The Rights, Duties and Liabilities of Tenants in Common Inter Sese

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NOTES
THE RIGHTS, DUTIES AND LIABILITIES OF TENANTS
IN COMMON INTER SESE

The peculiar nature of the relationship existing among tenants in common in land has long been a source of vexatious problems for the courts. The tribunals of England early committed themselves to the doctrine that such tenants were united in the possession of the land and, consequently, were each entitled to enter upon and enjoy each and every part of the common estate. So long as they all occupied and shared in the use of the land, apportioning the profits and expenses ratably, there was no difficulty. But it naturally developed that not all could or would occupy, and that some were bearing disproportionate shares of the taxes, interest, assessments, etc. Consequently, suits were instituted in equity, for accounting or partition, in which the aggrieved cotenant sought some relief.

I. RENTS AND PROFITS

A. Common Law.

The common law courts refusing to take notice of these differences among the cotenants themselves, operated under the theory that the co-owners were, in effect, partners, and therefore the act of one was the act of all. That is, if one tenant held the property, even to the exclusion of the others, the possession in him was also their possession and so they had no cause to complain. The law gave no remedy by which a co-owner could regain possession, and did not make the tenant in possession answerable to his co-owners, either for the advantages enjoyed by reason of such occupancy, or even for rents received from third parties.

B. Under the Statute of Anne.

Such a rule, though simple in its application and operation, was clearly harsh and inequitable to the aggrieved cotenant. In order to give him a remedy, Parliament enacted Statutes 4 and 5 Anne, chapter 16. This law provided, in part, that "Actions of account 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 and proportion.

1 Crane v. Waggoner, 27 Ind. 52 (1886).
2 Hamilton v. Conine, 28 Md. 635 (1868).
3 See George v. McGovern, 83 Wis. 555, 53 N.W. 899 (1892).
4 Cutler v. Currier, 54 Me. 81 (1866); Prairie Oil & Gas Co. v. Allen, 2 F. (2d) 565 (C.C.A. 8th 1924).
It remained for the courts to say whether or not a mere use and occupation was a "receiving" of more than a just share. The first ruling upon the statute permitted a recovery for such mere use, but it was soon reversed and the statute construed as being applicable only to rents actually received of third parties. This latter rule still obtains in England today.

C. In the United States.

1. In General.

The matter of liability for rents and profits is involved in considerable confusion in the United States. Several states have accepted the enactment and decisions upon it as a part of the common law, but even here there is disagreement in their interpretation. In many jurisdictions, principally in the South, the earlier decision is adopted and the tenant in possession is held to account for his use. However, inasmuch as the English statute did not, in terms, interfere with the rights of the cotenants to enjoy the land, it is, by the preponderance of authority, construed narrowly, not to include mere use and occupation or profits resulting from a use. Some states, including Wisconsin, have enacted statutes similar to that of Anne. It is uniformly held that the tenant is accountable for rents received from third parties, the courts declaring him to be a trustee for his cotenants. In instances where the liability has been imposed, the question has arisen whether such liability is for the rental value of the property, as it was at the time of entry, or for the actual receipts. The Supreme Court of Wisconsin has not yet passed upon this question, and the statute does not specify the measure of liability. It would seem that the better reasoning supports the majority rule. At common law the occupant is only exercising his legal right and is getting nothing for which he should be bound to account. This legal right to occupy should not

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5 Georgia, Kentucky, New Hampshire, New Jersey, North Carolina, South Carolina, Tennessee, Vermont, Virginia, West Virginia.
6 Hayden v. Merrill, 44 Vt. 336 (1872).
7 See Brown v. Wellington, 106 Mass. 318 (1871); Arnold v. Du Booy, 161 Minn. 255, 201 N.W. 437 (1924). This is the rule of Alabama, Arkansas, California, District of Columbia, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, New York, Pennsylvania and Texas.
8 Wis. STAT. (1939) § 234.21. This statute authorizes an action for money had and received against a cotenant for receiving "more than his just proportion of the rents and profits."
13 Wis. STAT. (1939) § 234.21.
depend upon the caprice or indolence of the cotenant.  

However, by reason of his fiduciary relation to his ward, a guardian of a cotenant out of possession is held to account, although the mere fact that the tenants out of possession are minors does not render those in possession accountable.

2. In Ouster.

It is to be noted that the reasoning of the courts is predicated upon the legal right of all to occupy and enjoy the land equally. Consequently, where that right has been denied, i.e. where there has been an ouster of a cotenant, the rule no longer obtains. In such case, the holder is accountable for his use and occupation regardless of whether or not he has made profits. However, even where there has been an ouster, the courts will look back into the circumstances. As a result, where the property has been employed in good faith, and no profits have materialized, there will be no liability despite the ouster. Oftentimes the question arises where the user has held the land in the genuine belief that he was the sole owner and, generally, such a circumstance will operate to permit the user certain deductions. Thus, in a leading case in Wisconsin, where the user was charged with rents and profits, he was allowed reimbursement, proportionately, for his expenditures for taxes, mortgage payments, repairs, etc. The rent to be charged him is determined on the basis of the yearly rental value, as if the property had been let to third parties. The Supreme Court of the United States has affirmed the liability of the cotenant who holds the entire property in a hostile manner on general principles of equity. In Wisconsin, the statutes provide a remedy in ejectment for an ouster or "some other act amounting to a total denial of his right as cotenant," and further provide that, in such case, the plaintiff "may

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14 Cannon v. Stevens, 88 Ark. 610, 115 S.W. 388 (1908). It has been said that "... it would be inequitable to compel a cotenant in possession to account for profits realized out of his skill, labor or business enterprise, when he has no right to call upon his fellow tenant to contribute anything toward the production of those profits nor to bear his proportion..." when the use has resulted in a loss. This is a excerpt from 52 Am. St. Rep. 926, a monographic note on this topic, annotating Ward v. Ward, 40 W.Va. 611, 21 S.E. 746 (1895).

15 Tyler v. Cartwright, 40 Mo. App. 378 (1890).

16 Bird v. Bird, 15 Fla. 424 (1875).

17 Le Barron v. Babcock, 122 N.Y. 153 (1890). In Thrustin v. Brown, 83 Kan. 125, 109 Pac. 784 (1910) it was held that there may be an ouster by the occupant merely because the property does not, of its nature, permit of any joint occupancy.

18 Crane v. Waggoner, 27 Ind. 52 (1886).

19 Ruffners v. Lewis, 7 Leigh (Va.) 720 (1836).

20 Stewart v. Stewart, 90 Wis. 516, 63 N.W. 886 (1895).

21 See also Holt v. Couch, 125 N.C. 456, 34 S.E. 703 (1899).

22 Austin v. Barrett, 44 Iowa 488 (1876).


recover damages for the rents and profits of the premises recovered" for a period not exceeding six years prior to the commencement of the action. 26

3. Agreement to Pay Rent.

A cotenant in possession may, moreover, be compelled to pay rent in instances where he has entered into an agreement to that effect. In such cases, the relation of landlord and tenant will be presumed, 27 and the agreement enforced under the usual law of remedies to landlords. In fact, special circumstances may even warrant an inference of such an agreement. 28 Upon the termination of such a lease, even though the lessee-cotenant retains the exclusive possession of the land, he is considered, under the Wisconsin decisions, to be holding only in his capacity as cotenant. 29 Under the majority rule, however, he would still be considered as holding over as a lessee, and as such, would be liable for rent.

II. EXPENDITURES AND DISBURSEMENTS

A. Liability for Current Expenses.

1. Generally.

We now come to the problem of who has the duty of repairing the property, paying the taxes, the interest on the mortgage, and so forth. The rule can be simply stated that generally this burden devolves equally upon all of the cotenants. 30 However, the courts make an exception where one cotenant has been in sole possession. In such case, he is "deemed to have undertaken the discharge of certain duties to his cotenants, such as that of preserving the property by making needful ordinary repairs, payment of interest on a subsisting mortgage, and payment of taxes and other annually maturing liens." 31 Being in possession, he is considered the agent of the others, authorized to do that which is necessary to preserve the estate. 32 Specifically, he has been held duty bound to "keep down the taxes on the whole during his occupancy" 33 to pay the interest on the mortgage, 34 the insurance, 35 and all other usual annually accruing incumbrances. But

26 Wis. Stat. (1939) § 275.10. But note that the statute expressly denies the plaintiff damages for the value of any improvements made by the defendant.
27 Davies v. Skinner, 58 Wis. 638, 17 N.W. 427 (1883).
28 Boley v. Barutio, 120 Ill. 192, 11 N.E. 393 (1887).
29 Rockwell v. Luck, 32 Wis. 70 (1873).
30 Willmon v. Koyer, 168 Cal. 369, 143 Pac. 694 (1914).
34 Supra, note 32.
it has been uniformly held that where he has, in fact, paid such
incumbrances, not being in sole possession, he has a right to be reim-
bursed by his cotenants, if the rents and profits which he has derived
are insufficient, on the general principles of good conscience. It will
be presumed by the law that he has paid at the request of the others
and for their use, and a promise to reimburse, sufficient to sustain a
common law action of assumpsit, will be implied.

2. Repairs.

At common law, the tenant could compel his cotenants to unite
for repairing by a writ de reparatione facienda, though he could not
recover for repairs already made, however necessary they might have
been. This is no longer the rule in the United States. Recovery for
necessary repairs is usually permitted.

3. Improvements.

Ordinarily, the cotenant has no right to be reimbursed for any
improvements which he has made, on the ground that this would con-
stitute imposing liability upon his cotenant without his consent. Nor
does it matter that the improvements are necessary or of utility. But
of course where the others have consented, they will be compelled to
contribute, and the courts will be found willing to imply consent, or a
promise to share the expenses, from circumstances. Good faith will
be inquired into, as where the occupant has acted upon the mistaken
belief that he owned the fee. Equity will go to great lengths, and
may give relief where the other cotenants have merely stood by, or
where fraud is involved, but mere silence will not suffice.

B. Remedies to Paying Cotenant.

Where the cotenant has made expenditures for which he is entitled
to be reimbursed, he has several remedies. As a rule, he has the right
to contribution, in an independent suit brought for the purpose, which
is enforceable by compelling the noncontributing cotenant to abandon

36 Freeman, Cotenancy and Partition, §§ 322, 512, cited with approval in Eads v. Rutherford, 114 Ind. 273, 16 N.E. 587 (1887).
38 Stewart v. Stewart, 90 Wis. 516, 63 N.W. 886 (1895).
39 Kites v. Church, 142 Mass. 586, 8 N.E. 743 (1886).
40 Fowler v. Fowler, 50 Conn. 256 (1882). "The expense of all necessary repairs, as well as the cost of preserving the title, as by paying off a mortgage, purchasing an outstanding title, paying taxes, assessments, and the like, will be apportioned among the several tenants, although it was borne in the first instance by one." Washburn, Real Property, § 894.
41 Calvert v. Aldrich, 99 Mass. 74 (1868).
44 Reed v. Jones, 8 Wis. 421 (1857).
45 Noble v. Tipton, 219 Ill. 182, 76 N.E. 151 (1905).
46 Crest v. Jack, 3 Watts (Pa.) 238 (1834).
his share as an alternative.\textsuperscript{48} The right is not personal and can be enforced only against the property, or as a deduction.\textsuperscript{49} Moreover, where he removes a mortgage, a tax lien,\textsuperscript{50} or some other encumbrance, he becomes subrogated to such lien to secure contribution, or is regarded as having an equitable lien upon the interest of his cotenant of the same character as that removed.\textsuperscript{51} As to the third parties, the lien is of course discharged by the payment. If the question arises in a suit for partition, the court may, where improvements have been made, give the tenant more than his proportionate share of the property or may give him that property upon which the improvements have been placed.\textsuperscript{52} But the mere fact that, in a particular case, that is impossible, does not create a liability in the other to pay.

The question of the right to reimbursement for expenditures frequently arises out of suits for an accounting or for partition. Ordinarily, the tenant may counterclaim, or seek deductions for taxes, ordinary repairs, payment of interest and principal on a mortgage, necessary legal disbursements, etc., where he has been charged with the rental value.\textsuperscript{53} Some courts will allow deductions even for insurance premiums paid,\textsuperscript{54} although such compensation has been denied in other jurisdictions.\textsuperscript{55} But he cannot recover upon a claim for his personal services rendered.\textsuperscript{56} The Wisconsin Statutes give the court broad powers in suits for partition, including the power to "apportion incumbrances, adjust claims for improvements or for rents and profits."\textsuperscript{57}

### III. Purchase of Tax Titles

Because of the relation of mutual trust and confidence existing in the contemplation of the law among tenants in common, the Wisconsin courts have consistently held that one cannot acquire a tax title and

\textsuperscript{48} Duson v. Roos, 123 La. 835, 49 So. 590 (1909).  
\textsuperscript{49} But see McLaughlin v. Estate of Curt, 27 Wis. 644 (1871), wherein it was held that if the tenant had paid the mortgage debt before a sale on foreclosure, he had a claim for contribution against the person, and a lien on the cotenant's interest, but if he redeemed from the sale after foreclosure, he had only the lien and no personal claim.  
\textsuperscript{50} Wis. Stat. (1939) § 74.63 gives the occupant who has paid taxes a right to recover in a personal suit from the party under whom he occupies.  
\textsuperscript{51} Connell v. Welch, 101 Wis. 8, 76 N.W. 596 (1898); Hogan v. McMahon, 115 Md. 195, 80 Ati. 695 (1911).  
\textsuperscript{52} Stewart v. Stewart, 90 Wis. 516, 63 N.W. 886 (1895). Wis. Stat. (1939) § 276.42 reads that "where any party has, with the knowledge or assent of the others or any of them, made improvements upon lands partitioned the portion of such lands upon which such improvements have been made may be allotted to such party without computing in their value the value of such improvements."  
\textsuperscript{53} Adams v. Bristol, 196 N.Y. 510, 89 N.E. 1095 (1909).  
\textsuperscript{54} Sharp v. Zeller, 114 La. 549, 38 So. 449 (1905).  
\textsuperscript{55} Pickering v. Pickering, 63 N.H. 468, 3 Ati. 744 (1885).  
\textsuperscript{56} Lake v. Perry, 99 Miss. 347, 54 So. 945 (1911).  
\textsuperscript{57} Wis. Stat. (1939) § 276.05.
hold the land adversely under it. As against his cotenants, it operates merely as a payment of the tax, and redemption of the property, for which he might demand contribution of them.\textsuperscript{58} Having purchased upon sale, he will be considered a trustee for the shares of his cotenants.\textsuperscript{59} However, in a more recent case,\textsuperscript{60} the court cited Freeman\textsuperscript{61} with approval of his opinion that “Tenants in common are not necessarily prohibited from asserting an adverse title. If their interests accrue at different times, and under different instruments, and neither has a superior means of information respecting the state of the title, then either, unless he employs his cotenancy to secure an advantage, may acquire and assert a superior, outstanding title, especially where the cotenants are not in joint possession of the premises” because there is not, then, that relation of mutual trust and confidence. Although he may not assert his title, the purchasing cotenant may keep the lien alive until he is repaid, and until such time his co-owners have no right to the possession, nor can they maintain a suit for partition.\textsuperscript{62}

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\textsuperscript{58} Hannig v. Mueller, 82 Wis. 235, 52 N.W. 98 (1892).
\textsuperscript{59} Frentz v. Klotsch, 28 Wis. 312 (1871).
\textsuperscript{60} Allen v. Allen, 114 Wis. 615, 91 N.W. 218 (1902).
\textsuperscript{61} FREEMAN, COTENANCY (2nd ed.) § 155.