1-1-1960

Chapter 9: Security and Mortgages

Richard G. Huber

Follow this and additional works at: http://lawdigitalcommons.bc.edu/asml

Part of the Property Law and Real Estate Commons

Recommended Citation


CHAPTER 9

Security and Mortgages

RICHARD G. HUBER

§9.1. Tenancy by the entirety: Surviving tenant's right to contribution. Those common law forms of co-ownership of land, in which the surviving co-tenant takes the entire property, developed in an age when land was not usually an article of commerce. In those states in which joint tenancies and tenancies by the entireties survive, creditors' rights and security interests relating to the land are complicated by the necessity of imposing some logic and uniformity upon the commercial use of these estates. When land so held is subject to a mortgage the situation becomes even more complicated when one of the co-tenants dies. The mortgage debt, if a joint obligation of both parties, personally binds each, and the note both signed will bind the estate of the non-surviving tenant as well as the survivor. But the land subject to the mortgage now becomes totally the property of the survivor, and foreclosure of the mortgage would affect only his sole interest in the land, unless, of course, there was a deficiency.

When two persons are liable as principals on a debt the general rule is that the one who pays the debt is entitled to contribution from his co-obligor or from his estate if he is deceased. Some courts have, therefore, required contribution from the estate of a deceased joint tenant or tenant by the entirety on the theory that payment of the loan has relieved the estate of the deceased from a personal obligation on the note. This result is clearly logical if one considers only the personal obligations of the parties, but it ignores the underlying mortgage on the land involved. Since the surviving tenant will gain the entire bene-

RICHARD G. HUBER is Professor of Law at Boston College Law School and Editor in-Chief of the ANNUAL SURVEY.

The author wishes to thank John B. Deady and Paul G. Delaney of the Board of Student Editors of the ANNUAL SURVEY for research assistance in preparing this chapter.

Since many security matters are now governed by the Uniform Commercial Code and other commercial legislation, readers should consult Chapter 6 for discussion of other cases and statutes dealing with security.

§9.1. 1 See, e.g., the creditor's problems discussed in Huber, Creditors' Rights in Tenancies by the Entireties, 1 B.C. Ind. & Comm. L. Rev. 197 (1960).

2 See Note, 73 Harv. L. Rev. 425 (1959), for a brief discussion of contribution.

3 In re Keil's Estate, 145 A.2d 563 (Del. 1958); Cunningham v. Cunningham, 158 Md. 372, 148 Atl. 444 (1930); Nobile v. Bartletta, 109 N.J. Eq. 119, 156 Atl. 483 (1911); In re Dowler's Estate, 368 Pa. 519, 84 A.2d 209 (1951); In re Kershaw's Estate, 352 Pa. 205, 42 A.2d 538 (1945).
fit of relieving the land from the mortgage, some courts have denied contribution from the estate of the deceased tenant. This later view was adopted by the Supreme Judicial Court in the 1927 case of Ratte v. Ratte, wherein joint tenancies were involved. The Court held that the right of contribution depends upon “principles of equity obliging those who assume a common burden to bear it in equal proportions.” Since a common obligation no longer existed as to the land, the Court decided that to require contribution by the estate of the deceased joint tenant would be inequitable. The effect of the note making the joint tenants jointly and severally liable on the debt was ignored.

In Florio v. Greenspan, decided during the 1960 Survey year, a home was bought by a husband and his wife as tenants by the entireties. A loan of $20,000, secured by a mortgage on the property, was used as part of the purchase price. The husband died shortly after the loan was made and the widow continued to make the required monthly payments, reducing the balance on the note by some $3500 by the time of trial. In a declaratory relief action against the administrator of her husband’s estate she contended that the unpaid balance was an obligation of the husband’s estate or that, at least, his estate was liable for one half of the debt remaining at his death. The Supreme Judicial Court held that this case was controlled by the Ratte case and denied relief to the widow. Although a few differences in the incidents of joint tenancies and tenancies by the entireties exist, they are not material to this dispute, which involves essentially the incident of survivorship, which is common to both estates. The Court, while admitting that other states have reached opposite conclusions, preferred to continue to follow the Ratte rule.

The Massachusetts rule satisfies the general policy that a person who has received the entire ownership interest in property should bear the burdens thereof, but it is not very justifiable theoretically nor, in some

5 340 Mass. 642, 165 N.E.2d 753 (1960). See further discussion of this case in §1.7 supra.
6 The issue in this case as to whether the wife was a mere surety on the husband’s debt was decided against her below and sustained here as a finding of fact. Other questions raised did not have to be answered because of the manner in which the Court decided the case, but they involved the widow’s right to contribution when she had not paid more than a small portion of the debt and her right to bring a suit against the husband’s estate some years after it was probated.
7 Massachusetts treats the tenancy by the entirety as essentially a joint tenancy, the only major differences in incidents of the two estates being that a tenant by the entirety cannot sever the estate and that the husband controls the estate completely during the joint lives of the tenants. See Hoag v. Hoag, 213 Mass. 50, 99 N.E. 521 (1912).
8 It noted the cases cited in note 3 supra.
aspects, realistically. Theoretically, at least, the mortgage is merely security for the loan and the primary obligation is the personal one on the note. In addition, the Massachusetts rule does not recognize that inequalities are inherent in nearly every mortgage situation in which a tenancy with right of survivorship is involved; no court has ever held that if a husband has paid the entire mortgage debt on a tenancy by the entirety immediately prior to his death the wife would be liable to his estate for the payment or even one half of it. Yet, as to the sole question of benefit to the deceased co-tenant, this hypothetical case is exactly similar to the Ratte and Florio cases. Some unfairness will almost certainly occur in any case in which a mortgage is taken on property held with right of survivorship if one tenant pays more than his share of the debt and then dies. Of course, payment of more than one's share during life is a voluntary act, taken with an understanding of the effect that the survivorship incident may have, whereas requiring contribution from the estate of a deceased co-tenant would be an involuntary act forced upon the estate of a person who no longer has even the remotest of possibilities of gaining the entire estate. If, however, a tenant pays the debt and seeks contribution from the co-tenant, he can recover this contribution from the estate of his deceased co-tenant as long as the debt was paid prior to the co-tenant's death. The Massachusetts rule does thus give a different rule of contribution dependent upon whether or not the co-tenant survived the payment of the debt.

In two types of fact situations, blind application of the Massachusetts rule would result in possible unfairness, even if one concedes that the rule is generally equitable. If property has insufficient value to discharge the mortgage, the rule would seem to place the obligation of paying any deficiency only upon the surviving tenant, who now has sole ownership. The Court recognized the existence of this problem in its Florio opinion, but did not need to decide it. The solution, however, may be to find that since the mortgage is now extinguished upon foreclosure and sale and the suit for the deficiency is clearly upon the note, the personal obligation of the estate of the deceased co-tenant will be the same as in any case in which two parties have agreed to be jointly and severally liable upon a debt; thus, contribution to the extent of one half of the deficiency judgment paid would be granted.

The second fact situation in which the Massachusetts rule could operate inequitably would occur when the money from the loan was not used for purchase or improvement of the land but for a private enterprise of one co-tenant who then dies; here, of course, the Mas-

11 The mortgagee can, of course, unless restricted by statute, enforce his remedies concurrently or successively. 3 Jones, Mortgages §1565 (8th ed. 1928). As a matter of practice he will almost certainly go against the land in his first action, either joining or later bringing a suit for any deficiency.
13 This point has been discussed as an objection to the Massachusetts rule in the cases cited in note 3 supra and in Comment, 32 B.U.L. Rev. 253, 255 (1952).
14 The same problem will exist to a lesser degree when the money is used for
§9.2 SECURITY AND MORTGAGES

sachusetts rule would result in the surviving tenant having to pay the mortgage while the deceased co-tenant's estate would have the benefit of the funds borrowed. This fact situation is unlikely, however, except when the tenants are members of one family and the tenant who did not gain any benefit from the loan could be assumed to be willing to accept the risk. In a purely business tenancy relationship the party gaining no benefit from the loan should be responsible for protecting himself. If he fails to do so, the Court may very properly consider that he was either willing to assume the risk or that he intended to make a gift in this form if events caused him to have to pay back the entire loan.

The rule of the Ratte and Florio cases may well not be the better one but it does provide a guide for the solution of estate and business problems involving these types of estates. Any untoward effects of the rule in any particular fact situation can be avoided by proper estate or business planning. One may comment, however, that those states fortunate enough to have abolished through legislation those tenancies with right of survivorship need not worry about this problem.

§9.2. Discharge of mortgage: Mortgagor as executor of mortgagee's estate. The rule has been long established in Massachusetts that when a debtor is appointed executor or administrator of his creditor's estate, the debt is extinguished and is treated as paid and as estate assets in hand. The earliest case cited as establishing this proposition in the Commonwealth is Stevens v. Gaylord. The case, however, held that the debt was not extinguished but that the right of action was suspended. This distinction was approved in Winship v. Bass but seems thereafter to have been ignored. The Stevens case also stated that the debtor-executor could, in his account, treat the debt as extinguished but might not be required to do so. Language in Tarbell v. Parker also supports the concept that the relationship merely creates prima facie evidence of payment, which essentially would suggest that the debtor-executor could rebut the finding that his debt was paid. The case, however, did give the right of election to a successor administrator, which certainly qualifies the original debtor-executor's right. At least by the time that Tarbell v. Jewett was decided in 1880 the rule was fully established that payment occurs by operation of law.

This rule as to the automatic extinguishment of a debt has been applied in varying situations. Bassett v. Fidelity & Deposit Co. required the debtor-executor to account for the debt as an asset of his a joint enterprise of the two tenants but one in which their respective interests vary proportionately from their interests in the land.

§9.2. 1 11 Mass. 256 (1814).
2 II Mass. at 266-267.
3 12 Mass. 198, 202-203 (1815).
4 11 Mass. 256, 266 (1814).
7 184 Mass. 210, 68 N.E. 205 (1903).

http://lawdigitalcommons.bc.edu/asml/vol1960/iss1/12
creditor's estate despite the fact that prior to the debtor's appointment he was insolvent and the right against him worthless. In *Choate v. Thorndike* a surety appointed executor of the creditor's estate had the debts on which he was surety charged as paid and as estate assets. The Court has further held in this surety situation that the delinquent original debtor is absolved from liability to the estate. The rule has been limited consistently, however, by language stating that it would not “be allowed to go so far as to work wrong and injustice.” Thus, in *Kinney v. Ensign* the Court refused to release a mortgage when to do so would give a windfall to a subsequent purchaser, indicating that a distinction can be made between the debt, which was released, and the security, which was not. *Sigourney v. Wetherell* held the rule of constructive payment unavoidable but, on the question of release of securities, stated that whether it “would be so far regarded as actual payment, as to exonerate a surety, or discharge any other collateral liability, is a distinct question . . .”

*Barnes v. Lee Savings Bank* decided during the 1960 Survey year, applied the extinguishment rule. The plaintiff was the sole legatee and executrix of her father's estate. Sometime before his death he had transferred property to her and her husband, retaining a bond debt secured by a mortgage upon the property. This mortgage was later subordinated voluntarily by the decedent to a mortgage loan on this and other property given by the defendant bank to the plaintiff and her husband. Later, being involved in business difficulties, they gave a further mortgage to the defendant bank to compensate it for money owed and did not reveal the existence of the father's mortgage. Foreclosure under the first mortgage left a cash balance in the bank's hands. The plaintiff, as executrix, claimed a portion of this money for the estate as proceeds to which the second mortgagee was entitled; the bank contended that, since the debt secured by the second mortgage was treated as fully paid, it was entitled to the balance of the foreclosure proceeds under its third mortgage. The Supreme Judicial Court agreed with the bank, quoting the rule of debt extinguishment, and stating that a bond or mortgage securing the now extinguished debt was necessarily discharged along with the debt. The “wrong and injustice” limitation on this rule did not apply on these facts since the decedent apparently had no creditors and the debtor-executrix was sole legatee; his estate did not suffer by the application of the rule.

§9.3. Mortgages: Improvement loan. General Laws, c. 168, §35(10), provides that a savings bank may make a loan to the owner of improved real estate upon which it holds a mortgage for repairs and al-

8 138 Mass. 371 (1885).
9 Hazel v. Valentine, 113 Mass. 472, 479-481 (1873). The debtor was, of course, held to be liable to the surety.
11 Ibid.
12 6 Metc. 553 (Mass. 1842).
13 6 Metc. at 558.
terations to the property.\(^1\) Section 28A of G.L., c. 183, requires, in part, that, after the recording of the original mortgage, a mortgagee’s further loan to a mortgagor for repairs, taxes, or assessments is to be secured by the original mortgage to the extent that the aggregate balance of the original and second loans does not exceed “at any one time” the amount of the original loan. *Wellfleet Savings Bank v. Swift*\(^2\) involved the interaction of these two statutory provisions. The original owners of property secured a mortgage loan for $5300 from the plaintiff bank in 1953; in 1955 they borrowed an additional $1000, which apparently was a loan under G.L., c. 168, §35(10).\(^3\) In 1956 they sold the property to the defendant herein, “subject to a first mortgage in favor of [the plaintiff].” The defendant was unaware of the $1000 loan and refused to pay on the balance, although he paid on the original loan balance.\(^4\) The plaintiff bank sought permission to foreclose the mortgage. The lower court held for the plaintiff bank, finding that at no time did the amount outstanding and owed to the bank exceed the original amount of the mortgage; this finding is contested, since the only evidence of amounts due is testimony that the original loan had been reduced to $3770.52 and the Clause 10 loan to $636.19, as of the date of the hearing in this case, which was about two and a half years after the defendant had the property conveyed to him, and three and a half years after the Clause 10 loan was originally made.

On appeal the defendant contended that the Clause 10 loan is not subject to Section 28A and therefore is an unsecured loan made by the bank to the original owners of the property. The Court found it unnecessary to rule on this point,\(^5\) since they held that, even if Section 28A applied, no evidence existed as to the aggregate amount of the two loans except at a period well after the Clause 10 loan was originally made and well after the transfer of the property involved to the defendant. Although doubt exists as to the meaning of the Section 28A clause “at any one time,” which refers to the time of computation of the aggregate of original and additional loans, clearly it could refer to no time after the conveyance of the property to the defendant. If it did apply to a later time, this would subject the grantee to a new encumbrance at some time after he acquired the property at a time when it was not subject to the encumbrance; his payments would re-

\(\text{§9.3.} \quad 1\) The loans are often referred to as Clause 10 loans. The section limits these loans to $1500 on any one parcel of real estate and requires payment within five years, or on transfer of the mortgaged premises, or with the payment of the mortgage loan balance.


\(\text{3} \quad 340\) Mass. 62, 65, 162 N.E.2d 799, 801 (1959), the Court noting that it preferred not to decide this issue since no brief was filed nor argument made by the plaintiff bank.

\(\text{4} \quad \text{Evidence, and the stipulated facts, indicates that the original owners had paid some amounts on the $1000 loan after they sold the property to the defendant. Record, p. 5.}\)

\(\text{5} \quad 340\) Mass. 62, 65, 162 N.E.2d 799, 801 (1959), the Court noting that it preferred not to decide this issue since no brief was filed nor argument made by the plaintiff bank.
duce the aggregate of the two loans so that they would total less than
the amount of the original loan and then the additional loan would
become an encumbrance upon the property, being covered by the
mortgage given at the time of the original loan.

§9.4. Legislation. Acts of 1959, c. 505, added new sections to G.L.,
c. 140, which are designed to limit interest rates on certain home mort-
gages. These sections apply to loans of more than $1500 secured wholly
or in part by a mortgage on real estate of three or less households, as-
essed at no more than $10,000, and occupied in whole or in part by
the mortgagor. Maximum interest rates are limited to \( \frac{1}{4} \) per cent per
month on the unpaid balance of the loan; further interest limited to 1
per cent per month can be charged when default occurs. The legislation
was enacted to safeguard the rights of small property owners and
in effect represents an extension of the Small Loan Act. Acts of 1960,
c. 446, amended Section 90A of this new legislation but made no signi-
ficant changes of substance; greater clarity and better style were ob-
tained. The penalty of 1 per cent per month is now clearly indicated
to apply only to the unpaid balance of the actual loan and not to the
unpaid regular interest, thus avoiding any compounding of this in-
terest. A sentence permitting the borrower to pay the entire unpaid
balance without incurring any penalty was added but, since the statu-
tory language permits interest only at the maximum rate, it would
seem that no penalties could have been charged even under the lan-
guage prior to the amendment. The express statement of the no-
enalty provision will, however, avoid any possible difficulties of
interpretation, since it lays down a precise and certain rule for the
guidance of all parties. Borrowers under this act are less likely to
consult lawyers than are those with more extensive investments. Thus,
this act and similar protective statutes should spell out rights and
obligations with maximum clarity so that they can be understood by
a person inexperienced in interpreting statutory law.

General Laws, c. 255, §31D, gives a lien to those persons who clean,
store, or otherwise service clothing and household goods. If work is
done upon the goods by the lienor, or if the storage period is for a
specified period, the statute provides for a 90-day period after com-
pletion of the work or the end of the agreed storage period, at the end
of which the lienor can commence action leading to the sale of the
articles upon which the lien is imposed. The statute has, however,
specified a period of one year from the date of storage when the storage
is for an unspecified period before the lienor can commence his action
to sell the stored articles. Acts of 1960, c. 285, has changed this one
year period to 120 days. Since, after the end of the period, the lienor
must give notice to the owner of the clothes or goods, and 30 days are

§9.4. 1 Sections 90A-90D were added to the chapter.
2 G.L., c. 140, §§96-114A. This interpretation is supported by the $1500 minimum
loan, which is the maximum amount under the Small Loan Act, and the limited
application of this act to those persons who, by lack of business experience and
strong economic position, might require this protection.
allowed the owner to redeem the articles subject to the lien, the shorter period works no hardship upon the owner and gives the lienor the right to proceed within a reasonable time to recover the value of his storage services.

Acts of 1958, c. 674, added a new Chapter 255B to the General Laws, regulating the retail instalment sale of motor vehicles. Acts of 1960, c. 173, added a new Section 20A to the chapter. The new provision requires the holder of the note under a mortgage or conditional sale to record on the return day of the foreclosure sale of a repossessed car an affidavit signed by the purchaser at the sale stating the price paid for the vehicle and the date and place of sale. Failure to comply with this recording requirement relieves the maker of the note from liability for any deficiency.
