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DISTINGUISHED, FOLLOWED, AND OVERRULED

NORTH CAROLINA RECONSIDERS ENTIRETIES
BY PARTITION DEED

In 16 Wash. & Lee L. Rev. 92 (1959), there appears a comment on the North Carolina case of *Smith v. Smith*,¹ in which the following facts are pertinent:

Minnie Smith and her son, John Smith, were tenants in common of a tract of land. John Smith married, and less than two months thereafter the following deeds were executed and recorded as one simultaneous transaction: one from John Smith to his mother,² conveying the entire tract in fee; the other from his mother to John and his wife, the latter deed conveying only a part of the tract and *reciting* that it created a tenancy by the entirety. Subsequently Smith and his wife became divorced, and she, having remarried, brought an action to partition the land. She contended that her status as tenant by the entirety was changed by divorce to that of a tenant in common³ of the property described in the deed from Minnie Smith, and that consequently an action for partition would lie, she being entitled to her rateable share.⁴ Having suffered an adverse ruling, she appealed. The Supreme Court of North Carolina remanded the case on grounds not pertinent to this comment,⁵ but *upheld* the trial court's ruling that "if it should be determined [at a new trial that] the deeds are partition deeds, the petitioner would derive no title. 'Accordingly, a deed made by one tenant in common to a cotenant and the latter's spouse in partitioning inherited land or land held as a tenancy in common, does not create an estate by the entirety or enlarge the marital rights

¹248 N.C. 194, 102 S.E.2d 868 (1958).

²Smith's wife joined in the deed. In order to terminate the marital rights of the grantor's spouse, the grantor customarily has his spouse join with him in the conveyance. See 3 American Law of Property § 12.51 (Casner ed. 1952).

³*Bernatavicius v. Bernatavicius*, 259 Mass. 486, 156 N.E. 685 (1927); *Fisher v. Fisher*, 217 N.C. 70, 6 S.E.2d 812 (1940); *Stewart v. Bleu's Estate*, 102 Vt. 273, 147 Atl. 692 (1929).

⁴Tenancy in common is the estate on which partition is based. *Smith v. Smith*, 248 N.C. 194, 102 S.E.2d 868, 871 (1958).

⁵The case was remanded on two grounds: that the trial court erred in treating the mutual deeds as partition deeds, there being insufficient evidence to indicate such an intent by the parties; and that it erred also in holding that the suit was prematurely brought by reason of an outstanding life estate in the grantor, Minnie Smith. This life estate "shall not be a bar to a sale for partition of the remainder or reversion thereof. . . ." 102 S.E.2d at 872.

of the spouse as previously fixed by law.'"⁶ The court thus adopted the doctrine that a partition deed which joins as grantee the spouse of a cotenant cannot create an estate by the entirety, even though the deed expressly purports to do so.⁷

The case again came before the Supreme Court of North Carolina a year later, and the court, in a unanimous decision, held that the deed which joined the plaintiff wife as grantee *did* create a tenancy by the entirety, and since this estate was destroyed by divorce, she was enabled to maintain her partition suit as a tenant in common.⁸ The court, however, did not expressly repudiate its view that a *partition* deed cannot create an estate by entireties when a cotenant's spouse is joined as grantee. Instead, it ruled that the evidence was insufficient to show that the mutual deeds *were* partition deeds,⁹ and went on to base its decision on the *intent of the parties*, as clearly manifested by the deed's very words.¹⁰

The court seems to reach the right result here, as the manifest intent of the parties should by no means be ignored. It also handily avoids flying in the face of the overwhelming majority rule that a partition deed cannot create an entireties estate by joining a cotenant's spouse.¹¹ However, should the court hereafter be confronted with a similar situation, but where the deeds are clearly partition deeds, it will be faced with the choice of becoming a lonely minority by ruling that a partition deed *can* create an estate by the entirety, or of reaffirming the unjust result reached in the first *Smith* case.

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⁶Id. at 871.

⁷This idea is in accord with the great weight of authority. E.g., *Jelly v. Lamar*, 242 Mo. 44, 145 S.W. 799 (1912); *Snyder v. Elliott*, 171 Mo. 362, 71 S.W. 826 (1903); *Whitsett v. Wamack*, 159 Mo. 14, 59 S.W. 961 (1900); *Shull v. Cummings*, 174 Mo. App. 569, 161 S.W. 360 (1913); *Wood v. Wilder*, 222 N.C. 622, 24 S.E.2d 474 (1943); *Speas v. Woodhouse*, 162 N.C. 66, 77 S.E. 1000 (1913); *Sprinkle v. Spainhour*, 149 N.C. 223, 62 S.E. 910 (1908); *Harrington v. Rawls*, 131 N.C. 39, 42 S.E. 461 (1902); *Harrison v. Ray*, 108 N.C. 215, 12 S.E. 993 (1891); *Rhodes v. Peery*, 142 Ore. 165, 19 P.2d 418 (1933); *Holt v. Holt*, 185 Tenn. 1, 202 S.W.2d 650 (1947); *Cottrell v. Griffiths*, 108 Tenn. 191, 65 S.W. 397 (1901); *Foster v. Foster*, 153 Va. 636, 151 S.E. 157 (1930); *Yancey v. Radford*, 86 Va. 638, 10 S.E. 972 (1890).

⁸*Smith v. Smith*, 107 S.E.2d 530 (N.C. 1959).

⁹"The deeds are silent with reference to any partition of land; there is no indication of the relative values of the tract conveyed and the tract retained by Minnie M. Smith." 107 S.E.2d at 537.

¹⁰The criterion, says the court, is "the intention of the parties as disclosed by their situations at the time, the facts and circumstances surrounding the execution of the deeds and the facts to be drawn from the deeds themselves." 107 S.E.2d at 537.

¹¹See note 7 *supra*.