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Creditors' Rights—Effect of Judgment Lien on a Joint Tenancy Later Severed

In *Hein v. W. T. Rawleigh Co.*¹ a husband and wife acquired real property in joint tenancy with the wife furnishing all the consideration. However, prior to this acquisition there had been a judgment entered against the husband in another action. The husband conveyed his rights to his wife who later died. *Held*: The wife's devisee was entitled to have title to the property quieted subject to the judgment creditor's lien on an undivided half. This decision presents the alternative questions: (1) whether a judgment lien on one joint tenant's rights continues undisturbed after a severance caused by release of the debtor's rights or (2) whether after severance the lien attaches to his severed interest and ceases as to the joint tenant's rights.

⁷ *Restatement, Restitution* § 151 provides:

. . . the measure of recovery for the benefit received by the other is the value of the property at the time of its improper acquisition

⁸ The Nebraska Supreme Court appears to be flexible in applying the traditional rules to compute damages resulting from fraud, depending of course, upon the equities involved. For example the "loss-of-bargain" rule was applied in the case of *McKibbin v. Day*, 74 Neb. 424, 104 N.W. 752 (1905). After the plaintiff was fraudulently induced to buy certain property represented to be worth \$7,000, which in fact was only worth \$4,353.31, the court allowed the difference, or \$2,646.69 in damages. The "out-of-pocket" rule was applied in *Trebelhorn v. Bartlett*, 154 Neb. 113, 47 N.W.2d 374 (1951). A stockholder was fraudulently induced to sell his stock which was actually worth about \$5,000, for about \$1,000. The seller was permitted to recover about \$4,000. For application of the remedy of rescission, see *State ex rel. Sorenson v. State Bank of Omaha*, 128 Neb. 705, 260 N.W. 195 (1935) and *Russo v. Williams*, 160 Neb. 564, 71 N.W.2d 131 (1955).

¹ 167 Neb. 176, 92 N.W.2d 185 (1958).

The court stated that the release by the husband did not affect or disturb the judgment creditor's lien on the debtor's interest in the real estate.² Just how the lien could remain undisturbed and yet attach to an undivided half is not explained by the court nor does it justify its decision on that point. It is therefore possible to erroneously conclude that a lien resulting from a judgment against one tenant simply attaches to an undivided one-half of joint tenancy property.

If the husband had died without conveying, would not the lien have been lost since it was upon his rights and all these were extinguished by death?³ Suppose the wife had died first while the property was in joint tenancy. Would not the lien have attached to all?⁴ Again, suppose the husband had sold his rights to a third person, can there be any doubt but that the joint tenancy under such circumstances would have been severed and the lien attached to the interest sold?⁵ Thus if the lien attaches to an undivided one-half it does so because of severance and this case is then no authority for the proposition that a lien attaches to half of joint tenancy property held by two tenants when one is a judgment debtor.

The courts have generally held that attachment of a lien is not a sufficient decrease of joint tenancy interest to hold the unity

² *Id.* at 190.

³ In *Musa v. Segelke & Kohlhaus Co.*, 224 Wis. 432, 272 N. W. 657 (1937), the plaintiff and her husband held real property in joint tenancy. The defendant recovered a judgment against the husband in another action. The husband died before execution was issued on the judgment. *Held*: By the nature of survivorship the surviving joint tenant becomes the owner of the property free of the lien on the cotenant's rights upon his death.

⁴ *Lessert & Steele v. Sieberling & Co.*, 59 Neb. 309, 80 N.W. 900 (1899), holds that real property, purchased by a judgment debtor subsequent to the rendition of judgment against him, is subject to the lien of such judgment as soon as the title vests in the debtor.

⁵ In *Zeigler v. Bonnell*, 5 Cal. App. 2d 217, 126 P.2d 118, 120 (1942), it was held that a judgment lien upon the interest of a joint tenant terminated on the death of the judgment debtor joint tenant. The court said, "When a creditor has a judgment lien against the interest of one joint tenant he can immediately execute and sell the interest of his judgment debtor, and thus sever the joint tenancy, or he can keep his lien alive and wait until the joint tenancy is terminated by the death of one of the joint tenants. If the judgment debtor survives, the judgment lien immediately attaches to the entire property. If the judgment debtor is the first to die, the lien is lost. If the creditor sits back to await this contingency, as respondent did in this case, he assumes the risk of losing his lien." See 2 *TIFFANY, REAL PROPERTY* § 425 (3d ed. 1939).

of interest broken and therefore the tenancy severed.⁶ Here, however, the court held that the release of the husband's interest in favor of the wife severed the joint tenancy.⁷ It is therefore possible to justify the result by other reasoning. The decision is sustainable on the theory that after severance the lien attached no longer to the husband's rights in the joint tenancy, but that it thereafter attached to that undivided half which at severance the husband immediately conveyed to the wife. Applying this reasoning, the decision of the court appears sound.

In conclusion, this case changes no existing rule of law. Liens may attach to a joint tenant's rights and may become liens against the whole estate or be lost completely depending on who takes by the right of survivorship. If the property is severed during the lifetime of the tenants, the lien attaches to the judgment debtor's share.⁸

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