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Real And Personal Property—Proceeds Of Fire Insurance Policy On Real Property Held By The Entirety May Be Divided As Of Right.

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through some fortuity such as wealth, habitual contact with the law, or intelligence, retain counsel either before or immediately after arrest.

The dissenting opinions unfortunately do not refer to one remarkably compelling argument with which the Court was faced in this case: that is, had the police officers not unlawfully delayed arraignment,[32] the conviction would have been summarily reversed on the authority of the post-arraignment right-to-counsel rule of *People v. Meyer*.[33] This irony must have called irresistably for reversal, but the Court, in so doing, has perhaps extended its ruling farther than conscience required. It would be sufficient to confer a right of counsel only where there has been an unlawful delay in arraignment.[34] If the Court has indeed so ruled, the conflict with efficient law enforcement which the dissenting judges foresee in their more liberal interpretation of the case,[35] would be moderated some. Yet this narrower holding does not alter the tendency of the present rule to favor persons with ready access to counsel over those with limited access. Said differently, the rule favors grand scale crime over petty crime, and this, of course, is an undesirable result. The three possible defects of the present rule (inequality of application, favoritism of large scale crime, and unnecessary interference with law enforcement) should evoke some reconsideration.

James B. Denman

REAL AND PERSONAL PROPERTY—PROCEEDS OF FIRE INSURANCE POLICY ON REAL PROPERTY HELD BY THE ENTIRETY MAY BE DIVIDED AS OF RIGHT.

Husband and wife were owners as tenants by the entirety of real property with improvements thereon. A dwelling house, covered by a fire insurance policy owned and held by them, was totally destroyed by fire. Upon execution of notice of claim by the owners the insurance company issued a draft payable to husband, wife, and another who was mortgagee of the property. Husband, who had been separated from the wife for some time, refused to endorse the draft. Upon wife's action for injunctive and other relief, husband moved to dismiss on the grounds that the proceeds were impressed with the same quality of inseverability as the estate they replaced. The Supreme Court granted the motion,[1] which was affirmed without opinion by the Appellate Division, Fourth Department. The Court of Appeals, two judges dissenting without opinion, reversed; *held*, the proceeds of a standard fire insurance are personal property which may be divided upon demand regardless of the nature of the estate they replace. *Hawthorne v. Hawthorne*, 13 N.Y.2d 82, 192 N.E.2d 20, 242 N.Y.S.2d 50 (1963).

32. N.Y. Code Crim. Proc. § 165; N.Y. Penal Law § 1844.
33. 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962). See Brief for Appellant, p. 37.
34. See note 28 *supra*.
35. Instant case at 159, 193 N.E.2d at 634, 243 N.Y.S.2d at 849.

1. Hawthorne v. Hawthorne, 24 Misc. 2d 508, 208 N.Y.S.2d 79 (Sup. Ct. 1960).

Tenancy by the entirety is a joint estate in lands peculiar to the husband and wife relationship. It arose in the common law out of the unity of identity of a husband and wife.[2] Today, perhaps the most important incident of this estate is its inseverability. In general, it may be severed only by the joint act of the husband and wife, or by a dissolution of the marriage.[3] Although one of the tenants may sell his interest in the lands,[4] the purchaser takes as tenant in common with the spouse subject to her right of survivorship and partition cannot be compelled.[5] What result should follow when the real property is replaced by personal property under circumstances beyond the control of the owners presents problems which the courts have resolved in various ways.

As a general rule in New York, personal property cannot be held by the entirety.[6] Nonetheless, the proposition has been advanced and discussed in opinions, but usually as dictum.[7] The cases raising the issue generally fall into one of two categories: damage awards in condemnation proceedings, and equity of redemption following mortgage foreclosure sales. Other cases include bonds and mortgages taken upon sale of lands held by the entirety and joint bank accounts and investments held jointly. In the condemnation cases the courts have been quite consistent in holding that the awards stood in the place of the lands. The earlier cases so held as to the rights of mortgagees,[8] which, of course, had nothing to do with tenancy by the entirety, but formed the basis for holding in a later case that the incident of survivorship would obtain if the condemned property was held by the entirety.[9] The equity of redemption cases similarly follow this rule;[10] however, the basic concern of the courts in these cases is the protection of the spouse's right of survivorship.[11] The other cases are somewhat in conflict, but the weight of authority favors the rule that personalty cannot be held by the entirety.[12] The main support for a contrary holding is the common law presumption that the husband owned all of the wife's personalty; therefore, when he attempted to pass an interest to her, his intent must have been to give her

2. See generally Note, *Tenancies by the Entirety in New York*, 1 Buffalo L. Rev. 279 (1952).

3. N.Y. Dom. Rel. Law § 56; Stelz v. Schreck, 128 N.Y. 263, 28 N.E. 510 (1891); Finnegan v. Humes, 163 Misc. 840, 298 N.Y. Supp. 50 (Sup. Ct. 1937).

4. Hiles v. Fisher, 144 N.Y. 306, 39 N.E. 337 (1895).

5. Bartkowaik v. Sampson, 73 Misc. 446, 133 N.Y. Supp. 401 (Oneida County Ct. 1911).

6. In the Matter of Albrecht, 136 N.Y. 91, 32 N.E. 632 (1892); Matter of McKelway, 221 N.Y. 15, 116 N.E. 348 (1917).

7. See Overheiser v. Lackey, 207 N.Y. 229, 100 N.E. 738 (1913); Goodrich v. Village of Otego, 216 N.Y. 112, 110 N.E. 162 (1915).

8. Utter v. Richmond, 112 N.Y. 610, 20 N.E. 554 (1889); Bank of Auburn v. Roberts, 44 N.Y. 192 (1870).

9. In the Matter of City of New York (Jamaica Bay), 252 App. Div. 103, 297 N.Y. Supp. 415 (2d Dep't 1937).

10. Dunning v. Ocean Nat'l Bank, 61 N.Y. 497 (1875); Germania Sav. Bank v. Jung, 28 Abb. N. Cas. 81, 18 N.Y. Supp. 709 (Sup. Ct. 1892). *But see* Franklin Square Nat'l Bank v. Schiller, 202 Misc. 576, 119 N.Y.S.2d 291 (Sup. Ct. 1950).

11. Farmer's and Mechanic's Nat'l Bank v. Gregory, 49 Barb. 155 (N.Y. Sup. Ct. 1867).

12. In the Matter of Estate of Blumenthal, 236 N.Y. 448, 141 N.E. 911 (1923); Loker v. Edmans, 204 App. Div. 223, 197 N.Y. Supp. 857 (3d Dep't 1923). *Cf.* Scutella v. County Fire Ins. Co., 231 App. Div. 343, 247 N.Y. Supp. 689 (4th Dep't 1931).

nothing greater than the right of survivorship.[13] Thus, the courts looked to an intention on the part of the husband to make a gift to his wife upon his death. This intent, or lack of proof of it, was the means of distinguishing the earlier cases.[14] In view of present-day rights of married women, it would seem that the presumption would rarely be applied in modern cases.

Commencing with the general proposition that there can be no holding by the entirety in personal property, the Court found that the fire insurance policy and the proceeds paid thereunder were personalty.[15] The dispositive question was whether equity demanded that the personal property so acquired be ascribed with the same quality of inseverability as the estate it replaced. Respondent urged that since the proceeds were the result of an involuntary conversion this case was closely analogous to the condemnation cases and the rule in those cases should be followed. The Court distinguished the instant case from the condemnation cases by observing that in the latter cases the forced conversion was completely involuntary and the loss was the legal source of the new res. In the case at bar the subject matter of the dispute arose as the result of a purely voluntary contract and the fruits of that contract should be treated like any other personal property voluntarily acquired. The Court went further, by way of dicta, to express dissatisfaction with any rule which would allow personalty to be held by the entirety. As a matter of policy, the Court felt that a tying-up of money, as a contrary holding would have required, would be a serious impediment to its enjoyment. The Supreme Court, on the other hand, felt that preservation of the spouse's right to survivorship overrode other considerations of policy. Therefore, it readily found this case analogous to those involving condemnation and equity of redemption where it was held that an "involuntary conversion" did not destroy a tenancy by the entirety.

Once, in deciding a case involving an estate held by the entirety, Judge William S. Andrews remarked, "we appeal to history and not to logic for the explanation."[16] Ironically, the lower court in the instant case appealed to both history and logic to arrive at its conclusion. The close analogies furnished by the condemnation and equity of redemption cases, together with the proposition that the basic policy consideration is the preservation of the right of survivorship makes the reasoning of the lower court seem quite sound. However, the idea that there can be joint ownership in personalty analogous to a joint estate in lands has its roots in a dictum from a case where the Court, at best, had joint tenancy, and not tenancy by the entirety in mind.[17] Furthermore, as pointed out in the instant opinion, the right of survivorship may be illusory. If a joint tenant sells his interest, his act converts the joint tenancy into a tenancy in common, which

13. West v. McCullough, 123 App. Div. 846, 108 N.Y. Supp. 493 (2d Dep't 1908). *But cf.* Matter of Polizzo, 308 N.Y. 517, 127 N.E.2d 316 (1955).

14. In the Matter of Estate of Blumenthal, 236 N.Y. 448, 141 N.E. 911 (1923).

15. Brownell v. Board of Educ., 239 N.Y. 369, 146 N.E. 630 (1925); Galante v. Hathaway Bakeries, Inc., 6 A.D.2d 142, 176 N.Y.S.2d 87 (4th Dep't 1958).

16. Matter of Lyon, 233 N.Y. 208, 210, 135 N.E. 247 (1922).

17. Overheiser v. Lackey, 207 N.Y. 229, 100 N.E. 738 (1913).

effectively destroys the right of survivorship.[18] Much of the uncertainty seems to be due to the doctrine of "equitable conversion," whereby the equity court can do justice by acting upon the presumed intentions of the parties.[19] This is not a fixed rule of law, but a mere fiction based on the maxim, "equity regards as done what ought to be done."[20] Viewed in this light the cases take on new meaning, although they lose some of their precedential value. For example, in a case cited with approval by the Court, a husband and wife were owners as tenants by the entirety of certain mortgaged real estate which was subsequently foreclosed. The wife, plaintiff, who had been abandoned and was legally separated from her defendant husband, had obtained judgments for alimony arrears. The husband was not within personal jurisdiction of the court. Had the court ruled the surplus to be inseverable, the wife would have been unable to proceed against her husband's share. Instead, the court held that the parties held the surplus as tenants in common.[21] In an earlier case under somewhat similar circumstances, the court came to an opposite conclusion; yet in that case, the judge felt constrained to point out that the wife was not being prejudiced by the decision.[22] In the condemnation cases the decisions often operated to secure an equitable lien on the damage awards in favor of mortgagees of the original land. Thus, rather than blindly applying a rule of law, the courts used their equitable powers to effect substantial justice and preserve the rights of parties who might otherwise be without remedy. Although the Court in this case based its decision upon fairly narrow grounds, it left little doubt as to the probable outcome of future cases involving analogous holdings of personalty by the entirety. In the Court's view, today, real estate is more the subject of commerce and less the object of possession and use, thereby necessitating changes in judicial thinking about how owners of property can enjoy it to its fullest extent. Whether the Court will finally abolish any holdings of personal property by the entirety, or whether it will distinguish it away as it did in this case, is problematical. It might be suggested that the latter course be adopted in order to preserve it for those cases where the equities demand that it be applied.

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18. In the Matter of Suter, 258 N.Y. 104, 179 N.E. 310 (1932); *cf.* Loker v. Edmans, 204 App. Div. 223, 197 N.Y. Supp. 857 (3d Dep't 1923).
19. Dunning v. Ocean Nat'l Bank, 61 N.Y. 497, 503 (1875) (concurring opinion).
20. In the Matter of Maguire, 251 App. Div. 337, 296 N.Y. Supp. 528 (2d Dep't 1937).
21. Franklin Square Nat'l Bank v. Schiller, 202 Misc. 576, 119 N.Y.S.2d 291 (Sup. Ct. 1950).
22. Stretz v. Zolkoski, 118 Misc. 806, 195 N.Y. Supp. 46 (Sup. Ct. 1922).