

# Real Property - Widow Not Entitled to Contribution for Mortgage of Property Held by the Entireties - *In re Keil's Estate*, 145 A.2d 563 (Del., 1958)

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dry ice would explode, the lack of such knowledge will not preclude a finding of negligence.<sup>12</sup> The *Rataj* and *Tidwell* cases, in holding that dry ice is a dangerous substance, appear to follow more closely the standards of tort liability and negligence evidenced by numerous American decisions.

<sup>12</sup> *LeJeune v. General Petroleum Co.*, 13 P.2d 1057 (1932); *Easler v. Downie Amusement Co.*, 125 Me. 334, 133 Atl. 905 (1926).

### REAL PROPERTY—WIDOW NOT ENTITLED TO CONTRIBUTION FOR MORTGAGE OF PROPERTY HELD BY THE ENTIRETIES

Aaron Keil and his wife Ada Keil acquired property as tenants by the entirety in 1954. In April 1956 Aaron and his wife borrowed \$8,000 to be used to improve the land. This debt was evidenced by a joint bond payable in five years and secured by a mortgage on the property. Aaron died in August 1956 and at the time of his death nothing had been paid on the debt. The estate proceedings took place in the Orphan's Court of New Castle County, Delaware. The widow contended that (1) the will evidenced an intention to exonerate her from all liability on the debt; and (2) if not entitled to be fully exonerated, she had a right to contribution for one half the debt. The widow was denied relief on both grounds, and appealed to the Supreme Court of Delaware, renewing both contentions. The Supreme Court also denied the first contention but affirmed the right of the widow to contribution for one half of the \$8,000 debt. *In re Keil's Estate*, 145 A 2d 563 (Del., 1958).

The question before the court was: If a husband and wife jointly incur a debt which is secured by a mortgage on property held by them as tenants by the entirety, and one spouse dies, does the surviving spouse have a right of contribution of one half the common debt from the estate of the decedent?

The Supreme Court of Delaware, in settling this issue for the first time in its history, passed upon a question of which there is much disagreement in the various courts of this country. The basis for reversing the lower court's decision was that the right of contribution exists independently of the interest each tenant has in the property. Therefore the survivorship feature of tenancy by the entirety in no way affects the right of contribution of one half the common debt claimed by the surviving spouse. The leading case in support of this position is *Cunningham v. Cunningham*,<sup>1</sup> which involved the right of contribution by the widow out of the deceased husband's estate for a proportionate share of a purchase money mortgage indebtedness. The court upheld the widow's claim, saying that

<sup>1</sup> 158 Md. 372, 148 Atl. 444 (1930).

in the absence of proof rebutting the presumption of equal liability of husband and wife as principals, they are co-principals. "As between Joint and Equal Principals, the right of proportionate contribution exists, and that right is assertable against the estate of a deceased co-principal."<sup>2</sup>

The rationale of such a decision is based on principles of equity. Since the payment of the debt is for the benefit of both joint obligors, the one discharging the whole obligation is entitled to contribution from the other.<sup>3</sup> It is emphasized in the principal case that the indebtedness of the deceased estate to the mortgagee is not affected, but that the question of contribution is between the joint obligors only.<sup>4</sup>

The opinion in the *Keil* case ignores the fact that the deceased and the appellant were tenants by the entirety of the property in question. Tenancy by entirety rests on the common law concept of spousal unity. That unity terminates upon the death of either one of the co-tenants. Each is seised of the whole. Hence death of one spouse causes no enlargement or change in the estate of the surviving spouse. The spouse which survives always owned the whole.<sup>5</sup> Thus upon death of either spouse the estate of the deceased spouse becomes divested of any interest in the property and to compel contribution would be to have the estate pay part of a debt on property in which the estate has no interest.<sup>6</sup>

The basis of contribution is equality, each co-tenant contributing a proportionate share of the indebtedness. The American Law of Property supports this position by saying "Each stands in the same situation in his relation to the property, and reason and justice as administered by equity require that each pay a proportionate share of the burden."<sup>7</sup> However as mentioned above each of the co-tenants in the principal case do not stand in the same situation in relation to the property. The deceased is completely divested of his interest. The Restatement of the Law of Restitution in supporting the right of contribution among co-tenants explains that the tenant who satisfies the debt has protected the interest of the other co-obligor.<sup>8</sup> In the case before us there is no interest to protect.

<sup>2</sup> *Ibid.*, at 374, 447. See *In re Dowlers Estate* 368 Pa. 519, 84 A.2d 209 (1951); *Brady v. Brady*, 110 Md. 656, 73 Atl. 567 (1909).

<sup>3</sup> *In re Kershaws Estate*, 352 Pa. 205, 42 A.2d 538 (1945); *Nobile v. Bartletta*, 109 N.J. Eq. 119, 156 Atl. 483 (1931); *Long Estate*, 65 Pa. District & County 95 (1949); *Commerce Union Bank v. Weis*, 27 Tenn. App. 433, 181 S.W.2d 764 (1944).

<sup>4</sup> 13 Am. Juris. Contribution, § 60, p. 55.

<sup>5</sup> Powell, *Real Property*, Vol. 4, Sec. 624 (1958).

<sup>6</sup> *Lopez v. Lopez*, 90 S.2d 456 (Fla. 1956); *In re Dowlers Estate*, 368 Pa. 519, 84 A.2d 211 (1951); *Ratte v. Ratte*, 260 Mass. 169, 156 N.E. 870 (1927); *Geldart v. Bank of New York*, 209 App. Div. 581, 205 N.Y.S. 238 (1924).

<sup>7</sup> American Law of Property, Vol. 2, Sec. 6.12 (1952).

<sup>8</sup> Restatement of the Law of Restitution, Sec. 85, p. 377 (1937).

The joint debt which Aaron and Ada Keil incurred was \$8,000. Assuming the property to be worth \$20,000 each had an equity of \$12,000, since as tenants by the entirety they were both seised of the whole. To allow contribution of \$4,000 to Ada Keil would give her an equity of \$16,000. If she were to pay the whole debt her equity would remain \$12,000. Thus when her husband died Ada Keil suffered no detriment. In addition the \$8,000 was used for improvements to the land of which she is now sole owner. It therefore seems inequitable for the estate of a deceased tenant by the entireties.<sup>9</sup>

<sup>9</sup> Tenancy by the entirety is not a recognized type of property holding in Illinois. See *Douds v. Fresen*, 392 Ill. 478, 64 N.E.2d 729 (1946); *Lawler v. Byrne*, 252 Ill. 194, 96 N.E. 892 (1911). Non-recognition of tenancy in the Married Woman's Act of 1861, Laws 1861, p. 143.

### TAXATION—UNION STRIKE BENEFITS HELD NOT TO CONSTITUTE INCOME UNDER INTERNAL REVENUE CODE

Plaintiff brought suit to recover taxes imposed by the Commissioner upon strike benefits received from the United Automobile Workers during the early stages of the now famous Kohler strike. At the trial,<sup>1</sup> the presiding judge reserved ruling on the Commissioner's motion for a directed verdict and submitted the case to the jury for a determination of whether the payments in question constituted a gift. The jury returned a verdict in favor of the taxpayer on this issue, whereupon the judge set aside the verdict and granted the Commissioner's motion for a directed verdict. On appeal, the court of appeals for the Seventh Circuit reversed, holding that strike benefits do not constitute income within the meaning of the Internal Revenue Code.<sup>2</sup> In addition, the court held that the particular receipts involved in this case were gifts and, therefore, expressly exempted from taxation by Section 102 of the Code.<sup>3</sup> *Kaiser v. United States*, 267 F.2d 367 (C.A. 7th, 1958).

One of the most perplexing problems in the interpretation of the Internal Revenue Code, taxability of strike benefits, is presented by the instant case. This decision raises serious questions of law and policy which doubtless will not be put to final rest unless and until the Supreme Court takes the case.

<sup>1</sup> The proceedings in the district court are reported in *Kaiser v. United States*, 158 F. Supp. 865 (E.D. Wis., 1958).

<sup>2</sup> The definition of gross income set forth in Section 61(a) is pivotal to all the income tax provisions in the Code. Only those receipts which are encompassed within this definition are subject to taxation.

<sup>3</sup> Section 102(a) provides: "Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance."