The Liability of a Cotenant to Other Cotenants for Rent, Profit and Use and Occupation

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COMMENTS
THE LIABILITY OF A COTENANT TO OTHER COTENANTS FOR RENTS, PROFITS AND USE AND OCCUPATION

I. Scope
The general subject of this comment is the liability of cotenants, to each other, for rents, profits and use and occupation. The first part of the article will deal with the national law on the topic, while the latter portion will be devoted to a review and discussion of pertinent Wisconsin law.

II. Common Law Prior to the Statute of Anne
At early common law in England, each cotenant of a tenancy in common had an equal and several right of entry and possession, and the possession of one was the possession of all. This was true, at one point, even though a cotenant held the common property to the exclusion of the others. Thus, the cotenants out of possession had no reason to complain and a suit of partition in equity was their only remedy. As a corollary of this right of possession it followed that each cotenant had a right to collect rents from third persons to whom the common property had been rented, and did not have to account to his fellow cotenants unless appointed bailiff, for the rents were considered products of the land. In the same respect, he was not liable for profits derived from or the use and occupation of the common property.

III. Statute of Anne
This harsh and inequitable rule was changed in 1705 by the Statutes 4 and 5 Anne, Chapter 16. This law provided that:

Actions of accounts shall and may be brought and maintained against the executors and administrators of every guardian, bailiff and receiver; and by one joint tenant and tenant in common, his executors and administrators, against the other, for receiving more than comes to his just share or proportion.

The result of this statute was that a cotenant who collected rents from third persons for a letting of the common property, was liable to his cotenants for their just share of the actual receipts, but was not liable to them for the profits derived from his use of the property or for his sole occupancy of the entire premises. It should be noted...

2 George v. McGovern, 83 Wis. 555, 53 N.W. 899 (1892).
that the action of account under the Statute of Anne was quite different than the action of account against a bailiff prior to 1705. Previously the bailiff was answerable not only for actual receipts, but also for what he might have made of the land without his willful default, while under the statute if the cotenant was sued as bailiff he was liable only for the actual receipts retained beyond his just share.\(^5\) In addition, the action under the statute was a legal remedy rather than equitable.\(^6\)

The leading case in England on the Statute of Anne is *Henderson v. Eason*,\(^7\) decided in 1851. In that case the tenant out of possession was attempting to recover a share of the profits derived from the cultivation of farmlands by the tenant in possession, and the court decided that a cotenant receives more than his share or just proportion only when he retains the whole of the rents from the third persons who have leased the common property. The statute, said the court, does not apply to situations where the cotenant in sole possession merely occupies the common property or where he occupies it and derives a profit from it by cultivation and so forth. In regard to the former situation the court felt it would be inequitable to hold that a cotenant became liable to pay rent or anything in the nature of compensation merely because of simple occupation of the common premises, for each cotenant has a perfect right to enjoy the property to its full extent. The court also felt that a cotenant in sole possession need not share the profits derived from the common property, for he is not receiving more than his just share when he takes the whole of the profits, but is merely taking the return from his own skill and labor. Besides, since the risk is his alone, he is entitled to all the profits.

The court, in reaching this decision, pointed out that the statute did not actually spell out what a cotenant is liable for, but merely says he is liable for "receiving more than comes to his just share or proportion." Then, emphasizing the word "receiving," the court reached the conclusion that the statute could only apply to a third person rental situation, for in the case of profits or use and occupation the cotenant in possession is really not receiving, but merely taking the benefit of the common property to which he has a perfect right as owner of an undivided one half.

The case of *Henderson v. Eason* is still good law in England today, and the English cases have continued to construe the statute very narrowly.\(^8\) Not only is the statute inapplicable where a recovery

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for use and occupation is sought, but also it does not apply to profits derived from the land, even in a situation where timber or minerals have been exploited.\(^9\)

### IV. MAJORITY POSITION IN THE UNITED STATES

In the United States there has been much diversity of opinion over the construction of the Statute of Anne.\(^{10}\) There has also been much confusion, for the examination of cases has been made difficult in many instances because of an indiscriminate use of the phrase "rents and profits." The courts have used this expression without any indication whether the words were intended to mean rents received from third parties, liability for personal occupancy, profits derived from a use of the land, or profits extracted from the land.\(^{11}\) An example of this is the case of *Garber v. Whittaker*,\(^{12}\) where it was stated generally that the occupant must account for "rents and profits," but the narrow holding was that he must account for rents received.

However, despite this element of confusion, it very clearly appears that the majority opinion in the United States favors the liability of a cotenant for rentals received from third persons, but does not sanction a recovery of reasonable rental value, or a share of the profits for use and occupation, unless there is an ouster or agreement.\(^{13}\) The majority opinion in the United States does not go as far as England, however, in saying that no liability attaches when minerals are extracted or timber is cut, for in this country a cotenant is accountable for taking anything which is part of the real estate.\(^{14}\) Sometimes this majority rule is based on a statute more or less similar to the Statute of Anne,\(^{15}\) and sometimes this result is arrived at without the mention of any statute,\(^{16}\) for it has been said that the Statute of Anne was engrained in the common law of the United States long prior to the Revolution.\(^{17}\)

Thus, in this country, a cotenant who has collected rents from a third party, is liable to his fellow cotenants for their proportionate share, when the leasing of the common property is binding on all interests, or purports to bind all interests and is acquiesced in by all, and the third party has enjoyed exclusive possession.\(^{18}\) The cotenant

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\(^9\) *American Law of Property* 59 (1952).


\(^{11}\) *Boyle v. Kempkin*, 243 Wis. 86, 9 N.W. 2d 589 (1943).

\(^{12}\) 36 Del. 272, 174 Atl. 34 (1934).

\(^{13}\) *American Law of Property* 60 (1952); 51 A.L.R. 2d 395.

\(^{14}\) *Petraborg v. Zontelli*, 217 Minn. 536, 15 N.W. 2d 174 (1944).

\(^{15}\) See infra, section VI.

\(^{16}\) *Fielder v. Childs*, 73 Ala. 567 (1883); *Gayle v. Johnston*, 80 Ala. 395 (1885).

\(^{17}\) 14 Am. Jur., Cotenancy §31 (1936).

who has so collected the rents is considered to be holding the funds as trustee,\(^{19}\) for the benefit of his cotenants, and he must account to them for the actual receipts and cannot discharge himself by paying over the reasonable rental value of his cotenants’ share.\(^{20}\) However, such a cotenant is not liable for that proportion of rents collected referrable to improvements made by him alone.\(^{21}\)

At this point it should be emphasized that the letting must be binding on all interests, or at least purport to bind all interests and be acquiesced in by all, before a cotenant is liable for collected rents.\(^{22}\) This is so, for a cotenant may explicitly rent out only his undivided interest, and then the lessee, in effect, merely becomes a cotenant of the other co-owners.\(^{23}\) In such a situation, it is apparent that the lessor is not liable to his cotenants for rents collected under the lease, even though the lessee enjoyed sole possession of the property. In the same vein, it may be observed that a cotenant cannot bind his fellow cotenants by a lease purportedly binding all interests for he is not their agent, and his fellow co-owners can treat the lease as not binding on their interests.\(^ {24}\) Where such an election is made, the co-owners obviously do not have any interest in the rents collected by the leasing cotenant. Apparently, it is also possible for cotenants to waive their right to a share of the rents collected where they have failed to make any demand for, and tacitly consented to the retention of all rents by one only of the cotenants.\(^{25}\)

When rents collected from third persons take the form of crops, it should be remembered that in some states arrangements with croppers are not considered to create the relationship of landlord and tenant, and hence the person in possession of the land may be considered an employee of the cotenant receiving the crop payment, rather than his lessee. If such is the case, the cotenant is not liable to his fellow co-owners for any share of the crops taken by him.\(^ {26}\)

While a cotenant is clearly liable by the majority rule for rents


\(^{19}\) Bates v. Hamilton, 144 Mo. 1, 45 S.W. 641 (1898).

\(^{20}\) Armstrong v. Rodemacher, 199 Iowa 928, 203 N.W. 23 (1925); Pool v. Pool, 214 Ky. 267, 283 S.W. 111 (1926).


\(^{23}\) Shepardson v. Rowland, 28 Wis. 108 (1871).

\(^{24}\) See 2 AMERICAN LAW OF PROPERTY 59 (1952); 49 A.L.R. 2d 797.

\(^{25}\) Hermance v. Weisner, 228 Wis. 501, 279 N.W. 608 (1938).

\(^{26}\) Cochran v. Leonard, 204 Ala. 163, 85 So. 693 (1920).
collected from third persons, it is also clearly the majority opinion that he is not accountable to his fellow cotenants for the use and occupation of the common premises when he has had sole possession, unless there is an ouster or agreement.27 The reasoning behind this rule is that since each cotenant has a right to occupy the common property, it follows that one of them cannot collect rent or other compensation from another for having exercised that right.28

The law as to rents is clear, as shown above, but when the word "profits" enters the picture, there is some difficulty because of the fact that it may apply to a variety of revenues and benefits, received, earned and extracted. However the better supported rule is that a cotenant is not liable to another for the gains or profits resulting from his use or occupancy of the common premises in the absence of an ouster or agreement.29 In the United States, however, this rule does not apply to the taking or disposal of that which is a part of the land itself and not ordinarily severable in normal use.30 As the majority holds that there is no liability for use and occupation, it is only logical that it would hold the same way as to profits, for to allow the recovery of profits would be to a large extent to undermine its position as to use and occupation. The basis of the majority rule as to profits is simply that such profits are the result of the labor and skill of the occupant, and the cotenant out of possession has no right to share in the fruits of the occupant's toil.31 A contrary rule would merely encourage indolence, and since the cotenant out of possession does not share in the risks he should not share in the profits.32

In the Alabama case of Rehfuss v. McAndrew,33 a fine distinction was made between income resulting from the labor of the occupant,

28 Utah Oil Refining Co. v. Leigh, 98 Utah 149, 96 P. 2d 1100 (1939).
30 See supra note 14.
33 250 Ala. 55, 33 So. 2d 16 (1947).
and rentals received from third persons. In that decision the court ruled that income received from boarders is not rent and the cotenant in possession did not have to account for it, for the lodger did not have exclusive possession of the premises and the income was the result of the occupying tenant's labor. The court then intimated that if the cotenant had rented out an apartment, rather than just taking in boarders, he would have been accountable, for the amount received would have been rent.

Also of interest are the two Michigan cases of Zweigel v. Zweigel and Walton v. Walton. In the former case the cotenants involved owned a business property as tenants in common. The defendant had conducted a store business in these common premises, but the stock in trade of the business was owned solely by the defendant. The court, in this decision, said the plaintiff had no right to share in the profits of the business, nor was the defendant liable for the reasonable rental value of the premises. In the latter case, where once again the defendant conducted a business on the common property, the court ruled that he did not have to account for the reasonable rental value of the property, but must account to his cotenant for her share in the profits of the business, where the stock in trade was jointly owned, and the defendant was managing the business under a court order.

V. Minority Position in the United States

There are a small number of jurisdictions in the United States which hold that a cotenant in exclusive possession of the common property is liable to his cotenants for use and occupation, although there has not been an ouster or agreement. Some courts have done this by a liberal interpretation of local statutes similar to the Statute of Anne, others by specific statute, and others without any mention of a statute.

In jurisdictions where a local statute is similar to or the same as the Statute of Anne, the courts usually follow one of two lines of reasoning in reaching the conclusion that there is liability for use and occupation. They either say that their statute is sufficiently different from the Statute of Anne to justify a departure from the majority.

34 224 Mich. 31, 194 N.W. 505 (1923).
rule or that the English construction of the Statute is too narrow and unduly emphasizes the term "receiving."

Of course the real basis of any minority decision is the belief that since the occupying cotenant has had the full use of his cotenant's share, it is only just that he should pay for this privilege. This is very clearly brought out in the Washington decision of *McKnight v. Basilides*, where the court decided that a cotenant, who had the sole possession of an urban residence was liable to his cotenants for their share of the fair rental value of the premises. The court, after reviewing Washington cases evidencing a variety of doctrines, declined to follow the majority rule, although recognizing its prevalence in the United States. The court stated that there was no sound basis for the majority rule and there was no possible reason for allowing a cotenant in the sole possession of the common property to reap a financial benefit, without paying for the use of that share of the property owned by his cotenants.

Generally speaking, the recovery allowed in the minority jurisdictions for use and occupation is the reasonable rental value of the shares owned by the cotenants out of possession. The courts seem to feel this is more just than allowing a recovery of a share of the profits, for under this rule the occupant does not lose the benefit of his labor and skill when large profits are realized, and the cotenant out of possession does not take the risk that the occupant is a poor manager. However, there are some cases where the occupant has been held liable for the actual profits earned by using and occupying the common property.

Apparently, even in a jurisdiction committed to the minority rule, a cotenant may waive his right to a recovery for use and occupation from a cotenant in sole possession, for in the Ohio decision of *Aubrey v. Aubrey*, the court reached such a conclusion. It should be noted, however, that the demand for accounting was incidental to a partition suit and equitable principles were involved.

In jurisdictions which normally adhere to the majority rule, it sometimes happens that an occupying cotenant is held liable for use

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40 See *supra* note 6.
42 19 Wash. 2d 391, 143 P. 2d 307 (1943).
44 See *supra* note 41.
45 *Pistole v. Lanier*, 214 Ky. 290, 283 S.W. 88 (1926); *Barnes v. Kidwell*, 245 Ky. 740, 44 S.W. 2d 331 (1932); (But compare *Taylor v. Farmers' and Gardeners' Market Asso.*, 295 Ky. 126, 173 S.W. 2d 803 (1943); *Pattison v. Pattison*, 207 Okla. 46, 247 P. 2d 514 (1952); (But compare *Eysenbach v. Naharkey*, 110 Okla. 207, 236 Pac. 619 (1924)).
46 70 Ohio App. 298, 45 N.E. 2d 892 (1941).
and occupation, even though no ouster or agreement is involved, when
the nature of the common property is such as to preclude any practical
joint occupancy. This is especially true in cases of individual resi-
dences and small business establishments.47

VI. Statutes
There are various statutes dealing with the problems of the liability
of a cotenant for rents and profits, and use and occupation. Some
states, among them New York, Virginia and West Virginia, have
statutes very similar to the original Statute of Anne. In New York
the statute is so construed as to hold a cotenant liable for rents col-
lected, but there is no accountability for mere use and occupation.48
In Virginia49 and West Virginia,50 the statute is given a much broader
construction, however, and the occupant is liable for both rentals col-
lected and use and occupation.

In Vermont, a cotenant is liable for "... receiving more than his
just proportion of an estate or interest ...."51 The addition of the
words "estate or interest" distinguish this statute from the Statute of
Anne, and it has been interpreted as authorizing a recovery for both
rentals collected, and use and occupation. The court in Alrich v.
Stevens,52 stated that the statute was similar to the Statute of Anne,
but still refused to adopt the English construction.

Two states, namely Illinois and Rhode Island, have very similar
statutes. In Illinois the operative words of the statute are that a
cotenant is liable when he "... shall take and use the profits or bene-
fits thereof in greater proportion than his, her, or their interest ...."
In Rhode Island, the statute reads that when a cotenant shall "... take,
receive, use or have benefit thereof, in greater proportion than his or
her interest ....", he is liable to his cotenant.54 It is readily apparent
that these statutes are radically different from the Statute of Anne by
virtue of the words "take" and "use". While these two statutes are
quite similar to one another in scope and verbage, they have been
given varying constructions in their respective jurisdictions. In
Rhode Island, which probably has the broader statute, the court in
Kahnovsky v. Kahnovsky,55 decided that a cotenant, while liable for
rentals collected, was not liable for use and occupation in the absence

47 Lohmann v. Lohmann, 50 N.J.S. 37, 141 A. 2d 84 (1958); Edsall v. Merrill,
37 N.J. Eq. 114 (Ch. 1883); Oechsner v. Courcier, 155 S.W. 2d 963 (Tex.
1954).
49 See supra, note 41.
52 See supra note 10 (Emphasis supplied).
55 67 R.I. 208, 21 A. 2d 569 (1941).
COMMENTS

of an ouster or agreement. In Illinois, however, a cotenant is liable under the statute for both rent received and use and occupation. A fourth classification of statutes is those in which a cotenant is liable for receiving more than his just proportion of the rents and profits of the estate. Jurisdictions with such statutes include Michigan, Minnesota, Ohio, and the District of Columbia. It should be noted that the difference between these statutes and the Statute of Anne, lies principally in the addition of the words “rents and profits,” and hence, they are capable of a broader construction to the extent of this addition. It is quite apparent that the addition of the word “rents” can add nothing to the majority construction of the Statute of Anne, for that word in conjunction with the word “receiving” limits its application to rents collected from third persons. However, the term “profits” is a new factor which, especially in view of the many possible definitions of the word, could conceivably broaden the prevailing interpretation of the Statute of Anne. An examination of the cases from the above mentioned jurisdictions does not bear out this contention, however. In general, the courts have not placed much emphasis on the verbiage of the statute concerned, with the exception of Ohio, but rather have stated the rules in terms of previous case law.

Ohio is alone in construing statutes of this sort to include liability for use and occupation. In the case of Cohen v. Cohen, the court stated that the Ohio statute was different from the Statute of Anne, by virtue of the addition of the words “rents and profits,” and the omission of the words limiting the liability of the cotenant to that of a bailiff, and hence a different interpretation was justified. The court also noted that its statute did not provide for a legal remedy as

56 Clarke v. Clarke, 349 Ill. 642, 183 N.E. 13 (1932).
57 Mich. Comp. Laws §§554. 138 (1948) : “One joint tenant or tenant in common, and his executors or administrators, may maintain an action for money had and received, against his cotenant, for receiving more than his just proportion of the rents or profits of the estate owned by them as joint tenants or tenants in common.”
58 Minn. Stat. §§557.06 (1953) : “One joint tenant or tenant in common, and his executors or administrators, may maintain an action against his cotenant for receiving more than his just proportion of the rents and profits of the estate owned by them as joint tenants or tenants in common.”
59 Ohio Rev. Code §§5307.21 (1953) : “One tenant in common, or co-parcener, may recover from another his share of rents and profits received by such tenant in common or co-parcener from the estate, according to the justice and equity of the case.”
60 Dist. of Col. Code §16-1301 (1951) : “... any tenant in common who may have received the rents and profits of the property to his own use may be required to account to his cotenants for their respective shares of said rents and profits. ...”
61 Although Wis. Stat. §234.21 (1957), on the subject of the liability of cotenants for rents and profits will be treated in detail later in section IX, infra, it should be noted at this point that the Wisconsin Statute is very similar to statutes of all the above four states, and in particular is almost an exact duplicate of the Michigan and Minnesota statutes. Hence, much of what is said here will apply to Wisconsin.
62 See supra note 6.
did the Statute of Anne, but rather provided for an account according
to the principles of equity. In the last analysis, the court feels that a
cotenant in sole possession of the common premises has received a
benefit, as he owns only one half of the property, and, accordingly, he
must pay to his cotenant the reasonable rental value of his share.

In Minnesota, there is some indication that a cotenant is liable
for his sole possession, but an examination of the cases would seem
to disprove this. In the case of Hoverson v. Hoverson, an action in-
volving a general guardian's account, the court, in an obiter dictum
statement, mentioned that a cotenant who had been in sole possession
of farmlands could have been held liable to his cotenants under the
Minnesota statute, in a suit for an accounting of the income, had they
so chosen to proceed. However, an examination of the Minnesota
cases shows that its statute is interpreted to ground liability only for
rentals received in the absence of an ouster or agreement. For ex-
ample, in the case of Arnold v. DeBooy, the court said that each
cotenant has the right to occupy the common property, owns the crops
he raises thereon, and is not liable for rents and profits unless he has
excluded his cotenants or agreed to share with them. The rationale
of the rule is that each cotenant has, at all times, the right to enter
upon and enjoy the common property.

In Michigan, there also seems to be some intimation that a co-
tenant is liable for use and occupation under its statute, but this ap-
ppears to be a remote possibility upon a review of the cases. In the
cases of Frensel v. Hayes, and Zwergel v. Zwergel, the statement
is made that a cotenant who occupies the common property exclusively,
is not liable for its rental value when he occupies with the consent
of his cotenants. These statements seem to imply that without such
consent the occupant would be liable. However, once again, an
examination of the cases shows that a cotenant in Michigan is only
liable for rentals received from third parties, and does not have to
account for use and occupation. An illustration of this is found in
the case of Everts v. Beach, where the court stated that a tenant in
common was not liable for use and occupation in the absence of any

63 216 Minn. 237, 12 N.W. 2d 497 (1943).
64 Hause v. Hause, 29 Minn. 252, 13 N.W. 43 (1882); Kirsh v. Scandia American
Bank, 160 Minn. 269, 199 N.W. 88 (1924); Arnold v. DeBooy, 161 Minn.
255, 201 N.W. 437 (1924); Petraborg v. Zontelli, 217 Minn. 536, 15 N.W.
2d 174 (1944).
65 161 Minn. 255, 201 N.W. 437 (1924).
66 Petraborg v. Zontelli, 217 Minn. 536, 15 N.W. 2d 174 (1944).
69 Sullivan v. Sullivan, 300 Mich. 640 2 N.W. 2d 799 (1942); Walton v. Walton,
Rep. 169 (1880); DesRoches v. McCrary, 315 Mich. 611, 24 N.W. 2d 511
(1946).
express promise, for the right of each to occupy is one of the legal incidents of such tenancy and it pervades the whole land.

In the District of Columbia the court has apparently decided that there is liability under the statute only for rentals received, and no recovery can be had for use and occupation unless there has been an ouster or agreement. 71

In Iowa we have an example of a statute which specifically allows a recovery for use and occupation, by the cotenant out of possession, from the occupant. 72 In the case of VanVeen v. VanVeen, 72 the court said this statute modified the former rule, and an ouster, agreement, or collection of rents from strangers no longer need be shown to allow a recovery.

VII. THE EFFECT OF OUSTER

The majority rule in regard to ouster is that a cotenant, who ousts his fellow co-owners and remains in sole possession of the premises, is liable for the rental value of their share, for the period of the exclusion. 74 This proposition seems to be in complete accord with the majority rule, that normally there is no liability for use and occupation, for that rule is based on the premise that each cotenant has an equal right to occupy the common property, and when this right is denied it is only fair that a new rule apply.

While a refusal by the occupying cotenant to permit his fellow cotenants to share in the possession of the common property is the basis of most ousters, it should be noted that mere sole possession or, as it is sometimes referred to, mere exclusive possession, is not considered an ouster. 75 This follows, of course, from the majority rule as to use and occupation, for if it were not so there would be liability in every case. One difficulty which will be encountered in cases of this sort, is the courts’ rather loose handling of the phrases “exclusive possession” and “to the exclusion”, so as to suggest that an ouster is present while actually the courts are referring to a case of sole possession only. 76

The normal recovery in a case where an ouster is present, is the

72 Code of Iowa §§57.16 (1954): “... it shall be lawful for any one or more of said tenants in common, not in possession, to sue for and recover, from such tenants in possession, his or their proportionate part of the rental value of said real estate . . . .”
73 See supra note 38.
76 See supra note 41.
fair rental value of the common premise in proportion to the ousted
cotenants' share in the ownership, rather than a share in the profits
realized. However, in the case of Youmens v. Youmens, a South
Carolina decision, there is a suggestion that an ousted cotenant can
recover either the fair rental value or a share of the profits. In juris-
dictions which demand an ouster before predicking liability for use
and occupation, the normal rule appears to be that there is no liability
for a mere refusal of a demand to pay rent or to vacate, when the
occupant doesn't exclude the tenant out of possession. This, again,
is in line with the majority rule that all cotenants have an equal right
to the occupancy of the common property. However, there are cases
where an occupant has been held accountable for use and occupation,
when normally he wouldn't be, because he did refuse a demand for
rent made by the tenant out of possession. In these cases, however,
the courts were usually dealing with urban, single family residences,
and as was mentioned before, the majority rule is sometimes modified
when the property is not susceptible to joint occupancy.

In some states liability for use and occupation follows from an
"ouster or exclusion," and sometimes the word "exclusion" is so con-
strued as to apply to situations where an ouster in the strict sense is
not present. The word has been defined as a "very elastic term"
which may be actual or constructive, and there is no firm test which
may be applied to all cases. It is obvious that such an interpretation
would leave much to the discretion of the court.

VIII. EQUITABLE SETOFF IN PARTITION

In partition proceedings or other cases where equitable principles
are applied, a recovery for use and occupation is frequently allowed
as a defensive setoff, when the tenant in possession wishes to obtain
contribution for expenditures made for improvements or for the pro-
tection and preservation of the property, even though he otherwise
would not be accountable. In Frenzel v. Hayes, the court stated

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77 2 American Law of Property 63 (1952); Steward v. Steward, 90 Wis. 516
(1895); Sons v. Sons, 151 Minn. 360, 186 N.W. 811 (1922); Estate of
Wallace, 270 Wis. 636, 72 N.W. 2d 383 (1955).
78 128 S.C. 31, 121 S.E. 674 (1924).
79 Brown v. Havens, 17 N.J. Super. 235, 85 A. 2d 812 (1952); Fiske v. Quint,
274 Mass. 169, 174 N.E. 196 (1931); Williams v. Sinclair Refining Co., 39
N.M. 388, 47 P. 2d 910 (1935).
80 Oechsner v. Courcier, 155 S.W. 2d 963 (Tex. Civ. App. 1941); Winkler v.
290, 283 S.W. 88 (1926); Barnes v. Kidwell, 245 Ky. 740, 54 S.W. 2d 331
(1932) (But compare Taylor v. Farmers' and Gardener's Market Asso., 295
Ky. 126, 173 S.W. 2d 803 (1943) with the last two cases cited).
81 See supra note 1, dissenting opinion.
82 Ibid.
83 Frenzel v. Hayes, 242 Mich. 631, 219 N.W. 740 (1928); Forler v. Williams,
257 Mich. 686, 241 N.W. 823 (1932); Hoiversen v. Hoverson, 216 Minn. 228,
12 N.W. 2d 501 (1943); Krish v. Scandia American Bank, 160 Minn. 269,
199 N.W. 881 (1924); Fundaburk v. Cody, 261 Ala. 25, 72 So. 2d 710 (1954);
that a cotenant was not normally chargeable with use and occupation, but where the question arises in partition proceedings in equity, and particularly where the possession has been exclusive, the rule recognized in Michigan is that, in adjusting the equities, the occupant who has had exclusive possession should account for the use and occupation. Also, see Fowler v. Williams,88 for the proposition that recovery for use and occupation is restricted to partition suits in Michigan. In the Minnesota case of Kirsh v. Scandia American Bank,86 it was also held that a cotenant normally has no duty to account for use and occupation, but where possession has been exclusive, equitable principles demand that before the occupant can get contribution, he must apply the net profits toward the contributions.

The normal setoff in these cases seems to be the reasonable rental value of the interest of the cotenant who is out of possession,87 but there are cases which say that the setoff should be such cotenant's share of the profits.88

Equitable setoff is a defensive measure and when the occupants claim for improvements or protective expenditures has been denied, theoretically, the claim of the cotenant out of possession, for use and occupation should be denied, unless there are other equities present.89 Of course, this principle of equitable setoff will only apply where there has been no ouster, for when an ouster is present the cotenant out of possession does not have to await a defensive opportunity to put forth his claim for use and occupation. In the reverse situation, where the occupying cotenant has been held liable under any theory for rents and profits, he is normally to be credited with expenditures for protecting and maintaining the property.90 Very seldom, however, can the occupant be credited with the value of personal services.91

IX. WISCONSIN LAW REGARDING THE LIABILITY OF COTENANTS

In general, there is little case law to be found in Wisconsin on the subject of the liability of cotenants to one another, and what is available is often sketchy and ambiguous. This is true, although there

84 Roberts v. Roberts, 136 Tex. 255, 150 S.W. 2d 236 (1941); Martin v. Martin, 218 Mo. App. 617, 266 S.W. 336 (1924).
87 160 Minn. 269, 199 N.W. 881 (1924).
89 See supra note 86; Hoverson v. Hoverson, 216 Minn. 228, 12 N.W. 2d 501 (1943).
are three Wisconsin statutes in point, namely sections 275.08, 275.10, and 234.21.

In one era, however, the law is quite clear; and that is in an action of ejectment in which an ouster has been shown under sec. 275.08 and 275.10. By the terms of sec. 275.10 the ousted cotenant can recover from the cotenant in possession "damages for the rents and profits of the premises recovered." The Wisconsin cases on the subject have allowed the ousted cotenant a recovery based on the fair rental value of his interest in the property, in conformity with the majority rule on the subject. In allowing this recovery for use and occupation, the statute specifically exempts the value of the use of any improvements made by the outing cotenant.

Although a studied judicial interpretation of sec. 234.21 is lacking, there is not much doubt that it would be construed to impose liability in a situation where one cotenant has collected and retained all of the rents. Such an interpretation would, of necessity, seem to follow in view of the complete unanimity of opinion in the U.S., and the conformity of this opinion to basic principles of justice and fair dealing between co-owners of property. In fact, this oneness of opinion is very likely the reason for the dearth of authority in Wisconsin. In support of this contention, it should be noted that sec. 234.21 is patterned on the Statute of Anne, and also specifically provides for receiving more than a "just proportion of the rents." In addition, all jurisdictions which have statutes very similar to, or the same as Wisconsin's, namely Michigan, Minnesota, Ohio and the District of Columbia, hold that a cotenant is liable to his fellow-cotenants for rentals received.

While we do not have a clear cut decision in Wisconsin on the topic of rentals, the cases of Shepardson v. Rowland, Stewart v.

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92 Wis. Stat. §275.08 (1957): "If the ejectment action be brought by tenants in common or joint tenants against cotenants the plaintiff must prove that the defendants ousted him or did some other act amounting to a total denial of his right as cotenant."

93 Wis. Stat. §275.10 (1957): "The plaintiff in ejectment may recover damages for the rents and profits of the premises recovered, during the time the same are unlawfully withheld, not exceeding six years prior to the commencement of the action, and damages for injuries to the freehold which damages shall be assessed by the jury. In estimating such damages the value of the use of any improvements made by the defendant or those under whom he claims shall not be allowed."

94 Wis. Stat. §234.21 (1957): "One joint tenant or tenant in common and his executors or administrators may maintain an action for money had and received against his cotenant for receiving more than his just proportion of the rents or profits of the estate owned by them as joint tenants or tenants in common."

95 Pacquette v. Pickness, 19 Wis. 219 (1865); Davis v. Louk, 30 Wis. 308 (1872); Steward v. Steward, 90 Wis. 516 (1895); Estate of Wallace, 270 Wis. 636, 72 N.W. 2d 383 (1955).

96 See Section VI, supra.

97 28 Wis. 108 (1871).
Stewart,98 Boyle v. Kempkin,99 and Herman v. Weisner,100 throw some light on the subject. In the first case mentioned the plaintiff was a tenant in common with the four defendants, who were minors. The mother of the defendant minors had been appointed their general guardian. The mother, acting as guardian, had leased the west half of the common premises to a third person, and had collected the rents under the lease and had, in fact, used them to pay taxes and expenses on the undivided one half belonging to the defendants, and the remainder for the support of herself and the children. This action of money had and received, under what is now sec. 234.21, was then started to recover one half of the rents received under the lease. The court held that, assuming the plaintiff had a cause of action, he should have brought it against the guardian, for she was the person who had received the money and not the present defendants. The court also brought up the question of whether the joinder of the defendants was proper and finally sustained the non-suit. While the court did not decide whether the plaintiff had a cause of action, the general tenor of its opinion would seem to suggest that it thought he did, but for the other difficulties mentioned.

In Stewart v. Stewart, which is an ejectment action, the following obiter dictum statement is found:101

Since the Statute of Anne, which became a part of the common law of this country, the right to maintain an action for accounting for rents, issues, and profits has generally, if not uniformly, been recognized in the United States. In this state that statute has been, in effect, re-enacted and extended. R.S. secs. 2199, 3087, 3173, 3192.102

The third case, Boyle v. Kempkin, deals principally with a trust agreement involving a parcel of land in which the settler and the defendant were cotenants. The court after upholding the validity of the trust agreement, ruled, without any further explanation or details, that there was no error in the lower court's direction that the defendant account to the trustee, his cotenant, for rents and profits. The court then cited sec. 234.21, but it is impossible to tell what type of rents or profits are involved, or what the theory of recovery is, aside from the general citation of the statute.

Another case of note is Herman v. Weisner, an action in partition. The plaintiff in that case had succeeded to the interests of one of seven

98 90 Wis. 516 (1895).
99 243 Wis. 86, 9 N.W. 2d 589 (1943).
100 228 Wis. 501, 279 N.W. 2d 608 (1943).
101 90 Wis. at 521.
102 In regard to the sections of the Revised Statute of 1878, mentioned here, §2199 is the same as today's §234.21, §3173 is the equivalent of §275.10, §3173 dealt with the liability of a cotenant for waste, and §3192 was concerned with the joinder of cotenants in various actions.
children who were tenants in common along with their mother, who is the defendant in this case. The cotenancy had originated at the death of the father in 1901, and at that time the defendant leased the farm to third persons. Over the years she collected the rents and out of them paid the taxes, insurance, and kept up the ordinary repairs. She also supported the children during their minority, paid off $6500 in mortgages on the land, and, by virtue of improvements, increased the value of the premises by $4000. All this was done under the belief that she was the sole owner. The trial court ruled that she was entitled to a lien on the property in the amount of $6500 for the mortgage principal she had paid off, and in the amount of $4000 for the improvements she had made. It did not set off the amount of rent she had received over the years from leasing the property. The plaintiff appeals on this point, and the court in its opinion conceded that the general rule was that if a cotenant in possession is to be allowed a lien for improvements he must also account for the rents and profits, but held that the rule does not apply in the instant case. The court pointed out that none of the original cotenants had ever set up any claim to rents and profits, and the defendant had received and kept them with their full consent. Hence, they were not now in a position to insist upon an accounting and neither was one holding under them. The court also stated that it took judicial notice of the fact that rentals received only amounted to about $400 yearly, and that this would hardly compensate the defendant for the interest she paid on the mortgage, or the sums she expended on taxes and repairs, for which she had not been given a lien.

It would appear from this case that Wisconsin, in the future, will hold a cotenant accountable, in partition proceedings where equitable principles are applied, for rentals received from third persons when such rentals are used as a setoff, and elements of waiver are not present. This view is further strengthened by the fact that the court took judicial notice that the defendant had expended more money on the property, for which sum she was not credited in this action, than she took out of the property in the form of rentals. Thus it can be seen that the result could very well have been a simple case of setting off the expenditures for interest and repairs against the rentals received, and the latter sum would cancel out the former, leaving the defendant with her liens for mortgage payments and improvements intact. Of course, holding a cotenant accountable when he is asking for contributions for protective expenditures is not the same as saying that a cotenant is liable per se for rentals received beyond his just share, but it is one step in that direction.

As mentioned previously in this article, the word "profits", in
statutes similar to sec. 234.21, is the key to a broad construction which would include a recovery for use and occupation, even in the absence of an ouster or agreement. Wisconsin, not unlike other jurisdictions with similar statutes, had not attempted a thorough inspection of the verbiage of sec. 234.21, and there is very little case law which deals with the subject of the liability of a cotenant for use and occupation. While there are no clear cut decisions, nevertheless, some are helpful in indicating the trend and will, therefore, be reviewed here.

One of these is McKinley v. Weber, an action in trespass, wherein the plaintiff was seeking damages for grasses cut on lands claimed as his own. The defendant proved that the land in question was owned by himself and another as tenants in common. In the course of its opinion, the court stated that the defendant was liable to account to his cotenant for the interest of such cotenant in the grass cut and, consequently, the plaintiff cannot maintain this action. The court then cited sec. 234.21. The statement by the court that the defendant is liable to his cotenant is, of course, dictum, but even if it were not, the case would not be the strongest authority for holding a cotenant liable for use and occupation or for a share of the profits. Grass is not a cultivated crop, and it would probably be considered a part of the real estate and, hence, would fall within the normal rule pertaining to the severance of real estate by a cotenant.

Stewart v. Stewart, supra, should be mentioned again, for there we find the dictum statement that the Statute of Anne has been, in effect, re-enacted and extended in Wisconsin, by virtue of sec. 234.21. The value of this case is limited, however, by the fact that the court did not indicate the limits of this extension or whether or not it includes liability for use and occupation.

The case of Werner v. Randall is perhaps the strongest Wisconsin authority for the proposition that there is liability for use and occupation, but even this is far from clear cut. In this case, King and Clausen were cotenants of a 400 acre farm. In 1915 Clausen had exclusive possession of the farm under a one year lease from his cotenant, King. The agreed rental figure for King's share was $1600. In 1916 King sold his undivided one half share to Randall. Randall, in turn, conveyed half of his share to Werner, so that for the year 1916, Werner, Randall, and Clausen were cotenants. Werner eventually started this action for partition. The lower court decided that Clausen was liable to his cotenants for the reasonable rental value of the farm, in proportion to their share in the ownership, for the year 1916. Clausen appealed from the decision, but the court sustained the

103 37 Wis. 279 (1875).
104 168 Wis. 506, 170 N.W. 727 (1919).
award. The court stated in its opinion that the farm had not been leased to third parties during the year 1916, and that the three owners had not mutually agreed that Clausen should remain in possession, as he did, at a stipulated rental. After this recital, the court stated that "The facts and circumstances showing Clausen's possession of the farm for the year support the court's conclusion holding him liable for its reasonable rental value." ¹⁰⁵

Thus in this case, the occupant was held liable for the reasonable rental value of the farm, but the court did not cite sec. 234.21, nor is the exact theory of liability clear. While it is possible that the recovery was based on a holdover by Clausen under the lease between him and his original cotenant, King, it is not likely, for the liability was expressed in terms of "reasonable rental value" and not in terms of "rent under the lease." In addition, Wisconsin does not recognize that a cotenant who has leased his cotenant's share, and holds over after the expiration of the lease, continues in possession under the pact, but rather takes the position that he holds over in his own right as a cotenant.¹⁰⁶ Again, it is possible that the court is simply holding Clausen liable, as a cotenant for use and occupation, but this also is doubtful, for the court did not mention sec. 234.21, and it seems hardly likely that it could arrive at such a decision without citing the statute.

What is more probable, it would seem, is that this was simply a case of equitable setoff or ouster. The theory of equitable setoff is supported by the fact that the defendant, Clausen, was credited with $500 worth of expenditures for protection and maintenance of the property. The theory of an ouster being present is given credence by the fact that Clausen in his answer claimed the conveyances to Randall and Werner were fraudulent and void, and it is entirely possible that under such a state of affairs Clausen had refused to recognize them as cotenants during the year 1916.

The case of Hermance v. Weisner, supra, while dealing with rents collected from third parties, should also be noted at this point, for it bears the implication that Wisconsin might accept the doctrine of equitable setoff where waiver and consent are not a factor. Whether this will apply to cases involving use and occupation, of course, cannot be answered at this time, but it should be noted that when the court conceded that equitable setoff was the normal rule, it used the broad term "rents and profits" and did not restrict it to rentals received from third parties although such was the subject matter of the case.

Boyle v. Kempkin, supra, should also be mentioned in conjunction

¹⁰⁵ 168 Wis. at 510.
¹⁰⁶ Rockwell v. Luek, 32 Wis. 70 (1873).
with the subject matter of liability for use and occupation, for although the theory of recovery is not clear, the court, nonetheless, did order a cotenant to account for "rents and profits", while citing sec. 234.21.

In Rainer v. Holmes,\textsuperscript{107} the question of equitable setoff was again raised in a partition proceeding. The cotenants in this case were twelve children who inherited the property upon the death of their widowed mother. When the mother died in 1936, the plaintiff, one of the twelve children, moved from Illinois to Wisconsin with her husband to care for her younger brothers and sisters. She and her husband moved into the house which comprised the common property, and continued to live there, all the while maintaining a home and caring for the orphaned children. The children left, one by one, as soon as they were able, and all had departed by 1947. Plaintiff continued to live on the common property until the bringing of this suit. Over the years she had made expenditures in the sum of $3599 for taxes, repairs, and maintenance, and improvements. The lower court ruled that the plaintiff was entitled to this amount out of the proceeds of the sale of the property. The defendant, a fellow cotenant and brother, appeals from the allowance for improvements, without any offset for use and occupancy for the years 1947 to 1954, during which time the plaintiff enjoyed exclusive possession of the premises. The court in its opinion sustained the allowance and denied any offset for use and occupation. It stated that where a cotenant has received rents and profits from the common property during his occupancy, such rents and profits can be offset against a claim for improvements by him. The court is apparently referring to actual rent receipts in this statement, for it goes on to say that what the defendant is seeking in this case is not an allowance for rents and profits, but an allowance for the use and occupancy. It continues with the statement that generally a cotenant is not liable for use and occupancy in the absence of ouster or agreement, for the law presumes that the possession of one cotenant is the possession of all. The court then said:

In view of all the authorities, we are of the opinion that an allowance for use and occupancy in a case such as this should not be made unless the equities of the particular case require it.

On the basis of this test the court then reviewed the equities and decided they were all in favor of the plaintiff, in view of her personal sacrifices. The court also took into consideration the fact that the plaintiff never excluded any of the cotenants who wished to live there.

The conclusions to be drawn from this case are many and varied. In the first place, it would seem that the implication drawn from the

\textsuperscript{107} 272 Wis. 349, 75 N.W. 2d 290 (1955).
case of *Herviance v. Weisner*, to the effect that actual rental receipts can be offset against a claim for improvements, is bolstered. However, the possibility of offsetting use and occupancy in Wisconsin has been made more remote, for the court seems to have missed the point of equitable setoff completely.

In the case of actual rental receipts the doctrine of equitable setoff is really meaningless, for, by the majority rule, the cotenant credited with this offset could have recovered his share of the rentals received in an independent action, apart from partition proceedings in equity.

When dealing with use and occupancy, however, the majority rule is that a cotenant in possession is not accountable in an independent action. Hence, the doctrine of equitable setoff was developed by courts of equity to protect the cotenant who has not enjoyed the possession of the common premises, but yet is expected to contribute for improvements of which the occupying cotenant has had the use and benefit. Thus, it can be seen that the court in the Rainer case, when it stated that generally there is no liability for use and occupation, was simply reiterating the majority rule in regard to cases in which there is not the opportunity to offset use and occupation against a claim for protective expenditures. What the court seems to miss is that equitable setoff is a defensive doctrine and cannot apply in a case of actual rental receipts, for in that situation there is an independent liability and no defensive opportunity need be awaited. Hence, it can be seen that in the case of actual rental receipts there cannot logically be any equitable setoff in the strict sense, for there are no equities to consider, as the cotenant out of possession has an absolute right to his share of the rent collected.

While the court in this decision has not recognized the doctrine of equitable setoff, still it cannot be said that it has denied it either. It seems rather to have left the “door open” when it stated that an allowance for use and occupation should not be made unless the equities of the particular case demand it. It must be remembered that the doctrine is an equitable one and it could be said that this case was actually permeated with equities which favored the plaintiff. In addition to these two factors, equitable setoff of use and occupancy is definitely the majority rule and this always must be considered in any evaluation of a position.

*Rainer v. Holmes* is obviously not direct authority for the proposition that a cotenant out of possession cannot recover for use and occupation, in a legal action as prescribed by sec. 234.21, but it certainly is indicative of the court’s attitude. The statement that generally there is no liability for use and occupation could hardly be

108 For a detailed justification of equitable setoff see Fundaburk v. Cody, 261 Ala. 25, 72 So. 2d 710 (1954).
stronger. However, it should be remembered that the sec. 234.21 was not mentioned in the opinion, and as the statute differs from the Statute of Anne by virtue of the addition of the words "rents and profits", there always is the possibility that it could be given a broader construction.

X. CONCLUSIONS AND RECOMMENDATIONS

In view of the cases discussed and the overwhelming majority opinion in the United States, it is very highly probable that Wisconsin will allow a cotenant to recover his share of actual rental receipts from the collecting cotenant. This opinion is further bolstered by the fact that the Wisconsin statute, sec. 234.21, is patterned generally on the Statute of Anne, and it is highly unlikely that it could be given a narrower construction. In addition, the jurisdictions of Minnesota, Michigan, Ohio, and the District of Columbia, all of which have statutes which are similar to, or the same as Wisconsin's, hold a collecting cotenant liable.

A recovery for use and occupation as an equitable setoff in partition proceedings is a possibility in Wisconsin, even in view of the Rainer case, because such is the majority opinion in the United States. It would be going too far, however, to say that such a recovery is probable.

While there is a possibility that an occupying cotenant will be charged with his use and occupation of the common premises as an offset in an equitable action, it is highly unlikely that such a charge will be allowed in Wisconsin where it cannot be used as a defensive measure. In other words, the chances of a recovery for use and occupation are remote in a legal action for money had and received under sec. 234.21, or in partition proceedings in equity where the occupant is not seeking contribution for protective expenditures. This conclusion is predicated on the fact that such non-liability is the majority rule in the United States, and also among those jurisdictions which have statutes similar to sec. 234.21. An added factor is the strong language found in the Rainer case disclaiming such liability.

Because there is not a decisive case on the subject, the possibility of liability cannot be ruled out, however, for the Wisconsin statute is sufficiently different from the Statute of Anne, as to be open to a different interpretation, and this is evident in the Ohio decision of Cohen v. Cohen, supra. The case of Werner v. Randall, supra, should not be forgotten either, for there the cotenant in possession was forced to account for the reasonable rental value of his use and occupation, although the exact theory of recovery is not clear.

Since sec. 234.21 is susceptible to a different construction than the Statute of Anne, and yet is worded in the same vague, indecisive man-
ner, it would seem that the Wisconsin statute could be given a compromise interpretation which would combine the best features of the minority and majority rules in respect to liability for use and occupation.

The majority rule of non-liability is, of course, based on the premise that each cotenant has a right to occupy the whole of the common premises and, hence, the occupant should not have to pay rent for exercising that right when he has not excluded his cotenants. The minority jurisdictions, on the other hand, simply feel that the occupying cotenant has had sole possession of the premises, thereby reaping a financial benefit, and thus should pay for the use of his cotenants' share.

Under the majority rule, a cotenant in possession is liable for the reasonable rental value of his use and occupation when he has ousted his cotenants. An ouster is basically a refusal by the occupant to allow his fellow cotenants to share in the possession of the property. However, in this country where urban living is the rule, joint occupancy of the common property is rarely practical and it is highly unlikely that a cotenant out of possession will demand a share in the occupancy of the property, a refusal of which will produce the necessary liability-bearing ouster. What is more likely is that a cotenant out of possession will make a demand for rent, or will ask that the cotenants in possession vacate so the common property can be rented to third persons and rental receipts shared. Thus, if the majority rule is to prevail, the tenant in possession can refuse a demand for rent or vacation without fear of liability, and his fellow cotenants are left without a remedy, aside from partition. In this way the tenant in possession is reaping a financial benefit, for he has sole possession, and his cotenants can do nothing about it, for if they should demand a share in the occupancy of the premises the demand will most likely be honored since the occupant knows that they will not physically occupy the property because of the practical difficulties involved.

The most just rule then, would seem to be a compromise, where the cotenant in possession is liable for use and occupation not only when he ousts his fellow cotenant, but also when he refuses a demand for the payment of rent for his use of the cotenant's share, or when he refuses to vacate the premises and rent to third parties for the common benefit. A rule of this type would be a compromise, for a cotenant in possession would not be liable for the rental value of his use and occupation in all instances, but only where he has actively refused to co-operate with his fellow co-owners. Thus it would not be possible, as it is in minority jurisdictions today, for the cotenant out of possession to sit idly by and let the bill for use and occupation
run up in his favor, all the while seemingly acquiescing in the agreement. Yet, on the other hand, such cotenant will still be given a measure of protection when the occupant has received more than his just share of the benefits of the estate by virtue of sole possession.

In view of the present state of Wisconsin law, it is recommended that when joint occupancy of the common property is not envisioned, the tenant out of possession, for his own protection, reach an agreement with the occupant in regard to rents and profits. Such agreements are legal, for cotenants can contract with each other regarding their respective shares, and while cotenants normally have equal rights of possession, this can be changed by agreement. Possible solutions are partnership agreements or leases between the cotenants.

If a cotenant lease is used the result will be a landlord-tenant relationship with all of the normal rights and duties of such an arrangement. It should be noted at this point that the majority rule is that a cotenant who holds over after the expiration of such a lease continues his possession under the lease as a tenant, and not in his own right as a tenant in common. Hence, he is liable to pay further rent in the same manner and amount as any lessee who holds over. This majority rule is tempered, however, by the fact that when the cotenant-lessee gives timely notice before the expiration of the term that he intends to continue in possession as a cotenant rather than as lessee, he is deemed to have held over in his own right as a co-owner and is not liable for rent under the lease.

Of course, in a jurisdiction committed to the rule of liability for use and occupation, this distinction would not be of too much practical value, for if the cotenant was not liable as a lessee for rent, he would still be liable for the reasonable rental value of his occupancy as cotenant.

In some jurisdictions an opposite view is taken on the subject of the holdover of a cotenant-lessee, the court ruling that the cotenant-lessee holds over in his own right as cotenant and is not liable under the lease for rent. Wisconsin is one of these jurisdictions and in the case of Rockwell v. Luek, the court stated the rule to be that when a cotenant-lessee holds over he will not be presumed, as in other cases, to be continuing his possession under the lease, but rather to be holding by virtue of his original right as tenant in common. However, in some jurisdictions, the court may find that the cotenant-lessee is continuing in possession under the lease, as in the case of Peterson v. McNeely.


110 See supra note 106.


114 See supra note 106.
ever, if he continues in possession, while recognizing his obligations and relation as a tenant under the lease, he then occupies subject to its conditions. In other words, in Wisconsin, more continued occupancy is not enough to form the basis of a holdover under a lease, where cotenants are concerned. In view of Wisconsin's position, it can be seen that a lease between cotenants is only a partial solution to the problem of protecting a cotenant out of possession, especially where the term of the letting is of relatively short duration.

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