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MORTGAGES—CONTRIBUTION—RIGHT OF SURVIVING TENANT BY THE ENTIRETY TO CONTRIBUTION FOR JOINT MORTGAGE DEBT—Decedent and his wife held title to certain land as tenants by the entirety. Shortly before decedent's death they jointly incurred an indebtedness of \$8000 secured by a mortgage on such land. The proceeds of the loan were used to improve the mortgaged

property. After decedent's death his widow, having succeeded to full ownership of the mortgaged land, claimed that she was entitled to contribution from decedent's estate for one-half of the joint mortgage debt upon the property. On the executors' petition for a final distribution decree the lower court denied the widow's right to contribution from the estate. On appeal, *held*, reversed, one judge dissenting. Decedent's estate must contribute one-half of the mortgage debt. The right of contribution is an attribute of joint liability flowing directly from the debt itself, and it does not depend upon a common interest in the land mortgaged to secure such debt. *In re Keil's Estate*, (Del. 1958) 145 A. (2d) 563.

There is a sharp conflict of authority as to whether a surviving spouse who discharges a joint mortgage debt on property held by the entirety has a right of contribution against the deceased spouse's estate. The problem usually arises when the proceeds of the mortgage loan are used for the benefit of the jointly held property.¹ One view, allowing contribution, proceeds on the theory that decedent's estate has been benefited by the payment of the joint obligation because it satisfied a claim against the estate.² Liability to contribute is consequently based on the rule that when a joint obligation is discharged by only one obligor, he should receive from the other obligors what he has paid on their behalf.³ Emphasis is placed on the joint debt as the source of the common burden giving rise to contribution.⁴ The other view proceeds on the theory that the mortgage lien is the source of a common burden upon the co-obligors, and because the lien, no longer affects decedent's estate when the entire title to the land passes to the surviving spouse, contribution is denied.⁵ The land is said to be the primary fund for the payment of the debt and therefore carries the entire burden of payment to the surviving spouse.⁶ Comparison of the two views indicates that the point upon which the courts are divided is the question whether the payment of the joint debt benefited the non-paying obligor in such a manner as to require contribution. Contribution rests

¹ In the usual case the land held by the entirety is encumbered with a "purchase money" mortgage. See the cases cited in notes 2 and 5 *infra*. However, where the proceeds of the mortgage loan are used to improve the property, as in the principal case, substantially the same problem is presented. In both situations the entire benefit of the loan inures to the surviving spouse.

² *In re Dowler's Estate*, 368 Pa. 519, 84 A. (2d) 209 (1951); *Underwood v. Ward*, 239 N.C. 513, 80 S.E. (2d) 267 (1954); *Cunningham v. Cunningham*, 158 Md. 372, 148 A. 444 (1929). See comment, 32 *BOST. UNIV. L. REV.* 253 (1952). See also *Magenheimer v. Councilman*, 76 Ind. App. 583, 125 N.E. 77 (1919), holding that where the estate paid a joint debt secured by a mortgage on property held by the entirety the estate was entitled to contribution from the widow.

³ *Eliason v. Eliason*, 3 Del. Ch. 260 at 263 (1869); *Brown v. Brown*, 58 Ariz. 333, 119 P. (2d) 938 (1941).

⁴ See, e.g., *Cunningham v. Cunningham*, note 2 *supra*, at 447.

⁵ *Lopez v. Lopez*, (Fla. 1956) 90 S. (2d) 456; *Ratte v. Ratte*, 260 Mass. 165, 156 N.E. 870 (1927); *Geldhart v. Bank of N.Y. & Trust Co.*, 209 App. Div. 581, 205 N.Y.S. 238 (1924). See also note, 13 *UNIV. PITT. L. REV.* 763 (1951).

⁶ See *Lopez v. Lopez*, note 5 *supra*, at 459.

upon the equitable principle that one shall not be made to bear more than his just share of a common burden to the advantage of his co-obligors;⁷ it therefore appears to be essentially a payment for the benefit conferred on the non-paying obligor. In the typical joint debt situation the advantage which the courts find conferred on the non-paying co-obligor appears in one of two forms. It can be found in either the proceeds of the debt which each co-obligor presumably receives,⁸ or in the discharge of an obligation for which each co-obligor is primarily liable.⁹ In most cases the non-paying obligor is substantially benefited in both ways.¹⁰ In the principal case, however, it would seem that neither of these benefits is sufficiently present to afford an equitable basis for contribution. The widow alone obtained all the benefits of the proceeds of the joint debt by succeeding to ownership of the improved land.¹¹ While the decedent was benefited by the use of the improvements acquired with the proceeds of the joint debt during his lifetime, the right to contribution could not arise before satisfaction of the joint obligation,¹² when the entire benefits of the debt proceeds had passed to the paying obligor. The majority of the court in the principal case, however, found a benefit in the fact the estate was discharged from primary liability on the joint debt.¹³ But while the removal of a legally enforceable claim against the estate is clearly of some benefit to it, such a benefit does not seem sufficiently substantial to warrant the application of equitable contribution doctrines. Since the value of the mortgaged land in the principal case was admittedly more than enough to satisfy the debt there is little likelihood any claim would ever be asserted against the estate. The benefit to the estate therefore is in large part illusory. On the other hand, in the event of default the widow is likely to lose the land of which she is now sole owner. It would seem then that the discharge of the debt is of far greater importance to the widow than it is to her husband's estate. The likelihood that the

⁷ See *McKelroy v. Hamilton*, (Tex. Civ. App. 1939) 130 S.W. (2d) 1114; *Asylum of St. Vincent De Paul v. McGuire*, 239 N.Y. 375, 146 N.E. 632 (1925). Contribution is an equitable doctrine and must be applied according to the equities of the parties involved. *Hoverson v. Hoverson*, 216 Minn. 228 at 235, 12 N.W. (2d) 501 (1943); *Carey v. McCaslin*, (Ohio App. 1942) 43 N.E. (2d) 519; *Lorimer v. Julius Knack Coal Co.*, 246 Mich. 214 at 217, 224 N.W. 362 (1929); 2 POMEROY, EQUITY JURISPRUDENCE, 5th ed., 157 (1941).

⁸ In re *McGlenn's Estate*, 55 Montg. (Pa.) 5 at 10 (1939); *Maresh v. Jennings*, (Tex. Civ. App. 1931) 38 S.W. (2d) 406.

⁹ See *Brown v. Hargraves*, 198 Va. 748, 96 S.E. (2d) 788 (1957). Cf. *Kennedy v. Camp*, 14 N.J. 390, 102 A. (2d) 595 (1954).

¹⁰ *Waters v. Waters*, 110 Conn. 342 at 345, 148 A. 326 (1929).

¹¹ See *Rell v. Combes*, 25 Ohio App. 476, 159 N.E. 133 (1927), finding that the duty to contribute ceases when all the proceeds of the joint debt have passed to the paying obligor. Similarly, it has been held that the measure of liability to contribute is determined by the proportionate interest of each obligor in the proceeds of the joint debt. See *Maresh v. Jennings*, note 8 supra.

¹² *Gafford v. Tittle*, 224 Ala. 605 at 608, 141 S. 653 (1932); *Dennig v. Meckfessel*, 303 Mo. 525 at 530, 261 S.W. 55 (1924).

¹³ Principal case at 565.

mortgage would be foreclosed in the event of default means the widow has received not only the proceeds of the debt but the practical burden of its payment as well. To base the right to contribution in such circumstances solely on the fact of discharge of legal liability is to make the doctrine of contribution one of form rather than substance.¹⁴

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¹⁴ See *Rell v. Combes*, note 11 *supra*, where the court refused to make legal liability alone the test for determining the question of contribution.