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PERSONAL PROPERTY-TENANCY BY THE ENTIRETY IN UNITED STATES SERIES "E" SAVINGS BONDS

William E. Beringer
University of Michigan Law School

PERSONAL PROPERTY—TENANCY BY THE ENTIRETY IN UNITED STATES SERIES "E" SAVINGS BONDS—A trustee in bankruptcy petitioned the referee to order a

bank to turn over certain United States Series "E" Savings Bonds as assets of the bankrupt's estate. The bonds were payable to the bankrupt "or" his wife and had been pledged to the bank by the bankrupt, with his wife's consent, as collateral for a personal loan. The referee denied the petition. On appeal, *held*, affirmed. Since the bonds were payable to persons who were husband and wife, a tenancy by the entirety was created, with each tenant holding an interest in the whole of the bond property. Neither tenant could alienate his own interest, and thus destroy the interest of the other, without the other's consent. Since the wife's consent to the pledging was held not to be consent to alienation, the bankrupt's estate could not use bonds to pay his creditors. *In re Smulyan*, (D.C. Pa. 1951) 98 F. Supp. 618.[1]

Co-ownership in United States Series "E" Savings Bonds is created in the same way as co-ownership in a common law tenancy by the entirety: title to the same property vests at the same time in persons who are in fact husband and wife.[2] The requirement that bond co-owners take title as husband "or" wife is no ground for distinction.[3] While "or" may be somewhat more consistent with a tenancy in which the co-owners have separable interests, by itself it hardly manifests a legislative intent to forbid tenancies by the entirety. Nor has "or" prevented creation of such a tenancy in joint bank accounts.[4] However, the kinds of co-ownership created in the bonds and in the common law tenancy by the entirety are fundamentally different.[5] The most characteristic incident of co-ownership in the tenancy is that neither tenant may alienate the tenancy property without the consent of the other.[6] Yet, according to the Treasury Regulations, either co-owner of a bond, without the consent of the other co-owner, may alienate the bond by cashing it in full at any bank; may, under certain limitations, pledge the bond to secure an obligation as surety or principal borrower; and may, perhaps, have his interest reached by his creditors or their representatives.[7] The court in the principal case attempted to explain away this

[1] Until the decision of the federal court in the principal case, the question whether a tenancy by the entirety could exist in Series "E" bonds had apparently been litigated only in the lower courts of Pennsylvania. The federal court adhered to the holding of the majority of those courts. See Bowie Estate, 73 Pa. D. & C. 264 (1950); Halstrick v. Halstrick, 56 Pa. D. & C. 349 (1946). *Contra:* Yocum v. Yocum, 46 Schuyl. Leg. Reg. 165 (1951); Ruben v. Ruben, 95 Pitts. Leg. J. 65 (1947), criticized in 95 UNIV. PA. L. REV. 799 (1947).

[2] 1 TIFFANY, REAL PROPERTY, 1st ed., 379 (1903).

[3] There may be only two co-owners, who need not be husband and wife; and they must take title with "or" between their names. 31 C.F.R. (1949) §316.5(a)(2).

[4] According to Madden v. Gosztonyi Savings & Trust Co., 331 Pa. 476 at 486-487 (1938), the effect of "or" is to give to each co-owner "an immediate expression of authority, of agency to act for both" in cashing the account himself; the effect of "and" is to necessitate that both co-owners sign for the cash. *Accord:* Hagerty v. Hagerty, (Fla. 1951) 52 S. (2d) 432. See, also, State v. Progressive Building & Loan Assn., 174 Tenn. 597, 129 S.W. (2d) 513 (1938). *Contra:* Marble v. Treasurer and Receiver General, 245 Mass. 504, 139 N.E. 442 (1923).

[5] However, both co-ownerships provide for survivorship: 31 C.F.R. §315.46(c); TIFFANY, REAL PROPERTY, 1st ed., 381 (1903).

[6] TIFFANY, REAL PROPERTY 381 (1903), note 2.

[7] 31 C.F.R. §§315.45, 315.12, 315.13, 315.13(b) and 315.13(c).

inconsistency by saying that if a co-owner cashed the bond without consent a tenancy by the entirety would be impressed on the cash.[8] But the court fails to meet the issue. The fact remains that a single co-owner can execute a valid conveyance of tenancy property.[9] Existence of the tenancy in the bond is not proved by existence of the tenancy in the cash. Thus, it seems clear that tenancy by the entirety is an inaccurate description for bond co-ownership. This inaccuracy becomes significant, however, only if the nonalienability rule of a tenancy by the entirety can thereby operate in a situation not specifically covered by the Treasury Regulations. The regulations clearly provide for a general rule of nontransferability subject to several exceptions.[10] The scope of one of these exceptions, the one involved in the principal case, is ambiguous. A trustee in bankruptcy has the right to obtain payment on the bankrupt's bonds "to the extent of [the co-owner's] interest therein."[11] It can be contended that "extent" of interest may be defined in terms of kinds of interest, such as a tenancy by the entirety, instead of in terms of proportion of interest as determined, for example, by the number of co-owners. If so defined, the tenancy's rule of nonalienability becomes operative as a supplement to the regulations and prevents the trustee from obtaining any payment at all.[12] On the other hand, it can also be contended that when the trustee is given the right to obtain payment to the "extent" of the bankrupt co-owner's interest, the trustee is permitted to obtain some payment, but in an amount measured by the proportionate interest of the bankrupt co-owner. It is submitted that this construction is the more correct one. It is more consistent with the plain meaning of the regulation, and, in addition, prevents an inaccurate conception of a tenancy by the entirety from being used to construe a limitation upon the right of the trustee, which, in view of the many married persons co-owning Series "E" Bonds, makes the trustee's rights largely useless.

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[8] The court did not explain how a tenancy whose distinguishing characteristic is nonalienability can exist in property which is negotiable.

[9] Thus, the remedy of the nonconsenting co-owner is a suit against the cashing co-owner for a share of the cash. Berhalter v. Berhalter, 315 Pa. 225 at 229, 173 A. 172 (1934). A tenancy by the entirety could not be partitioned at common law. TIFFANY, REAL PROPERTY 403 (1903).

[10] Nontransferability: 31 C.F.R. §315.11; right to redeem the bond at a bank: §315.45; limited right to pledge the bond: §315.12; and attachability by trustee in bankruptcy, receiver of an insolvent, and a judgment creditor: §§315.13, 315.13(b) and 315.13(c).

[11] 31 C.F.R. §§315.13, 315.13(b) and 315.13(c). Others having this right are the receiver of an insolvent and a judgment creditor.

[12] The court in the principal case did not mention this regulation, but the result of the case is consistent with the construction of the regulation suggested here, and perhaps this explains the court's silence.