenant are seen to be very small and left him in a very poor position.¹² The present statute would seem to be an attempt to remedy this situation. How effective it will be remains to be seen. As yet, there are no cases interpreting the act. It should be noted that the statute applies only to tenancies by the entireties created after the effective date of the act, 1 September 1949. We must look at the general rules and Pennsylvania cases to determine the relationship of one tenant in common and his judgment creditor.

Generally speaking, a tenant in common is the same as a tenant in severalty except that his right to possession is not exclusive. He has a right to possession of all the property and has no right to exclude his cotenants from the same right of possession.

"Tenants in common hold by several and distinct titles, with unity of possession only. No privity of estate exists between them but as between themselves their interests are several, there being no unity of title, *each owner being considered solely and severally seized of his share.*"¹³
"*A tenant in common though he owns an undivided share only has a separate and distinct estate, and, except for the fact that he does not have exclusive possession, has the same rights in respect to his share as a tenant in severalty.*"¹⁴

If the estate of a cotenant does have these attributes which make it separate and distinct it would seem that execution on and sale of that interest would be perfectly feasible. The Pennsylvania cases follow this view. In *Hopkins v. Forsyth*, 14 Pa. 34, the court held that execution on a judgment against two members of a group of persons who owned a steamboat as tenants in common and the resulting sale of the steamboat in no way affected the title of those tenants in common who were not debtors under the judgment, unless they had consented to have their interest sold in return for a proportional share in the proceeds of the sale. Again, in *Arnold v. Cessna*, 25 Pa. 34, where a judgment for purchase money had been recovered against one of two persons who held equitable title to property as tenants in common and the property had been sold in satisfaction of the judgment, the court held that the heirs of the non-debtor tenant still had perfectly good title

¹¹ *Eastern Acceptance Corporation v. Gold*, 60 D. & C. 95 (Pa. 1947).

¹² For summary of methods of terminating tenancy by entireties, see 53 DICK. L. REV. 131.

¹³ 62 C. J. 409, § 4.

¹⁴ TIFFANY, REAL PROPERTY, § 285, p. 287 (1940).

to a one half interest in the equitable title as tenants in common with the purchaser at the sale.

And so Pennsylvania follows the general rule that the property of tenants in common is liable to be levied upon under an execution against one of them, and the share of the execution debtor therein may be sold to satisfy the judgment.

Applying these principles to the statute here under consideration, it would seem that the judgment creditor has been put in a more advantageous position. Providing that the tenancy by entireties in question came into existence after the effective date of this act, 1 September 1949, the judgment creditor would appear to have a right to have execution and sale of the one half share of the judgment debtor in the jointly held property any time after the divorce decree was entered.

W. H. Frederick, Jr.