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Liability of the Survivor for Payment of an Obligation Secured by Entireties Property

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> determine whether any applicant for a license to practice any form of the healing art is sufficiently well informed concerning those sciences on which the art is based to justify his examination by one of the state boards authorized to issue such a license as the applicant desires.

The basic science statutes are supplementary to the usual licensing statutes and require that the applicant obtain, as a prerequisite to securing a license in a particular field of the healing art, a certificate showing that he is proficient in certain basic sciences, usually anatomy, physiology, pathology, chemistry, and bacteriology. In other words, in these states the demonstration by the applicant of his proficiency in these basic sciences does not entitle him to practice one of these arts; it merely entitles him to appear before a professional board of his choice for an examination in his field of specialization. In preventing the licensure of unqualified persons, they have worked well.[69]

The American Medical Association has drawn up a Uniform Basic Science Statute which it recommends to the various state legislatures.[70] In this statute "the healing art" is defined. The members of the examining board may not be actively engaged in the practice of the healing art but must be members of faculties of state educational institutions.

The effectiveness of this type of statute is illustrated by a survey which showed that a group of 8,960 persons have been examined by basic science examining boards in the several states which have adopted the law; only 12% of those being examined for doctor of medicine failed the examination and were unable to apply for a license to practice. Of the second largest group to be examined, osteopaths, 41% failed. In the third group, composed of chiropractors 74% failed.[71]

It is apparent that the adoption of such a statute would go far in protecting the public from incompetent, poorly educated practitioners in any healing art. A similar law would certainly be worthy of study by Wyoming legislators.

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LIABILITY OF THE SURVIVOR FOR PAYMENT OF AN OBLIGATION SECURED BY ENTIRETIES PROPERTY

Among the difficult problems arising from the holding of property as tenants by the entirety is the liability of a deceased tenant's estate for an obligation secured by a mortgage on the property at the time of his death. The survivor now holds all of the property alone; should he be liable for the entire secured obligation, or should the estate of the deceased be held liable for at least half of the obligation? There is a split of authority on this point which is discussed by the Delaware court in the recent case of

69. Pamphlet, Basic Science Laws, op. cit. supra note 68.
70. Ibid.
71. Ibid.

In re Keil's Estate.[1] The court points out that there are two lines of cases, one emphasizing the law surrounding the rights and obligations of those signing a joint and several note, the other emphasizing the law relating to a tenancy held by the entireties. The cases that have based their decisions on the law of tenancies by the entirety have concluded that the ultimate obligation for paying the mortgage debt rests with the survivor of the tenancy by the entireties. The cases that speak of the obligations of the holders of a joint and several note hold the estate liable for one-half the obligation. The court states that both lines of cases are supported by sound legal principles. This note will attempt an analysis of the cases to determine which line of authority is most persuasive. It should be emphasized that this question is one of ultimate liability since it is quite clear where a joint and several obligation is involved, that the creditor has the option of suing one or both the obligors on the note.[2]

The origin of the mortgage involved might be considered important, and in a case which held that the survivor was responsible for the entire mortgage obligation the court specifically limited their holding to cases where a purchase money mortgage is involved.[3] This holding would seem to be sound: such a mortgage is executed in order to purchase the land and therefore the survivor who holds all of the land should have the entire obligation. This case, however, is the only one that has intimated that the type of mortgage involved may be decisive in the case. There is no other direct authority for making the distinction suggested, and there are in fact two cases holding the survivor liable on the entire obligation where the mortgages involved were not purchase money mortgages.[4]

Whether the mortgagee is a party to the dispute has been a factor. The court in the case of *In re Keil's Estate* based their decision on this point.[5] Both lines of cases were examined and the reason the court gave for choosing the one line in preference to the other was that since the dispute did not involve the creditors and was a dispute between the surviving tenant and the deceased tenants estate, the issues could be resolved by applying the law surrounding a tenancy by the entirety. By applying that law, the survivor was held liable, as the tenants held per tout et non per my with the survivor taking the entire estate, and therefore the survivor, as sole owner, should bear the obligation. Another case, however, which reached the same result as *Keil's Estate* did involve a situation where the mortgagee had entered the dispute.[6] If the creditor enters the litigation and presents

1. In re Keil's Estate, ___ Del. ___, 140 A.2d 139 (1958).
2. 8 Am. Jur. § 519, Bills and Notes. It should be noted that the Uniform Joint Obligations Act codifies this specific point by providing that on the death of a joint obligor in contract, his executor or administrator (or estate) shall be bound as such jointly and severally with the surviving obligor. Wisconsin Statutes, 113.06 (1955).
3. Lopez v. Lopez, ___ Fla. ___, 90 So.2d 456 (1956).
4. Ratte v. Ratte, 260 Mass. 165, 156 N.E. 870 (1927); In re Keil's Estate, supra note 1.
5. Supra note 1.
6. In re Dell's Estate, 154 Misc. 216, 276 N.Y.S. 960 (1935).

proof of a debt that is due, the estate would have the duty to liquidate the debt, but this in no way determines the ultimate responsibility for the debt where it is secured by a mortgage on a tenancy by the entireties. The estate would still have rights against the survivor.[7]

Payment of an indebtedness by one of two or more joint obligors is for the benefit of all, and one making payment is entitled to contribution from the others.[8] With the exception of one case,[9] the decisions seems to favor the right of contribution to the obligor who discharges the mortgage on the entireties property, and the courts have disregarded the law surrounding the tenancy by the entirety. This has been true where the estate of the deceased tenant has paid,[10] and also where the survivor has paid.[11] Most of the cases which have held the survivor responsible for the entire obligation have involved situations where the obligation has not been paid.[12] An exception is *Ratte v. Ratte,* where the court held the survivor liable on the whole obligation after he had paid it, and would not allow contribution.[13] The reason given in the case was that the right of contribution is based on there being a common burden and, therefore no right of contribution existed since all of the land was now held by the survivor of the tenancy by the entirety. This decision serves to illustrate the most significant thing in all of these cases, i.e., that if the court examines the problem as one being based on the special nature of a tenancy held by the entireties, then factors such as contribution cease to be significant.[14]

From the analysis of the cases it seems fairly obvious that there are few, if any, unchallenged generalizations that one can isolate and anticipate as controlling if this problem should be litigated in a Wyoming court. The soundest legal approach to the problem is offered in the cases where the court considers the special nature of tenants holding by the entirety. In the *Lopez* case the court says that the nature of the obligation is to be considered in the light of the incidents of the ownership of the property which is security for the debt: the husband and wife each own the whole of the estate simultaneously, and the burden of the mortgage follows the security.[15] It is logical that the person who holds the whole of the mortgaged estate should be responsible for the entire obligation on the mortgage. Such a result is inescapable where a purchase money mortgage is involved. It would seem only slightly less valid for any other security interest.

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7. Keil's Estate, supra note 1.
8. Magenheimer v. Councilman, 76 Ind.App. 583, 125 N.E. 77 (1919); Kershaws Estate, 352 Pa. 205, 42 A.2d 538 (1945).
9. Ratte v. Ratte, supra note 4.
10. Cunningham v. Cunningham, 158 Md. 372, 148 Atl. 444, 67 A.L.R. 1176 (1930); Kershaws Estate; Magenhemier v. Councilman, supra note 8.
11. Dowler's Estate 368 Pa. 519, 84 A.2d 209 (1951).
12. Keil's Estate, supra note 1; Dell's Estate, supra note 6; Lopez v. Lopez, supra note 3.
13. Ratte v. Ratte, supra note 4.
14. It should be noted in passing that in no case has exoneration been allowed. Annotations to 67 A.L.R. 1176.
15. Lopez v. Lopez, supra note 3.

A practical approach should be noted in conclusion and that is in the field of estate planning. Where the estate planner deals with entireties property that bears the burden of a secured obligation he has the opportunity to provide for payment of the debt in a manner that will meet the wishes of the tenants. The desirability of this is obvious where the first tenant to die is the husband. It is possible by a will provision to place the burden of paying the debt on the estate and free the widow of possible liability. This solution was suggested in one of the cases, but the will provision was nullified because the will turned out to be inoperative.[16] An easy solution is offered if a valid will provision is made.

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16. Cunningham v. Cunningham, supra note 10.