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test of *Schenck v. United States*²⁸ to obscenity statutes, completing the trend toward a more liberal and modern approach to literature of all types. However, for the present time, the Court has placed obscenity statutes clearly within the due process clause of fourteenth amendment of the United States Constitution, and has given fair warning to the states that they cannot arbitrarily restrict the sale of literature.

JOHN M. THOMSON

REAL PROPERTY — TENANCY BY THE ENTIRETIES — RIGHT OF CONTRIBUTION FROM ESTATE OF DECEASED SPOUSE

• Husband and wife executed notes and purchase money mortgages on Florida properties which they owned as tenants by the entireties. After the death of the husband, the wife sued her husband's executor for contribution and exoneration with respect to the balance owed on these notes and mortgages. *Held*, a surviving spouse is *not* entitled to contribution or exoneration from the estate of a deceased spouse for money due on notes and purchase money mortgages executed by them where land was held by entireties. *Lopez v. Lopez*, 90 So.2d 456 (Fla. 1956).

This was a case of first impression in the Florida court, but the questions presented have been passed upon in several of the twenty jurisdictions which recognize tenancy by entireties.¹ Exoneration in respect of liens on entireties properties has generally been denied the surviving spouse.² However, decisions are in sharp conflict as to the right to contribution.

The courts of Indiana,³ Maryland,⁴ New Jersey,⁵ North Carolina,⁶ Pennsylvania⁷ and Tennessee⁸ hold that the decedent's estate is liable for half

28. 249 U.S. 47, 52 (1919). "Whether the words used, are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils. . ."

In *Doubleday & Co. v. New York*, 335 U.S. 848 (1948), the appellant unsuccessfully argued the applicability of the clear and present danger test to his conviction under the New York statute prohibiting sale of obscene publications. See Lockhart and McClure, *Literature, The Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295 (1954).

1. Those jurisdictions which recognize entireties are: Arkansas, Delaware, District of Columbia, Florida, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wyoming.

For a tabulation of conflicting attributes of entireties tenures in the several states, see Phipps, *Tenancy by Entireties*, 25 TEMP. L.Q. 24 (1951). However, this excellent survey does not evaluate a survivor's right to contribution.

2. *Cunningham v. Cunningham*, 158 Md. 372, 148 Atl. 444 (1930); *Gardner v. Waldman*,—R.I.—, 111 A.2d 922 (1955).

3. *Magenheimer v. Councilman*, 76 Ind. App. 583, 125 N.E. 77 (1919).

4. *Cunningham v. Cunningham*, 158 Md. 372, 148 Atl. 444 (1930).

5. *Nobile v. Bartletta*, 109 N.J.Eq. 119, 156 Atl. 483 (1931).

6. *Underwood v. Ward*, 239 N.C. 513, 80 S.E.2d 267 (1954); *Wachovia Bank and Trust Co. v. Black*, 198 N.C. 219, 151 S.E. 269 (1930).

7. *In re Dowler's Estate*, 368 Pa.519, 84 A.2d 209 (1951); *In re Kershaw's Estate*, 352 Pa. 205, 42 A.2d 538 (1945).

8. *Newson v. Shackelford*, 163 Tenn. 358, 43 S.W.2d 384 (1931).

of the balance of a purchase money debt. They regard husband and wife as joint and equal principals who come under "the general rule applicable to co-obligors that as between them, when one of them pays more than his proportionate share of the debt owed by both, the payer is entitled to contribution from the other."⁹ These jurisdictions consider unity of the person an incident of the *estate* created by the conveyance, and not an incident of the obligation. They also recognize, as Florida does,¹⁰ that the mortgagees could have discarded the mortgage entirely and have maintained an action against either the widow or the decedent's estate for the balance of the note.

On the other hand, Massachusetts¹¹ and New York¹² deny contribution to the survivor on purchase money debts where property was held by the entireties. These courts hold that the decedent no longer has an interest which would be benefited by discharging a mortgage on the property, since the survivor became sole owner upon the spouse's death.

The decision in the instant case could have been sustained on the grounds that the widow had not actually paid the balance due on the notes before she sued for contribution,¹³ but the Florida court proceeded to deny such a right even if payment had been made. Further, the opinion characterized the debt of a purchase money mortgage on entireties property as "a debt being owed wholly by the wife, and simultaneously wholly by the husband,"¹⁴ with the result that "each spouse, as between themselves, is obligated to pay the full amount thereof."¹⁵

It is submitted that the decision in the *Lopez* case is but another anomalous corollary to the continued existence in Florida of the anomalous estate by entireties. This opinion by the Florida court, "in order to be consistent with our holdings on the nature of an estate by entireties,"¹⁶ construed the mortgages and notes to be *ab initio* a sort of obligation by entireties, the ultimate liability of which falls on the spouse who happens to survive.

Such an interpretation goes beyond the New York and Massachusetts opinions denying contribution, which concede that husband and wife were joint principals but insist that any right of contribution is extinguished with the death of one spouse. The announced Florida rule, if carried to its full

9. *Meckler v. Weiss*, 80 So.2d 608, 609 (Fla. 1955). Here the Florida court was speaking of tenants in common rather than by entireties.

10. *Taylor v. American Nat'l Bank*, 63 Fla. 631, 57 So. 678 (1912).

11. *Ratte v. Ratte*, 260 Mass. 165, 156 N.E. 870 (1927).

12. *Robinson v. Bogert*, 187 Misc. 735, 64 N.Y.S.2d 152 (Surr. Ct., Westch. Co. 1946); *In re Dell's Estate*, 154 Misc. 216, 276 N.Y.S. 960 (Surr. Ct., Orange Co. 1935); *Geldart v. Bank of New York and Trust Co.*, 209 App. Div. 581, 205 N.Y.S. 238 (2nd Dep't 1924).

13. "Contribution . . . is the right of one who *has discharged* a common liability or burden to recover of another also liable the aliquot portion which he ought to pay or bear." (Italics supplied.) 18 C.J.S., *Contribution* § 1 (1939). (However, all the cases which have allowed contribution have not insisted on payment as a condition precedent.)

14. *Lopez v. Lopez*, 90 So.2d 456, 459 (Fla. 1956).

15. *Ibid.*

16. *Ibid.*

implications, is not only contrary to the understanding of the contracting parties and to the established nature of jointly executed obligations¹⁷ but also would necessarily lead to the further anomalous result of precluding even the mortgagee from suing the decedent's estate.

Two solutions present themselves for consideration. First, Florida should join those states which have concluded that tenancy by entireties is a category of ownership "no longer sufficiently useful to justify its separate existence."¹⁸ In view of Florida's historical legislative policy against the common law doctrine of survivorship,¹⁹ its constitutional abolition of the disability of married women to own separate property,²⁰ and the equally persuasive tax disadvantages inherent in ownership by entireties,²¹ continued recognition of the doctrine is anachronistic.²²

But if, on the other hand, tenancy by entireties must endure in Florida, questions arising from its peculiar incidents should be decided with regard to all the equities of the particular fact situation, instead of by attempts to comport with the fictitious attributes of a medieval concept. Clothing the purchase money mortgage and note with the ambiguous characteristics of the entireties property would seem to be a backward step.

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17. Contrast with the positive statements in WILLISTON, *CONTRACTS* § 345 (1936).

18. 4 POWELL, *REAL PROPERTY* § 664 (1954).

19. FLA. STAT. § 689.15 (1951) as originally enacted in 1829 denied survivorship without exception. The statute was amended in 1941 to exclude tenancies by entirety.

20. FLA. CONST. art. 11, § 1 (1885).

21. For some disadvantages, see Bernstein, *Tax Dangers in Tenancy by Entireties*, 1 *MIAMI L.Q.* 86 (1947). (The 1954 Internal Revenue Code modifies these to a degree.)

22. Elimination of this form of ownership was recommended by the Committee on Substantive Changes in Real Property Principles of the American Bar Association in 1944. See Niles, *Abolish Tenancy by Entireties*, 79 *TRUSTS & ESTATES* 366 (1944).

The accident of the acceptance of the entireties doctrine in Florida is told in Ritter, *A Criticism of the Estate by the Entirety*, 5 *U.FLA.L.REV.* 153 (1952). For other incongruous results of the doctrine, see Mayer, *The Status of Entireties in Florida*, 5 *MIAMI L.Q.* 592 (1951).