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REAL PROPERTY—ADVERSE POSSESSION—TITLE ACQUIRED BY HUSBAND AND WIFE—John and Maltie Preston moved onto a parcel of land in 1910 where they lived until 1950 when John died intestate. Maltie died intestate in 1954. Title to the land had been perfected by twenty years adverse possession. Evidence showed that the adverse possession was intended to inure to their joint benefit.¹ Complainants, collateral heirs of John, sued in ejectment claiming that John took the whole title by exclusive adverse possession. Defendants, collateral heirs of Maltie, claimed a tenancy by the entirety had been created, with the survivor, Maltie, becoming the sole owner. The court of appeals ruled that the husband and wife had become tenants in common. On writ of certiorari to the Supreme Court, *held*, affirmed without opinion.² *Preston v. Smith*, (Tenn. 1956) 293 S.W. (2d) 51.

The principal case is the first to present the problem of the concurrent estate acquired by joint adverse possession of husband and wife. The common law knew no such question, for the husband and wife composed

¹ It would seem that when a husband and a wife enter land and possess adversely to the true owner the prescription would ordinarily run in favor of the husband alone. The decision in the principal case does not indicate any evidence on which the court based its ruling that the possession was joint. If it was merely the fact that both husband and wife were on the land without color of title, then all disseisin by married couples would lead to the creation of a concurrent estate.

² The opinion of the court of appeals was reprinted at the suggestion of the members of the Supreme Court.

one legal entity for property purposes.³ Thus adverse possession by a married couple became the sole possession of the husband. Married women's separate property acts have abolished this common law unity and permit the wife to hold property as though she were a single woman.⁴ These statutes necessarily permit a married woman to become an adverse possessor. In ruling that a tenancy in common was created in the principal case, the Tennessee court relied primarily on the rule, stated mainly in dictum, that tenancy by the entirety must arise from conveyance or devise.⁵ The rationale of this rule is somewhat open to question inasmuch as the married women's acts, by destroying the marital proprietary unity, seemingly sanction the joint disseisin of husband and wife and the creation of joint estates. The court's decision is not necessarily incorrect, but it should be pointed out that plausible arguments may be advanced as well in favor of either a joint tenancy or a tenancy by the entirety. Littleton laid down the rule that two or more persons may disseise another to their joint use and thus become joint tenants.⁶ This rule has been followed by several cases, none of which examined the validity of Littleton's premise.⁷ Of course, this thread of authority makes no mention of the possibility of adverse possession raising a tenancy by the entirety because when the rule was founded the wife could not disseise her husband. Yet, if Littleton's rule is sound law, the modern rule abolishing the proprietary unity of marriage would clearly permit spouses to become joint tenants by adverse possession. From this proposition it is a short step to the creation of an estate by the entirety where local law presumes joint marital property to be held by the entirety.⁸ It seems that all three concurrent estates are possible when a husband and wife jointly disseise another.

In view of these possibilities, criteria by which the estate may be characterized is essential. Clearly where the intent of the parties may be ascertained it should control. Absent direct evidence of intent, the estate will probably be determined by prevailing construction preferences in the state. A number of states which do not recognize tenancy by the entirety

³ *Tyler v. United States*, (D.C. Md. 1928) 28 F. (2d) 887; *In re Brown*, (W.D. Ky. 1932) 60 F. (2d) 269; 2 *TIFFANY, REAL PROPERTY*, 3d ed., §430 (1939).

⁴ 2 *AMERICAN LAW OF PROPERTY* §5.56 (1952). The Tennessee Married Women's Act was passed four years after the statute of limitations had begun to run but the court held this immaterial.

⁵ 2 *TIFFANY, REAL PROPERTY*, 3d ed., §430 (1939); *Licker v. Gluskin*, 265 Mass. 403, 164 N.E. 613 (1929).

⁶ *LITT.* §278; *CO. LITT.* 181a; 2 *AMERICAN LAW OF PROPERTY* §6.1 (1952).

⁷ *Putney v. Dresser*, 43 Mass. (2 Metc.) 583 (1841); *Ward v. Ward*, L.R. 6 Ch. App. 789 (1871).

⁸ There is some authority indicating that tenancy by the entirety can arise by prescription. The common law rule that any estate real or personal vesting in husband and wife created a tenancy by the entirety could be stretched to cover adverse possession. *FREEMAN, COTENANCIES AND PARTITION* §63 (1894). It has been held that tenancy by the entirety may be created by descent, which involves no instrument. *Gillan's Exrs. v. Dixon*, 65 Pa. 395 (1870). Although that case involved personalty the court indicated that realty and personalty would be treated alike. *Contra*, 2 *AMERICAN LAW OF PROPERTY* §6.6, n. 17 (1952).

favor tenancy in common over joint tenancy.⁹ In these jurisdictions specific intent to create a joint tenancy must be shown to rebut the creation of tenancy in common. It would seem clear that any court bound to such a rule would find a tenancy in common in the marital disseisin situation, since, by hypothesis, the intent of the parties is uncertain. On the other hand, jurisdictions which recognize tenancy by the entirety¹⁰ often tend to favor that estate where husband and wife are grantees of a joint estate.¹¹ This policy would undoubtedly favor an estate by the entirety where intent is unclear. An opposing policy argument is that the abolition of the unity of husband and wife has destroyed the foundation of tenancy by the entirety. Thus no good reason exists for expanding the means of creating this estate when the theory underlying it no longer exists. Similarly it may be pointed out that Littleton's rule favoring joint tenancy was developed when that was the favored estate.¹² Today, the tenancy in common is preferred. Certainly the problem presented by the factual situation of the principal case may be resolved in a number of ways. Arguably the philosophy of modern law favoring emancipation of married women's property from the control of the husband would be best served by the result reached by the Tennessee court. Tenancy in common best protects the proprietary interests of the wife. Her interest does not depend on survival and alienability of her interests is more free. Nevertheless the principal case may be criticized for not considering the numerous possible answers to a novel and intriguing question of modern property law.

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⁹ 2 AMERICAN LAW OF PROPERTY §6.3, n. 1 (1952); 4 POWELL, REAL PROPERTY §602 (1954).

¹⁰ A majority of the states recognize tenancy by the entirety. 2 AMERICAN LAW OF PROPERTY §6.6 (1952).

¹¹ 2 AMERICAN LAW OF PROPERTY §6.6, n. 9 (1952); *Godman v. Greer*, 12 Del. Ch. 397, 105 A. 380 (1918); 161 A.L.R. 457 at 466 (1946).

¹² 2 AMERICAN LAW OF PROPERTY §6.5 (1952).