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BANKRUPTCY—TENANCY BY THE ENTIRETIES—CREDITOR'S RIGHT AGAINST ENTIRETY PROPERTY AFTER DISCHARGE OF HUSBAND IN BANKRUPTCY—The United States as assignee sought a joint judgment on four unsecured promissory notes signed by the defendants, who are husband and wife. The husband had filed in bankruptcy before the assignment of the notes to plaintiff and was discharged from all debts filed in the bankruptcy proceeding schedules (including the instant debt) prior to any action on these notes. His estate by the entireties, however, was not used to satisfy any listed debts. *Held*, plaintiff is entitled to proceed to judgment. A discharge in

bankruptcy limits only the sources available for satisfaction. *United States v. Fetter and Fetter*, (D.C. Mich. 1958) 163 F. Supp. 10.

Although an estate by the entirety at common law was subject to the husband's control¹ and to the claims of his creditors,² the wife could not be deprived of her right of survivorship in the estate.³ Her indefeasible right rendered the estate valueless as a means of obtaining credit.⁴ One result of the enactment of married women's property acts⁵ was that the entirety estate became available to joint creditors⁶ and accordingly became a valuable source of obtaining credit for a husband and wife.⁷ Generally under these acts neither party alone has an alienable interest in the estate⁸ or any interest available to his individual creditors.⁹ This immunity from individual creditors results in the exclusion of the entirety estate from the property used to satisfy creditors in a bankruptcy proceeding against either spouse, since the Bankruptcy Act does not provide for joint discharges.¹⁰ And the result of an individual discharge is to release a person from all debts, individual and joint.¹¹ Consequently, the creditor, who must get a joint judgment in order to perfect a lien on the entirety property,¹² may be

¹ 2 TIFFANY, REAL PROPERTY, 3d ed., §435 (1939).

² *Id.*, §434.

³ MADDEN, PERSONS AND DOMESTIC RELATIONS 125 (1931). See *Edwards & Chamberlin Hardware Co. v. Pethick*, 250 Mich. 315 at 319, 230 N.W. 186 (1930). See also 82 A.L.R. 1235 (1933).

⁴ At common law a married woman could not affect her interest in property by a conveyance. See *Albany Fire Ins. Co. v. Bay*, 4 N.Y. 9 at 12 (1850).

⁵ Mich. Comp. Laws. (1948) §557.51, Sec. 1. This act is illustrative of the usual purpose of married women's property acts; that is, to abrogate the common law disability of the wife to contract and become liable jointly with her husband.

⁶ Mich. Comp. Laws. (1948) §557.53, Sec. 3. "Hereafter the real estate of the husband and wife owned by them as tenants by entirety . . . shall be liable to seizure and sale on execution . . . in satisfaction of any judgment which has been recovered against the persons who were at the time of the execution of such written instrument husband and wife jointly or the survivor upon any instrument signed by both."

⁷ The court in *Edwards & Chamberlin Hardware Co. v. Pethick*, note 3 *supra*, points out at 319 that one purpose of the statute was to alleviate the difficulty of obtaining credit by a husband and wife whose only property interests were held by the entirety.

⁸ By the nature of the estate by the entirety it cannot be disposed of without the assent of both husband and wife. *Schram v. Burt*, (6th Cir. 1940) 111 F. (2d) 557 at 561. But see 141 A.L.R. 179 (1942), for discussion of the abolishment of estates by the entirety by some married women's acts.

⁹ For an extensive discussion of the interest of either spouse in entirety property being subject to individual creditors, see 166 A.L.R. 969 (1947).

¹⁰ The Bankruptcy Act provides that the discharge of one debtor will not affect the liabilities of his co-debtors, 30 Stat. 550, §16 (1898), 11 U.S.C. (1952) §34, and nowhere does it provide for a joint discharge of co-debtors. But see A3 CORP. REORG. 259 at 262 (1940) for cases where some bankruptcy courts have consolidated proceedings against a husband and wife to allow the tenancy by the entirety to be used for the satisfaction of their joint creditors.

¹¹ All provable claims are released by the discharge except those exempted by 30 Stat. 550, §17 (1898), 11 U.S.C. (1952) §35. See 1 COLLIER, BANKRUPTCY, Moore ed., §1727 (1956).

¹² *Dioguardi v. Curran*, (4th Cir. 1929) 35 F. (2d) 431 at 432.

prevented from doing so by the discharge of one spouse in bankruptcy. Yet it would seem that the debtor ought not to be allowed to keep the property used to obtain credit and at the same time escape liability on his debt. Thus courts face the dilemma of determining how to protect the joint creditor's right against the entirety estate without being in conflict with the Bankruptcy Act. It seems settled that the joint creditor may apply to the bankruptcy court for a stay of proceedings until he obtains in the state court a judgment and lien against the entirety property.¹³ A difficult problem arises, however, in finding a suitable theory for allowing the creditor to obtain a judgment and lien *subsequent* to the husband's discharge in bankruptcy. One line of cases has held that once the debtor is discharged, the creditor has lost all right to proceed against him.¹⁴ This seems unduly harsh in view of authority recognizing the purpose of the Bankruptcy Act to be to discharge a debtor from his personal debts in consideration for his giving up his property for liquidation among his creditors, and not to operate on property unavailable to the bankruptcy court.¹⁵ Other courts have used a variety of theories to allow the creditor to proceed against the estate after the husband's discharge. One theory used is that the creditor's action is *quasi-in-rem*, thereby circumventing the defense of a discharge from personal liability.¹⁶ While there may be some basis for this approach, as the creditor is seeking to establish his interest in particular property, still the creditor in such an action must be given the right to proceed against the debtor on the personal obligation. Another approach taken has been to regard the common law unity of the tenants by the entireties¹⁷ as a distinct entity which is subject to suit even though one or both of its members has been discharged from personal liability.¹⁸ This, however, appears to be creating a fiction to reach a desired result.¹⁹ The holding in the instant

¹³ *Echelbarger v. First Nat. Bank of Swayzee*, 211 Ind. 199 at 202-203, 5 N.E. (2d) 966 (1937). See *Wharton v. Citizen's Bank of Bosworth*, 223 Mo. App. 236, 15 S.W. (2d) 860 (1929); 82 A.L.R. 1235 (1933); *Phillips v. Krakower*, (4th Cir. 1931) 46 F. (2d) 764; 8 REMINGTON, BANKRUPTCY, Henderson ed., §3238 (1955).

¹⁴ *Wharton v. Citizen's Bank of Bosworth*, note 13 supra; *Dickey v. Thompson*, 323 Mo. 107, 18 S.W. (2d) 388 (1929). See also *Phillips v. Krakower*, note 13 supra.

¹⁵ *First Nat. Bank of Goodland v. Pothuisje*, 217 Ind. 1 at 12, 25 N.E. (2d) 436 (1940); *Echelbarger v. First Nat. Bank of Swayzee*, note 13 supra; *Phillips v. Krakower*, note 13 supra. "The rule is now well settled that the bankruptcy court has no jurisdiction to enforce a lien or claim on exempt property and that such matters must be litigated, usually in the state courts." 1 COLLIER, BANKRUPTCY, Moore ed., §6.05 (1956); 8 REMINGTON, BANKRUPTCY, Henderson ed., §3229 (1955).

¹⁶ *Edwards & Chamberlin Hardware Co. v. Pethick*, note 3 supra; *Kolakowski v. Cyman*, 285 Mich. 585, 281 N.W. 332 (1938); 8 REMINGTON, BANKRUPTCY, Henderson ed., §3229 (1955).

¹⁷ MADDEN, PERSONS AND DOMESTIC RELATIONS 123 (1931).

¹⁸ *First Nat. Bank of Goodland v. Pothuisje*, note 15 supra; 130 A.L.R. 1244 (1941). See notes, 89 UNIV. PA. L. REV. 1073 at 1080-1081 (1941); 53 HARV. L. REV. 1389 at 1390 (1940).

¹⁹ See note, 53 HARV. L. REV. 1389 at 1390 (1940).

case suggests a more suitable rationale. A discharge in bankruptcy is treated only as limiting the sources of property available for satisfaction. Thus since the estate by the entirety is unavailable to general creditors of the individual bankrupt, the bankruptcy proceeding has no effect on such property. This property is still available to those who have the right to proceed against it. Taken together with the view that a discharge in bankruptcy does not destroy the debtor's liabilities but rather provides him with an affirmative defense,²⁰ a sound basis has been supplied for allowing the joint creditor to proceed against the entirety property even after discharge of the individual debtor in bankruptcy.

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²⁰ "Discharge in bankruptcy is an affirmative defense and it cannot be presumed that the discharged debtor will plead it" (as a bar to the enforcement of the creditor's judgment). 1 COLLIER, BANKRUPTCY, Moore ed., §16.06 (1956); *First Nat. Bank of Goodland v. Pothuisje*, note 15 *supra*, at 7 and 8.