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## Real Property—Estates by the Entirety—Homestead Rights in Two Persons in the Same Family

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gle of the federal courts to reconcile the rule with requisite independence towards doubtful or undecided questions is manifest. To quote Professor Corbin, "If it [*Erie R. R. v. Tompkins*] is an admonition to federal judges that there is no 'federal general common law' that is to be found solely in the opinions of other federal judges, much is thereby gained. But if it is a direction to substitute an omnipresence brooding over Pennsylvania alone, in place of the roc-like bird whose wings have been believed to overspread forty-eight states, something has indeed been lost."<sup>22</sup>

C. A.

**REAL PROPERTY—ESTATES BY THE ENTIRETY—HOMESTEAD RIGHTS IN TWO PERSONS IN THE SAME FAMILY—[Missouri].**—In a recent Missouri case<sup>1</sup> land was held in an estate by the entirety. After the death of the husband a judgment in favor of plaintiff on a joint note executed by the man and wife subsequent to acquisition of the land was sought to be levied thereon. *Held*, that the wife under Missouri statutes<sup>2</sup> acquired a right of homestead and exemptions upon the filing of the deed to herself and husband, and that the husband having failed to claim such exemptions, she might do so after his death.

This case emphasizes a peculiar interpretation of the Homestead Statutes<sup>3</sup> and the Married Woman's Act<sup>4</sup> when construed together. Under the Homestead Act alone,<sup>5</sup> before the Married Woman's Statute,<sup>6</sup> the wife could never claim an exemption unless the husband died, absconded, or absented himself from his usual place of abode.<sup>7</sup> She could never claim it when the husband was alive and present regardless of whether the title to the property was in the husband, wife, or jointly in both.<sup>8</sup> But when the husband died leaving a widow or minor children, the homestead right descended to them and this was not made conditional upon the husband's having failed to claim.<sup>9</sup> Under the Married Woman's Act<sup>10</sup> the wife may

22. Note, *The Common Law of the United States* (1938) 47 *Yale L. J.* 1351, 1353.

1. *Ahmann v. Kemper* (Mo. 1938) 119 S. W. (2d) 256.

2. R. S. Mo. (1929) secs. 608, 615, 2998.

3. R. S. Mo. (1929) sec. 608.

4. R. S. Mo. (1929) sec. 2998.

5. R. S. Mo. (1929) sec. 608 provides in part that "The homestead of every housekeeper or head of a family, consisting of a dwelling house and appurtenances, and the land used in connection therewith \* \* \* [shall] be exempt from attachment and execution."

6. R. S. Mo. (1929) sec. 2998.

7. *Gladney v. Berkley* (1898) 75 Mo. App. 98; *White v. Smith* (1904) 104 Mo. App. 199, 78 S. W. 51.

8. *Martin v. Barnett* (1911) 158 Mo. App. 375, 138 S. W. 538.

9. *Armor v. Lewis* (1913) 252 Mo. 568, 161 S. W. 251.

10. R. S. Mo. (1929) sec. 2998, after stating that a married woman shall be deemed a *femme sole*, provides that "a married woman may invoke all exemption and homestead laws now in force for the protection of personal and real property owned by the head of a family, except in cases where the husband has claimed such exemption for the protection of his own property." See also *Luster v. Cook* (Mo. App. 1927) 297 S. W. 459.

invoke all exemptions in force for the head of a family except where the husband has made such claim for the protection of his own property.<sup>11</sup> This right in the wife is limited to property owned by the wife and does not include that owned by the husband.<sup>12</sup> Construed with the homestead statute the Married Woman's Act<sup>13</sup> is regarded as an enabling statute removing the disability of the wife to claim exemptions in her own property while the husband is alive and refuses to claim, and she may still, under the Homestead Law,<sup>14</sup> claim exemptions in her husband's property when he dies or absconds.<sup>15</sup> Another Missouri statute<sup>16</sup> provides that the homestead right is created and vests upon the date of filing of the deed for record.<sup>17</sup>

The peculiarity arises when these statutes, as interpreted by Missouri courts, are applied to an estate by the entirety. It is well settled in Missouri that such estates have not been changed by the Married Woman's Act<sup>18</sup> but have remained as they were at common law.<sup>19</sup> Each spouse owns all the property and the estate is one whole, indivisible unit, vested in one person with a dual body and personality.<sup>20</sup> When one spouse dies, the sur-

11. *Martin v. Barnett* (1911) 158 Mo. App. 375, 138 S. W. 538; *State ex rel. Schwetman v. Oberheide* (Mo. App. 1931) 39 S. W. (2d) 395.

12. *White v. Smith* (1904) 104 Mo. App. 199, 78 S. W. 51.

13. R. S. Mo. (1929) sec. 2998.

14. R. S. Mo. (1929) sec. 608.

15. In *Gladney v. Berkley* (1898) 75 Mo. App. 98, the court held that under the Homestead Act there could be but one homestead right which must be exercised by the husband because so long as the marriage relation exists, he is regarded the head of the family. But the husband having absconded, the wife could claim. In *Smith v. White* (1904) 104 Mo. App. 199, 78 S. W. 51, the court, with reference to the opinion in *Gladney v. Berkley*, said: "The homestead in question belonged to the husband and the court's decision had reference to property of that situs only. It could not be held to apply to a case where the property in question belonged to the wife because it would clearly be against the very letter of said section 4335 [R. S. Mo. (1889) sec. 4335, R. S. Mo. (1929) sec. 2998]. \* \* \* the language of the act is that 'a married woman may invoke all exemption and homestead laws, notwithstanding the husband may be head of the family.'" *Martin v. Barnett* (1911) 158 Mo. App. 375, 138 S. W. 538, holds that the wife can claim exemption "under section 2185, R. S. 1909 [R. S. Mo. (1929) sec. 608] only when the husband has absconded or absented himself from his usual place of abode in this state; under section 8304 [R. S. Mo. (1929) sec. 2998] only when the husband has failed to make his claim." See also *Bank of Liberal v. Redlinger* (1902) 95 Mo. App. 279, 68 S. W. 1073; *Luster v. Cook* (Mo. App. 1927) 297 S. W. 459.

16. R. S. Mo. (1929) sec. 615 reads in part as follows: "Such homestead shall be subject to attachment and levy of execution upon all causes of action existing at the time of acquiring such homestead, \* \* \* and for this purpose such time shall be the date of the filing in the proper office for the record of deeds, the deed to such homestead \* \* \*."

17. See in this connection *Sharp v. Stewart* (1904) 185 Mo. 518, 84 S. W. 963; *Balance v. Gordon* (1912) 247 Mo. 119, 152 S. W. 358; *McCluer v. Virden* (C. C. A. 8, 1934) 70 Fed. (2d) 724.

18. R. S. Mo. (1929) sec. 2998.

19. *Frost v. Frost* (1906) 200 Mo. 474, 98 S. W. 527, 118 Am. St. Rep. 689; *Stifel's Union Brewing Co. v. Saxy* (1918) 273 Mo. 159, 201 S. W. 67, L. R. A. 1918C 1009.

20. See 2 *Blackstone, Commentaries* 182, where during a discussion of

vivor simply keeps what he or she had before.<sup>21</sup> There is no increase in the estate, and the change is in the person rather than in the estate.<sup>22</sup>

Therefore the holding that the widow received a right of homestead at the time of the filing of the deed seems correct.<sup>23</sup> If this be carried to its logical conclusion, it would seem that there may be two persons in the family who have a vested right to claim exemptions: (1) the husband as head of the family under the Homestead Act<sup>24</sup> and (2) the wife by reason of the Married Woman's statute.<sup>25</sup> But it has been repeatedly held that as between husband and wife there can be only one right of homestead, and that right must be asserted in the name of the husband because so long as the marriage relation exists *de jure*, he must be regarded the head of the family.<sup>26</sup>

In the instant case the court correctly solves the problem by holding that while the right vests in both spouses, its exercise by one precludes exercise by the other.<sup>27</sup>

W. J. H.

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TORTS—AUTOMOBILE GUEST STATUTE—STATUS OF PERSON WHO CONTRIBUTES TOWARD TRAVELING EXPENSES—[Texas].—A Texas statute<sup>1</sup> requires proof of ordinary negligence in the case of a passenger for hire and gross negligence in the case of a guest, defining the latter as one who rides in another's car "without payment." In a recent decision<sup>2</sup> the Court of

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the incidents of joint estates the author says, "and therefore, if an estate in fee be given to a man and his wife, they are neither properly joint tenants nor tenants in common; for husband and wife being considered as one person in law they cannot take the estate by moieties, but both are seized of the entirety, *per tout et non per my*." See also *Goldberg Plumbing Supply Co. v. Taylor* (1922) 209 Mo. App. 98, 237 S. W. 900.

21. *Ashbaugh v. Ashbaugh* (1918) 273 Mo. 353, 201 S. W. 72.

22. *Garner v. Jones* (1873) 52 Mo. 68; *Rezabek v. Rezabek* (1916) 196 Mo. 673, 192 S. W. 107; *Fulbright v. Phoenix Ins. Co.* (1932) 329 Mo. 207, 44 S. W. (2d) 115; *In re Staiger's Estate* (1929) 104 N. J. Eq. 149, 144 Atl. 619; *In re Dell's Estate* (1935) 154 Misc. 216, 276 N. Y. S. 960; *Newsome v. Shackelford* (1931) 163 Tenn. 358, 43 S. W. (2d) 384.

23. R. S. Mo. (1929) sec. 615.

24. R. S. Mo. (1929) sec. 608.

25. R. S. Mo. (1929) sec. 2998.

26. *Gladney v. Berkley* (1898) 75 Mo. App. 98; *Martin v. Barnett* (1911) 158 Mo. App. 375, 138 S. W. 538.

27. In *Morrow v. Zane* (1914) 185 Mo. App. 111, 170 S. W. 918, the Springfield Court of Appeals held however that the wife had in effect two estates: (1) her own by the entirety which was acquired prior to the incurring of the debt and in which she therefore could claim homestead; (2) her husband's estate by the entirety which was acquired by his deed conveying his interest to her subsequent to the incurring of the debt and in which she therefore could not claim homestead. The court apparently bases its conclusion upon the idea that at common law estates by the entirety were divisible because the husband had right to possession and usufruct of such lands during marriage and his interest was vendible. But see *Hall v. Stephens* (1877) 65 Mo. 670, 27 Am. Rep. 302; *National Bank of Plattsburg v. Fry* (1902) 168 Mo. 492, 68 S. W. 348, and the authorities cited in notes 13, 14, 15, and 16, *supra*.

1. Tex. Vernon's Stat. (1936) c. 225, art. 6701b.

2. *Raub v. Rowe* (Tex. Civ. App. 1938) 119 S. W. (2d) 190.