NOTES AND COMMENTS

THE TENANCY OF JOINT DISSEISORS.

The problem here considered is the nature of the interest acquired by adverse possession where two or more persons not the true owner have throughout the statutory period acted as concurrent owners.

The general rule is stated in *Halsbury*[1] thus: "When two or more persons acquire a title under the Statute by joint possession they become joint tenants of the property so acquired, but their beneficial interests may be those of tenants in common in equity." As Lord Hatherley L.C. pointed out in *Ward v. Ward*[2] this would follow naturally from the doctrine that where the four unities of possession, title, time and interest co-exist, without more, you have a joint tenancy. *Ward v. Ward* itself was a case where two tenants in common acquired the interest of the third tenant in common by adverse possession and were held to have acquired the third undivided share as joint tenants. The Lord Chancellor remarked that the case seemed "very analogous to that of one of three tenants in common conveying his share to the other two without words of severance. The two are joint tenants of the share so conveyed though they remain tenants in common as to their original shares."

Eleven years later in *Bolling v. Hobday*[3] Chitty J. followed this decision. In that case realty was given by will to trustees upon trust for A for life and after A's death upon trust to convert and divide the proceeds of conversion between B, C, D and E as tenants in common. B and C went into possession after the death of A with the ultimate result that the trustees' title was extinguished and a question as to the nature of the tenancy arose between devisees of B and C. It was claimed that even if the decision in *Ward v. Ward* applied to the undivided shares of D and E, B and C had a beneficial interest in two undivided fourth shares as to which they should be held to be tenants in common. Chitty J., however, rejected this contention on two grounds: first, that on the extinguishment of the legal estate of the trustees, the trusts by which the estate was affected were also extinguished and secondly that B, C, D and E were entitled only to a portion of the proceeds of sale of the land and not to an undivided share of the land itself. However the second ground was sufficient to support the decision and the authorities suggest that so far as Chitty J. relied on the first ground he drew an incorrect conclusion from his premises.

It is submitted that the court is at liberty to look at all the circumstances of the case before it in order to determine whether there is anything in the actions of the joint tortfeasors which would indicate an intention to sever. This is implied in the judgment in *Ward v. Ward* where Lord Hatherley said "it is not averred that they entered into a joint speculation as farmers and made this land partnership property"[4] thus suggesting that if the respondents had been partners the normal presumption that partnership property is held under a tenancy in common might have prevailed.

The passage in *Coke on Littleton*[5] on which Lord Hatherley relied certainly supports the view that you may look at all the circumstances, for there it is stated that "if 2 or 3, etc., disseise another to the use of

1. 2nd Edn., Vol. 20, p. 744.
2. (1871) 6 Ch. App. 789, at p. 791.
3. 31 W.R. 9.
4. *supra*, at p. 792.
5. s. 278, p. 180b.

one of them then they are not joyntenants but he to whose use the disseison is made is sole tenant." Coke gives an interesting example that if A disseise one to the use of B without B's knowledge and B later assents to the disseisin A is the tenant of the land until the assent but after assent B is the tenant though both A and B are disseisors. Thus not only would the nature of the tenancy when it first arose depend on intention, but the intention of the disseisors could subsequently affect it.

It would follow that in *Bolling v. Hobday* Chitty J. could legitimately have looked to the trusts of the will as some evidence of the intention with which the disseisors held even though the trusts might have been extinguished.

This is the course which has been followed by the Irish Courts. Thus in *MacCormack v. Courtney*[6] the Divisional Court on a case stated by Palles B. held that where the next of kin of an intestate acquired the title at law by adverse possession they did so as tenants in common in the proportions to which they were entitled in equity. In *Smith v. Savage*[7] Barton J. followed both *Ward v. Ward* and *MacCormack v. Courtney* holding that next of kin of an intestate in possession of chattels real acquired a joint tenancy in the shares of the other next of kin but in respect of their own original shares they acquired as tenants in common. He apparently thought that next of kin would always, as between the joint tort-feasors, acquire a possessory title as tenants in common for the "next of kin are in possession not as trespassers under a wrongful title but as equitable tenants in common and when the Statute runs in their favour they acquire title as legal tenants in common."

Other instances in which the disseisors would hold as tenants in common of the legal estate can be readily imagined. For example, where tenants in common of a mortgage acquire the title to the equity of redemption or again where expenses are borne and profits shared in unequal proportions, the disseisors hold to their own use in unequal shares and, as one of the unities is absent, their tenancy cannot be joint.

It is accordingly submitted that persons who together acquire an interest in land by adverse possession will become joint tenants of that interest unless the circumstances, as a whole, indicate their intention to hold as tenants in common.

—AIRLIE SMITH.

6. [1895] 2 I.R. 97.
7. [1906] 1 I.R. 469.

LIABILITY OF A LANDLORD FOR NUISANCE.[1]

In *Wringe v. Cohen*,[2] the Court of Appeal reviewed the whole position as to the liability of an owner or occupier for a nuisance on his premises due to lack of repair. The appellant landlord based his defence upon the supposed doctrine that a landlord who has covenanted to repair leased premises is liable for a nuisance upon those premises only if he actually knows, or ought to have known, of the existence of the nuisance. For this contention he mainly relied upon *St. Anne's Well Brewery v. Roberts*,[3] and upon the opinion of Goddard J. in *Wilchick v. Marks*,[4] that the landlord was liable only if he actually knew.

1. The author gratefully acknowledges the assistance he has received in writing this note from discussion with the Honours class in the Law of Wrongs.
2. [1940] 1 K.B. 229.
3. (1928), 44 T.L.R. 703.
4. [1934] 2 K.B. 56, at p. 66.