**Hastings Law Journal**

Volume 8 | Issue 3 Article 10

1-1957

# Real Property: Joint Ownership--Right of Survivorship as Affected by Murder of One Co-Tenant by Another

Leo Andrade

The adequacy of this remedy is questionable. The foundation of the protest must be that the owner has been deprived of all beneficial use of the property, but the taking is not confirmed until the passage of title to the condemner, which may not occur during the period provided by this statute for commencement of an action.[22] The court may feel that an allegation of a mere possibility of injustice without any force or coercion on the part of the taxing authority does not constitute a cause of action.[23] It might also construe the payment as voluntary even though made under protest.[24] The costs of the action will be thrown upon the condemnee, as the taxing authority is acting within its right.

An appeal to the local board of equalization[25] would be fruitless, as it appears that the board has no power to strike out or cancel an assessment,[26] but only to raise or lower it.

Payment of taxes or assessments into court by the condemnee pending the outcome of the proceedings would also be inadequate. The condemnee would be forced to bear costs and would be deprived of the use of his money during the proceedings.

It seems that if a remedy which will meet all circumstances is to be found, it must come from the legislature. The writer suggests enactment of the following provision as a just and adequate solution:

> Where there has been a taking under court order by the condemner of such a nature as to deprive the condemnee of a substantial part of the beneficial use of his property, taxes and special assessments that accrue against the property shall not be deemed payable until the award of compensation, or abandonment by the condemnee, terminates the proceedings in eminent domain. Such taxes or assessments may then be enforced only against the legal owner at the termination of the proceedings.

This test is more liberal than the one set out in *People v. Peninsula Title Guarantee Co.* in that it does not require a physical change in the propery—mere possession by the condemner and exclusion of the condemnee would be sufficient grounds for its application—and all the rights of all the parties would seem to be adequately protected.

*Charles C. Ringwalt Jr.*

---

REAL PROPERTY: JOINT OWNERSHIP—RIGHT OF SURVIVORSHIP AS AFFECTED BY MURDER OF ONE CO-TENANT BY ANOTHER

In recent years the popularity of joint ownership of real and personal property has increased. The convenience of such a relationship both during the term of tenancy and upon its dissolution by the death of the other co-tenant(s) has been inviting. However, it is paradoxical that the incident of joint ownership which has offered perhaps the most appeal, the right of survivorship, should prove, at times, to be an enigma, perplexing to even the most learned courts and authorities. No-

[22] Cameron v. Smith, 50 Cal. 303 (1875).

[23] Benson v. City of Long Beach, 61 Cal. App. 2d 189, 142 P.2d 440 (1943); Bolton v. Terra Bella Irr. District, 106 Cal. App. 313, 289 Pac. 678 (1930).

[24] Southern Service Co. v. Los Angeles County, 15 Cal. 2d 1, 97 Pac. 963 (1940), *appeal dismissed,* 310 U.S. 610 (1940); Maxwell v. County of San Luis Obispo, 71 Cal. 466, 12 Pac. 484 (1886).

[25] CAL. REV. AND TAX. CODE § 1605.

[26] People v. Pacific Mail Steamship Co., 50 Cal. 282 (1875); People v. Ashbury, 46 Cal. 523 (1873).

where have the horns of this dilemna shown themselves to be sharper than in the fact situation confronting the Indiana court in the case of *National City Bank of Evansville v. Bledsoe*.[1]

During their marriage, Bynus and Thelma Bledsoe acquired as tenants by the entireties, certain real estate in Evansville, Indiana. Sometime thereafter Bynus "shot, killed and murdered"[2] his wife, Thelma, and later committed suicide. Suit was brought by the personal representative of the wife's estate against the personal representative of the husband's estate claiming title to the realty previously held by the entireties. The plaintiff argued that the general rule of survivorship which would ordinarily operate to give the surviving spouse sole and exclusive ownership of the property in question was inapplicable when that tenancy was dissolved by the murder of one co-tenant by the other.

Essentially, the problem at bar was whether the wrongdoer, as sole survivor, should be allowed to benefit from his iniquity. The Appellate Court of Indiana, with two judges dissenting, answered in the affirmative by holding that the whole of the property in question vested in the murdering spouse, arriving at this result by a mechanical application of the rule of survivorship.

Before further discussion on the merits of the question posed by the Bledsoe case, it would perhaps be profitable to state briefly some of the pertinent legal aspects of the tenancies involved. The Bledsoes held the property as tenants by the entireties, a tenancy based on the common law fiction that the husband and wife are one.[3] This form of ownership is essentially a type of joint tenancy but has certain unique qualities which set it apart.[4] However, the problem under consideration is inherent in all cases where land is owned jointly, whether by the entireties or joint tenancy.

Tenancies by entireties and joint tenancies are alike in that each co-tenant is said to be seised of the whole subject only to the rights of the other co-tenant(s).[5] The two most prominent distinctions between them are: (1) while the former is limited to two persons, husband and wife, the latter may encompass any number of co-tenants, and (2) in the former there can be no severance effected unilaterally during the coverture to the prejudice of the right of the survivor, while in the latter a severance can be accomplished by the conveyance of his interest by one joint tenant to a stranger.[6] The distinguishing feature of both these tenancies is the right of survivorship which gives the whole of the interest to the surviving tenant upon the death of his co-tenant(s), the survivor becoming a tenant by severalty, viz, holding in his own right to the exclusion of all others.[7] It is the application of this rule of law to the peculiar facts in the Bledsoe case which raises doubt as to its efficacy as a rule of universal application.

The Indiana court reasoned that since the rules respecting survivorship as an incident to tenancies by entireties are "universally recognized,"[8] to alter their operation without the aid of express statutory authorization would amount to judicial

---

[1] .....Ind. App....., 133 N.E.2d 887 (1956).
[2] *Id.* at ....., 133 N.E.2d at 888.
[3] 3 TIFFANY, REAL PROPERTY § 418, 430 (1939).
[4] *Id.* at § 419, 430.
[5] *Id.* at § 430.
[6] *Ibid.* See comment, 8 HASTINGS L.J. ..... (1957).
[7] 3 TIFFANY, REAL PROPERTY § 430.
[8] .....Ind. App. at ....., 133 N.E.2d at 891.

usurpation of the purely legislative function of policy making. This position has found support in other decisions dealing with the same problem.[9]

Further justification for refusing to place any limitation on the rights of the surviving tenant has been found in the existence of constitutional provisions prohibiting forfeiture of estate or corruption of blood as a punishment for criminal acts.[10] It is argued that, since the murder was seised of the whole estate in question from the time of the grant, upon the death of his co-tenant(s) he acquired no new interest. To deny his right of survivorship would be to visit such a forfeiture.[11]

When presented with the argument that it would not be just to allow the murderer to succeed to the whole of the property formerly held by entireties, the court in *Oleff v. Hodapp*,[12] figuratively shrugged its shoulders and inquired: "How can we *logically* take his *own* property away from him?" (Emphasis added.)[13]

It is this statement which demonstrates the strength and belies the weakness of the position taken by the above courts. Their argument is founded on the two premises stated previously, viz, the immunity of the established rule of survivorship from judicial alteration, and the presence of a vested interest in the whole of the property in the murderer which is insulated from forfeiture. The *logical* application of these premises to facts like those in the Bledsoe case leads unavoidably to a judgment against the victim's representatives. However, this patently inequitable result has led many courts and writers to analyze and challenge the aforementioned premises in an effort to arrive at a more just solution.

The equitable maxim which holds that no one may take advantage of his own wrongdoing[14] has been emphatically asserted by many learned courts and authorities to refute the argument that to alter the strict operation of the common law rule of survivorship is a task without the province of the court. Singularly apt is the following quotation by Justice Cardozo:

> "The social interest served by refusing to permit the criminal to profit by his crime is greater than that served by the preservation and enforcement of legal rights."[15]

This idea has found support in judicial opinions which refuse to adhere to the strict letter of the common law when equitable principles intervene.[16] That there shall be no profit from crime is a concept which enters by necessary implication into all laws.[17] Nor can the resort to such a well established maxim be termed judicial legislation.[18]

As to the proposition that the killer acquires no new interest, viz, that what he realizes through survivorship was his own all the time, it is submitted that the surviving co-tenant does in fact acquire additional legal interest to which he would not otherwise be entitled. In both a joint tenancy and one by the entireties, enjoyment of the property is shared equally.[19] During the continuance of the co-own-

[9] Sherman v. Weber, 113 N.J. Eq. 455, 167 Atl. 517 (1933); Wenker v. Landon, 161 Ore. 265, 88 P.2d 971 (1939); Smith v. Greenberg, 121 Colo. 417, 218 P.2d 514 (1950).

[10] See, *e.g.*, MINN. CONST. art. I, § 11; Mo. CONST. art. II, § 13.

[11] Beddingsfield v. Estell and Newman, 118 Tenn. 39, 100 S.W. 108 (1907).

[12] 129 Ohio St. 432, 195 N.E. 838 (1935).

[13] *Id.* at 434, 195 N.E. at 841.

[14] CALIF. CIV. CODE § 3517.

[15] CARDOZO, THE NATURE OF JUDICIAL PROCESS 43 (1921).

[16] Barnett v. Couey, 224 Mo. App. 913, 27 S.W.2d 747 (1930).

[17] People v. Schmidt, 216 N.Y. 324, 110 N.E. 945 (1915).

[18] Budwitt v. Herr, 339 Mich. 265, 63 N.W.2d 841 (1954).

[19] 3 TIFFANY, REAL PROPERTY § 418, 435 (1939).

ership, exclusive enjoyment is merely a contingency. Here the survivor by his felonious act has eliminated the necessity of sharing this enjoyment, and further, he has destroyed the possibility that, in the natural course of events, he might have pre-deceased his victim who would thereby become himself vested with the sole and exclusive ownership.

In the case of a joint tenancy, the killer has also foreclosed any possible severance worked by the unilateral act of his deceased co-tenant which would have effectively destroyed any right of survivorship. In a tenancy by entirety, while no severance could have been achieved by the sole act of the murdered spouse, the survivor may now dispose of the property without the cooperation of his spouse, something which he could not have done had he or she remained alive. Therefore, although all these interests might have devolved on the wrongdoer in any event, they were, prior to the death of his co-tenant, merely the subjects of chance. Having eliminated this element of chance, the killer has in fact acquired new interests, and to refuse to allow such an inequitable acquisition visits no constitutionally proscribed forfeiture.[20]

If it can then be said that the foregoing arguments successfully assail the position of those courts concurring with the result reached in the principal case, the question is raised: what is the proper solution?

Those courts which have on similar facts, reached a result contrary to the decision in the Bledsoe case have been as one in basing their conclusion on the equitable doctrine referred to above.[21] However, they have evidenced little if any disposition toward unanimity as to how the doctrine should be applied.

The position which seems to achieve the most satisfactory compromise among those authorities that would deny to the survivor any benefit from his crime, is that accomplished through the vehicle of the constructive trust. Through this device, legal title is allowed to vest (or remain vested) in the survivor, but subject to a beneficial interest over in the deceased's estate. This gives effect to the letter of the common law of survivorship, and at the same time makes certain that the slayer realizes no ill-gotten gains.

Dean Ames, in posing a hypothetical situation where B and C are joint tenants in fee simple and B murders C,[22] says:

> "Each joint tenant has a vested interest in a moiety of the land as long as he lives, and a contingent right to the whole upon surviving his fellow. The vested interest of C, the murderer, cannot be taken away from him even by a court of Equity. But C, having by his crime taken away B's vested interest, must hold that as a constructive trustee for the heirs of B; and, it being impossible to know which of the two would have outlived the other, equity would doubtless give the innocent victim the benefit of the doubt . . ."[23]

The result must be accomplished by a court of equity, forcing the survivor to give up that which he has gained by force of the common law.[24]

---

[20] 4 SCOTT, THE LAW OF TRUSTS § 493.2 (2d ed. 1956): "The enlargement of his interests is recognized in the decisions which hold that an estate tax or inheritance tax can be imposed on the death of one of two joint tenants." *Accord,* 3 BOGERT, TRUSTS AND TRUSTEES § 478; RESTATEMENT, RESTITUTION § 188 (1936).

[21] See, *e.g.,* Budwitt v. Herr, 339 Mich. 265, 63 N.W.2d 841 (1954).

[22] Ames, *Can a Murderer Acquire Title and Keep It?* in LECTURES ON LEGAL HISTORY 321 (1913).

[23] *Ibid.*

[24] *Ibid.*

In accord with this analysis is the Restatement of Restitution,[25] which spells out the interests suggested by Dean Ames, i.e., the murderer takes the whole of the legal estate subject to a trust in favor of the victim's estate except as to one-half the income for the life of the survivor.[26]

Professor Bogert, in his work on trusts,[27] agrees that any practical benefit derived by the survivor from the murder of his co-tenant should be placed in constructive trust for the benefit of the decedent's successors, but would base the determination as to the quantum of the trust upon the relative life expectancies of the parties. If the murderer's expectancy is the greater, the trust impressed would only be for one-half the estate for the duration of the victim's expected life, and at the expiration of that time the ownership of the whole, both legal and equitable, would vest in the survivor. Should the decedent's expectancy be greater, the trust would be as to the whole of the property, subject to an estate in one-half for the duration of the expected life of the murderer.[28]

Nor should it be necessary, in order that the trust may be impressed, that the murderer kill for the purpose of acquiring the property in question.[29]

The use of a constructive trust in these situations obviates the constitutional objections possibly arising from the result achieved by the New York court in *Van Alstine v. Tuffy*,[30] where the court gave the whole of the property to the heirs of the murdered co-tenant, thereby forfeiting the vested interest of the murderer.

Also, its use is more easily rationalized under the rule of survivorship than is the rather strained reasoning of those courts which find a severance worked when one co-tenant feloniously causes the death of the other.[31] The property is then distributed as though it had been held by the murderer and his victim as tenants in common, one-half going to the decedent's estate and the other half to the murderer. This result appears to rest on one of two grounds. By way of analogy, it is reasoned that since a divorce works a severance of a tenancy by entireties, a fortiori, the slaying of one's spouse should have a similar effect. The alternative argument holds that before the rule of survivorship can be called into operation, there must be a survivor in legal contemplation, and this status cannot be attained by one who has murdered his co-tenant.

Another example of the judicial struggle to avoid benefiting the murderer under the rules of survivorship is found in the Wisconsin case of *In re King's Estate*.[32] Here the court held the murder of the co-tenant did not dissolve the joint tenancy, but that the murderer continued to hold as a joint tenant with the decedent's ad-

---

[25] RESTATEMENT, RESTITUTION § 188, comment *b* (1936).

[26] *Ibid.*; *accord,* Bryant v. Bryant, 193 N.C. 372, 137 S.E. 188 (1927).

[27] 3 BOGERT, TRUSTS AND TRUSTEES § 478 (1939).

[28] *Ibid.*; *accord,* Colton v. Wade, 32 Del. Ch. 122, 80 Atl.2d 923 (1951); Sherman v. Weber, 113 N.J. Eq. 451, 167 Atl. 517 (1933); *but cf.* Nieman v. Hurff, 11 N.J. 55, 93 Atl.2d 345 (1939).

[29] 3 BOGERT, TRUSTS AND TRUSTEES § 478 (1939); Wade, *Acquisition of Property by Wilfully Killing Another — A Statutory Solution,* 49 HARV. L. REV. 715, 723 (1936). *Contra,* Thomas, *Public Policy as Affecting Property Rights Accruing to a Party as a Result of Wrongful Acts,* 1 CALIF. L. REV. 397, 409 (1913).

[30] 103 Misc. 455, 169 N.Y.S.173 (1918).

[31] Ashwood v. Patterson, 49 So.2d 848 (Fla. 1951); Hogan v. Martin, 52 So.2d 806 (Fla. 1951); Cowan v. Pleasant, 263 S.W.2d 494 (Ky. 1953); Budwitt v. Herr, 339 Mich. 265, 63 N.W.2d 841 (1954); Grose v. Holland, 357 Mo. 874, 211 S.W.2d 464 (1948); Barnet v. Couey, 224 Mo. App. 913, 27 S.W.2d 757 (1930).

[32] 261 Wis. 266, 52 N.W.2d 885 (1952).