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The Inter Vivos Rights of Cotenants Inter Se

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COMMENT

THE INTER VIVOS RIGHTS OF COTENANTS INTER SE

The inter vivos rights and remedies among joint tenants with respect to their common property are in general the same as those of other co-owners of property. Differences become most apparent upon the death of one tenant. During the period when all of the joint tenants are alive, they are included in the general group, "cotenants," the term for co-owners of property,[1] and their rights and remedies for the most part fall within the rules governing co-tenants. Some exceptions will be considered here.

One difference between the rules governing joint tenants and those governing other co-owners is that while service of notice concerning the common property normally binds only the tenant in common who is served, service upon a joint tenant is notice to all of the tenants.[2] Other differences center around the rule that cotenants of property are usually in a relationship of trust and have a fiduciary duty toward one another.[3]

Although it is sometimes held that tenants in common are not in a relationship of mutual trust,[4] historically, in equity, joint tenants, because they hold under a common conveyance, are always in a position of trust and confidence.[5] The fact that cotenants may not feel the particular sentiment of a fiduciary relationship, since the co-ownership may result by operation of law rather than from a voluntary formation, makes little difference; most courts will nevertheless continue to find the fiduciary relationship between them. The reasoning is clear: Since the interest of each cotenant can only be advanced by the advancement of all the tenants' interests, the natural presumption is that the act of one is intended to benefit all.

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[1] Caldwell v. Farrier, 248 S.W. 425 (Tex. Civ. App. 1923); 14 AM. JUR. *Cotenancy* § 1 (1938); 7 R.C.L. *Cotenancy* §§ 1, 2 (1914).

[2] Conrad v. Hawk, 122 Cal. App. 649, 10 P.2d 534 (Dist. Ct. App. 1932); Ellis v. Columbine Creamery Co., 83 Cal. App. 48, 256 Pac. 489 (Dist. Ct. App. 1927); Detlor v. Holland, 57 Ohio Dec. 492, 49 N.E. 690 (1898).

[3] Cotton v. Cotton, 236 Ala. 459, 183 So. 442 (1938); Koch v. Kiron St. Bank, 230 Iowa 206, 297 N.W. 450 (1941); Mason v. Barrett, 295 Ky. 462, 174 S.W.2d 702 (1943); Chavez v. Chavez, 56 N.M. 393, 244 P.2d 781 (1952).

[4] For cases holding that a confidential relationship does not exist between tenants in common unless their interest in the land is the result of the same act or instrument or by agreement, see Stevens v. Reynolds, 143 Ind. 467, 41 N.E. 931 (1895); Clark v. Lindsey, 47 Ohio St. 437, 25 N.E. 422 (1890); Brokaw v. Richardson, 255 S.W. 685 (Tex. Civ. App. 1923); 14 AM. JUR. *Cotenancy* § 52 (1938).

[5] FREEMAN, COTENANCY & PARTITION § 151 (2d ed. 1886); 2 AMERICAN LAW OF PROPERTY § 6.16 (Casner ed. 1952).

Since a cotenant is entitled to possession of the entire property, subject to the rights of his fellow tenants, one tenant may be in sole possession and thus will be clothed with an important indicium of title. Here the fiduciary relationship protects the other cotenants from the possessing tenant's dealings with third parties. Also, the possessing cotenant may be informed of infirmities in the common title, and it would be inequitable to let him take advantage of his fellow tenants because of his position. For this reason, it is normally held that the fiduciary duty includes the duty of a tenant to protect the common title.[6] This is not an affirmative duty, and it is taken to mean only that the cotenant may clear the common title by purchasing outstanding claims of third persons, but when he does, he must permit the other cotenants to share in the acquisition.[7] Usually the purchasing cotenant need only offer for a reasonable time to let the other cotenants share by paying their respective portions[8]. The same rule is apparently applicable when, to protect the common property, the cotenant must acquire other property.[9] When one cotenant buys the interest of another, the transaction is usually given the closest scrutiny by the courts because of the fiduciary responsibility present.[10]

Although joint tenants occupy a relationship of mutual trust, they are not normally agents of one another,[11] and the actions of one tenant concerning the common property are not binding upon the others, unless they have previously authorized or subsequently ratified the acts. The rule is somewhat modified, however, when the act is beneficial to all of the tenants.[12]

Many states have passed legislation preventing a person from benefiting from the killing of his joint tenant. The Washington provision,

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[6] Breitman v. Jaehnal, 99 N.J. Eq. 243, 132 Atl. 291 (1926), *aff'd mem.*, 100 N.J. Eq. 559, 135 Atl. 915 (1927).

[7] Ruffin v. Crowell, 253 Ala. 653, 46 So. 2d 218 (1950); Spencer v. Spencer, 160 Fla. 749, 36 So. 2d 424 (1948); Robertson v. Gregsby, 41 So. 2d 860 (La. 1949); Sperry v. Tolley, 114 Utah 303, 199 P.2d 542 (1948); Dwight v. Waldron, 96 Wash. 156, 164 Pac. 761 (1917); Stone v. Marshall, 52 Wash. 375, 100 Pac. 858 (1909); Burnett v. Kirk, 39 Wash. 45, 80 Pac. 855 (1905).

[8] Buchanan v. Pitts, 111 F.2d 599 (5th Cir. 1940); Markstein v. Schilleci, 258 Ala. 68, 61 So. 2d 75 (1952); Ammann v. Foster, 179 Okla. 44, 64 P.2d 653 (1937).

[9] Cedar Canyon Consol. Mining Co. v. Yarwood, 27 Wash. 271, 67 Pac. 749 (1902).

[10] Rose v. Roso, 119 Colo. 473, 204 P.2d 1075 (1949); Woodard v. Carpenter, 31 Wn.2d 271, 195 P.2d 983 (1948).

[11] Badger v. Boyd, 16 Tenn. App. 629, 65 S.W.2d 601 (1933); Rocky Mtn. Stud Farm Co. v. Lunt, 46 Utah 299, 151 Pac. 521 (1915); 14 AM. JUR. *Cotenancy* § 4 (1938).

[12] *E.g.*, where one cotenant files an adverse claim for the benefit of himself and one of the cotenants. Nesbitt v. DeLamar's Nevada Gold Mining Co., 24 Nev. 273, 52 Pac. 609 (1898), *petition for cert. dismissed*, 177 U.S. 523 (1900); 14 AM. JUR. *Cotenancy* § 82 (1938); 7 R.C.L. *Cotenancy* § 14 (1914).

RCW 11.84.050, provides that upon the slaying of a joint tenant by a cotenant, one-half of the common property passes immediately to the decedent's estate, and the remainder at the time of the death of the slayer.

RIGHT TO USE THE COMMON LAND

Joint tenants share a common estate in the land and each owns this estate conjointly with the other tenants. While for some purposes each joint tenant is considered a tenant of the whole of the common premises (as in the cases of tenure and survivorship), for other purposes (such as alienation and forfeiture), the tenant is considered as having an undivided share in the common estate.[13] Generally, each has equal rights to the possession and use of the real property, but each tenant's rights are subject to the rights of his cotenants.[14] Ordinarily, the possession of one tenant is the possession of all the cotenants,[15] and one tenant in possession cannot restrain another tenant from occupying the land and exercising his own rights of possession and use.[16] A tenant in sole possession, however, may use and occupy the land, enjoying the common estate in the same manner as though he were the sole proprietor.[17] He may occupy and use the entire common property at all times, provided his fellow tenants do not make claim to their own rights of use.[18] Because each tenant's interest is in the whole of the estate, one cotenant may not appropriate any particular portion of the estate for use during the existence of the joint ownership, or upon partition of the common property.[19]

Joint tenants may make contracts between themselves concerning the use of the common property,[20] or concerning a division of the income from the common property.[21]

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[13] 2 AMERICAN LAW OF PROPERTY § 6.1 (Casner ed. 1952); 2 BLACKSTONE, COMMENTARIES *180-83; 2 TIFFANY, REAL PROPERTY § 418 (3d ed. 1939).

[14] Prairie Oil & Gas Co. v. Allen, 2 F.2d 566 (8th Cir. 1924); Howard v. Manning, 79 Okla. 165, 192 Pac. 358 (1920); De La Pole v. Lindley, 131 Wash. 354, 230 Pac. 144 (1924).

[15] Struzinski v. Struzinsky, 133 Conn. 424, 52 A.2d 2 (1947); Barnard v. Pope, 14 Mass. 434 (1817).

[16] Swartzbaugh v. Sampson, 11 Cal. App. 451, 54 P.2d 73 (Dist. Ct. App. 1936).

[17] Morrison v. Clark, 89 Me. 103, 35 Atl. 1034 (1896); Pickering v. More, 67 N.H. 533, 32 Atl. 828 (1894).

[18] Provident Life & Trust Co. v. Wood, 96 W. Va. 516, 123 S.E. 276 (1924); Silva v. Helger, 75 R.I. 397, 67 A.2d 27 (1949).

[19] Swartzbaugh v. Sampson, 11 Cal. App. 451, 54 P.2d 73 (Dist. Ct. App. 1936).

[20] Spahn v. Spahn, 70 Cal. App. 2d 791, 162 P.2d 53 (Dist. Ct. App. 1945); Tindall v. Yeats, 392 Ill. 502, 64 N.E.2d 903 (1946); McGinley v. Cannon, 90 Wash. 311, 155 Pac. 1047 (1916).

[21] Wells v. Wells, 64 Cal. App. 2d 113, 148 P.2d 126 (Dist. Ct. App. 1944).

CONVEYANCES BY A COTENANT

Although each cotenant has an undivided share in the whole of the common tract, and in each specific portion thereof during the existence of the joint ownership, a conveyance by one cotenant of a particular portion, purporting to represent his entire interest in the common estate, is treated in some courts as having no effect on the other cotenants.[22] The reasoning of these courts is that such a conveyance operates to prejudice the rights of the other cotenants as it is an attempt by one cotenant to create a new tenancy in common in a distinct part of the common estate. Such conveyances are not allowed for the additional reason that the cotenant's title is to an undivided share in the whole of the estate, and he is not allowed to carve out his own part, nor convey in such a manner as to compel his cotenants to take their shares in several distinct parcels as he may please. This rule is followed in some courts whether the interest sought to be conveyed is an actual fee interest in a specific portion of the real estate, or rights to take minerals,[23] timber,[24] or other incorporeal rights in the land.[25] Such a conveyance, however, is usually found to bind the grantor and those holding under him by way of estoppel, if the grantor should ever get a clear title to the particular portion that he conveyed.

Other courts treat a conveyance of a specific portion, representing the cotenant's interest in the common property, as effectual to pass the interest of the grantor in that specific part of the land[26] with the result of making the grantee a tenant in common with the other cotenants. The grantee in this case takes the chance that upon partition he or the grantor may not be awarded the particular interest, and as he has no greater rights than his grantor, he may not demand the particular portion upon a partition action.[27] Still other jurisdictions treat such a conveyance as not void, but voidable at the election of an objecting or non-conveying cotenant.[28] This seems to be the least acceptable of the various views taken by the courts, as normally in these juris-

[22] Benedict v. Torrent, 83 Mich. 181, 47 N.W. 129 (1890); Southern Ins. Co. v. Postal Telegraph-Cable Co., 156 N.C. 259, 72 S.E. 361 (1911); FREEMAN, COTENANCY & PARTITION, 198-203 (2d ed. 1886).

[23] Adams v. Briggs Iron Co., 61 Mass. (7 Cush.) 361 (1850).

[24] Nelson v. Bergman, 146 Tenn. 376, 242 S.W. 387 (1922); Lee v. Follensby, 83 Vt. 35, 74 Atl. 327 (1909).

[25] Southern Ins. Co. v. Postal Telegraph-Cable Co., 156 N.C. 259, 72 S.E. 361 (1911).

[26] Virginia Coal & Iron Co. v. Hylton, 115 Va. 418, 79 S.E. 337 (1913); Woods v. Early, 95 Va. 307, 28 S.E. 374 (1897).

[27] Swartzbaugh v. Sampson, 11 Cal. App. 451, 54 P.2d 73 (Dist. Ct. App. 1936).

[28] Pellow v. Arctic Mining Co., 164 Mich. 87, 128 N.W. 918 (1910); Young v. Young, 307 Mo. 218, 270 S.W. 653 (1925); Barnhart v. Campbell, 50 Mo. 597 (1872).

dictions the non-conveying cotenant must do some act to ratify the action of the conveying cotenant.[29] Under the usual rules of agency, for a ratification of the agent's acts by the principal to occur, the agent must be purporting to act as an agent. But where the cotenant conveys, purporting to pass his own good title to the land, he is not acting as an agent for the other cotenants. Moreover, to allow the non-participating cotenants' interest to change hands by a conveyance by one cotenant violates the Statute of Frauds which requires the conveyance of an interest in land to be in writing.[30]

In regard to conveyances by a cotenant of his interest (corporeal or incorporeal) in a particular portion, which is less than the grantor's interest in the whole of the common estate, subject to the grantor's being awarded that portion on partition, a minority of the states take the position that such a grant is absolutely nugatory except between the grantor and the grantee.[31] A majority of the courts will allow the grantee to become a tenant in common with the other cotenants as to the particular interest.[32] Of course these new tenants in common have restricted rights; since they hold under the right of their grantor, they may not be awarded any of the specific portion upon partition.

The better view seems to be that where the cotenant attempts to convey either the whole of the specific tract or just his undivided interest in the common property, the grantee should succeed to his grantor's undivided interest in that portion. This would further the free alienation of property, and would not place too great a burden upon the other tenants. The other cotenants will have an undivided share of the estate upon partition, and the acts of the one cotenant cannot prejudice their rights. If the conveyance of the specific portion is treated as a conveyance of the grantor's interest therein, which may amount to nothing upon partition, there is no danger that the common tract will be divided into small parcels. The same result could be achieved by requesting partition, but this may not be desirable under the terms of the grant creating the joint ownership.

Under the old common law rules, the creation of multitudinous tenancies in common in a particular portion or interest in an estate made partition in kind difficult or impossible, and partition in kind was the only partition available. The jurisdictions allowing the co-

[29] Note 28 *supra.*

[30] 2 TIFFANY, REAL PROPERTY § 454 (3d ed. 1939).

[31] Lucas v. Ferris, 95 Conn. 619, 112 Atl. 165 (1921); Barnes v. Lynch, 151 Mass. 510, 24 N.E. 783 (1890).

[32] Pearce v. Third Ave. Imp. Co., 221 Ala. 209, 128 So. 396 (1930); Middlecoff v. Cronise, 155 Cal. 185, 100 Pac. 232 (1909).

tenant to pass an interest in a specific portion of the common estate do so under the modern practice, and where partition in kind is difficult or impossible, the land can be sold and the proceeds divided among the parties according to their respective rights. It is generally held, however, that a conveyance of more than the joint tenant owns (more than his undivided share) is effective to convey his undivided interest only.[33]

There is one exception taken by the states which recognize the validity of the conveyance by one tenant of a specific portion of the common property. This is the grant of an easement: It is generally held that one cotenant may not, without the joinder of the other cotenants, grant an easement in the common land.[34] A grant of an easement is an attempt by one cotenant, not to substitute another cotenant in his place, as in the case of a conveyance or a lease, but to enable a person not a cotenant to interfere, perhaps perpetually, with the possession of the other cotenants.

LEASES

One tenant may lease his whole interest in the common tract, but the lease by him of the whole estate cannot deprive the other cotenants of their rights. The lessee succeeds to the right of the cotenant under whom he holds, and he becomes a tenant in common with the other cotenants.[35] The tenant holding under the lease may recover possession of the entire tract against anyone except a cotenant,[36] and a cotenant has no right to oust a person who holds possession with the consent of another cotenant.[37] If the cotenant attempts to lease a specific portion of the common tract, the lease is a valid lease of the cotenant's interest in that portion,[38] but does not bind the other cotenants unless they have shared in or compelled an accounting for the rents received.[39] In states which hold that the cotenant cannot

[33] Highland Park Mfg. Co. v. Steele, 232 Fed. 10 (4th Cir. 1916); Giddens v. Reddoch, 207 Ala. 297, 92 So. 848 (1921).

[34] Pfeiffer v. University of Cal., 74 Cal. 156, 15 Pac. 622 (1887); Forrest Milling Co. v. Cedar Falls Milling Co., 103 Iowa 619, 72 N.W. 1076 (1897); Silverman v. Betti, 222 Mass. 142, 109 N.E. 947 (1915); Palmer v. Palmer, 150 N.Y. 139, 44 N.E. 996 (1896); Thomas v. Morgan, 113 Okla. 212, 240 Pac. 735 (1925).

[35] Geary v. Taylor, 166 Ky. 501, 179 S.W. 426 (1915); Satterlee v. Umenthum, 47 S.D. 372, 198 N.W. 823 (1924).

[36] Verdier v. Verdier, 152 Cal. App. 2d 348, 313 P.2d 123 (Dist. Ct. App. 1957); Swartzbaugh v. Sampson, 11 Cal. App. 2d 451, 54 P.2d 73 (Dist. Ct. App. 1936); Waterford Irr. Dist. v. Turlock Irr. Dist., 50 Cal. App. 213, 194 Pac. 757 (Dist. Ct. App. 1920).

[37] Lee Chuck v. Quan Wo Chong & Co., 91 Cal. 593, 28 Pac. 45 (1891).

[38] Davis v. Byrd, 238 Mo. App. 581, 185 S.W.2d 866 (1945).

[39] Jewel Tea Co. v. Eagle Realty Co., 70 F. Supp. 918 (D. Neb. 1947); Nelson v. Wentworth, 243 Mass. 377, 137 N.E. 646 (1923).

convey a specific portion of the common property, as a corollary, he may not lease a specific portion of the common land.[40]

WASTE

Generally at common law there was no action that a cotenant could maintain against his fellow cotenants for waste. The Statute of Westminister II, 1285, 13 Edw. 1, c. 22 changed the English law to allow for such action. Many states have enacted similar statutes, and the Washington provision is found in RCW 64.12.020,[41] allowing for an action between cotenants for waste committed on real property. The Washington statute provides for treble damages as a remedy.

Although most states provide a statutory remedy for a cotenant in the event of waste committed on the property by a fellow cotenant (and those that do not, usually rely upon the Statute of Westminister as giving such a remedy under the common law), there is not a good definition or any common agreement of what constitutes waste between cotenants. Waste is a term usually defined as an abuse or destruction of property by one rightfully in possession resulting in a permanent injury to the inheritance.[42] The basis for determining that waste has been committed is that the actions of the occupier of the land are inconsistent with the limitations of his estate. Thus it is easy to see why many of the courts have difficulty deciding whether there has been waste committed by a cotenant in fee. If a man is the owner of an estate in fee (even though he is a cotenant), his use of the land should not be restricted, nor should he be held accountable for such use, as long as he does not exceed a standard for a reasonable fee owner. Application of this reasoning to a joint tenant in fee would lead to the conclusion that his use of the land would be unimpeachable for waste, except possibly for equitable waste. The English rule is nearly in accord with this position, and it has been held that such a co-owner in fee has the right to use and enjoy the common property in any reasonable way, so long as he does not exclude his cotenants from the same use and enjoyment.[43]

Many American courts agree with the English view, and hold that

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[40] Medina Oil Development Co. v. Murphy, 233 S.W. 333 (Tex. Civ. App. 1921).

[41] See Cross, *The Amendment of the Waste Statute—Retrogression*, 21 WASH. L. REV. 31 (1946).

[42] Halifax Drainage Dist. v. Gleaton, 137 Fla. 397, 188 So. 374 (1939); Thayer v. Shorey, 287 Mass. 76, 191 N.E. 435 (1934).

[43] Job v. Patton L.R. 20 Eq. 84 (1872); Martyn v. Knowllys, 8 T.R. 145, 101 Eng. Rep. 1313 (K.B. 1799); 2 AMERICAN LAW OF PROPERTY § 6.15 (1952).

a cotenant has the same right to reasonable use and enjoyment of the property as he would have as the sole owner in fee.[44] It has, however, been held waste to pull down a sawmill owned in common,[45] or to remove machinery from a mill owned in common and place it in another mill.[46]

In other jurisdictions, the courts evidently feel that allowing a cotenant to use and occupy the land as if he were the sole owner in fee is inconsistent with his particular position as a co-owner, and violates the rights of his cotenants. This is especially apparent in the cases dealing with mines, quarries, and timber lands. In these cases there is little uniformity. In most of the cases, the courts allow the continued operation of a mining project or oil well if the land was used for that purpose when the joint ownership was created.[47] The real difficulty arises over the right of a cotenant to open a new mine or develop and drill a new oil well, or to cut timber. In most of these cases, these courts apply the test for waste that is normally applied to a life tenant, forgetting that the cotenants are actually tenants in fee. Thus it has been held that a cotenant individually may not open a new mine,[48] drill a new oil well,[49] or cut timber upon the land.[50] The courts' reasoning appears to be that the unilateral action of one tenant should not be allowed to diminish the value of the common estate, and even if the minerals or timber do not represent the principal value of the land, their use is a destruction and waste of the inheritance of the other tenants. This reasoning, of course, ignores the fact that the cotenant in fee has an ownership interest in the land, and it may be that the only way he can benefit from his ownership is through such exploitation. Where a non-acting cotenant is dissatisfied with the exploitation of the land, he may seek partition to protect his interests. It seems that a more reasonable rule would be the English one, that the cotenant with a fee interest should have the rights of a reasonable fee owner, subject only to the rights of his cotenants. In practice, many of the courts that call such use of the land waste follow this procedure, and although the cutting of timber, mining of the land, or taking of

[44] Buchanan v. Jencks, 38 R.I. 443, 96 Atl. 307 (1916); Gillum v. St. Louis A. & T. Ry., 5 Tex. Civ. App. 338, 23 S.W. 717 (Ct. Civ. App. 1893).
[45] Maddon v. Goddarce, 15 Me. 218 (1839).
[46] Symond v. Harris, 51 Me. 14 (1862).
[47] Prairie Oil & Gas Co. v. Allen, 2 F.2d 566 (8th Cir. 1924); Howard v. Manning, 79 Okla. 165, 192 Pac. 358 (1920).
[48] Abbey v. Wheeler, 170 N.Y. 122, 62 N.E. 1074 (1902).
[49] Williamson v. Jones, 43 W. Va. 562, 27 S.E. 411 (1897).
[50] Provident Life & Trust Co. v. Wood, 96 W. Va. 516, 123 S.E. 276 (1924).

oil is called waste, the tenant committing such violations is held accountable only for net profits realized from such operations, and not for the treble damages that could be awarded.[51]

OUSTER

Ouster refers to the act of one cotenant in depriving the other cotenant of his rights to possession of the land under such circumstances that the tenant who is in possession would, if that possession continued for the statutory period, acquire title by adverse possession.[52] Under normal circumstances the possession of one cotenant is the possession of all the cotenants; hence exclusive possession by one tenant alone is not sufficient for an ouster.[53] The further acts required are most commonly either the exclusion of the cotenant demanding access to the land or a denial of his title.[54] This may result even though the exclusion is from a smaller part of the land than that of the excluder's share,[55] or where the cotenant in possession purports to convey exclusive title under a claim of exclusive right.[56] In such cases the ousted tenant must have knowledge of such acts on the part of the cotenant;[57] also, in the case where the cotenant in possession claims to be the sole owner, his cotenants are not ousted unless they have adequate knowledge of his claims.[58] However, in the case of a grantee of a cotenant, holding under a deed purporting to convey the entire tract, no actual notice is necessary, and the grantee's open and notorious possession and recording of the deed is adequate to constitute an ouster and commence the running of the statute of limitations against the other cotenants.[59] The question of whether one cotenant's acts actually amount to an ouster is normally one for a jury under the proper instruction of the court.[60]

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[51] Guest v. Guest, 234 Ala. 581, 176 So. 289 (1937); Williams v. Bruton, 133 S.C. 395, 131 S.E. 18 (1925).

[52] Struzinski v. Struzinsky, 133 Conn. 424, 52 A.2d 2 (1947).

[53] Church v. State, 65 Wash. 50, 117 Pac. 711 (1911).

[54] Cameron v. Chicago M. & St. P. Ry., 60 Minn. 100, 61 N.W. 814 (1895).

[55] Susquehanna Transmission Co. v. St. Clair, 113 Md. 667, 77 Atl. 1119 (1910); Muskeget Island Club v. Prior, 228 Mass. 95, 117 N.E. 2 (1917).

[56] Saulsberry v. Maddix, 125 F.2d 430 (6th Cir. 1942); Layton v. Campbell, 155 Ala. 220, 46 So. 775 (1908); Ogelsby v. Hollester, 76 Cal. 136, 18 Pac. 146 (1888).

[57] Tillotson v. Foster, 310 Ill. 52, 141 N.E. 412 (1923); Acton v. Lamberson, 102 Ore. 472, 202 Pac. 421 (1921). Washington apparently requires that the one tenant have actual notice of the other's adverse claim. McKnight v. Basilides, 19 Wn.2d 391, 143 P.2d 307 (1943). *But see* Cox v. Tompkinson, 39 Wash. 70, 80 Pac. 1005 (1905).

[58] Saucier v. Kremer, 297 Mo. 461, 249 S.W. 640 (1923).

[59] Prescott v. Nevers, 19 Fed. Cas. 1286 (No. 11390) (C.C.D. Me. 1827); Broadwater v. Parker, 209 Ga. 801, 76 S.E.2d 402 (1953); Parker v. Proprietors of Locks & Canals, 44 Mass. (3 Met.) 91 (1841).

[60] Hare v. Chisman, 230 Ind. 333, 101 N.E.2d 268 (1951).

The remedy of an ousted tenant is ejectment with an accompanying action for mesne profits. Judgment for the plaintiff in such an action does not oust the defendant from possession of the land, but only affirms the plaintiff in his rights to possession in common with the defendant.[61]

RENTS, PROFITS AND ACCOUNTING

The original common law was that a cotenant could not be made to account to his fellow cotenants for the use and occupation of and appropriations of rents and profits from the common land unless his acts amount to an ouster or unless he has agreed to act as bailiff for them. The English law was changed by the Act of Anne, 1705, c. 16, § 27, which purported to make a cotenant liable to his cotenants for the excess of rents and profits over and above his fair share. The English courts, however, construed the statute narrowly, and applied it only where the cotenant had received rents from a third person. The Act of Anne has been considered a part of the common law of the United States, but its application has not been uniform. The largest number of jurisdictions, like the English courts, make a narrow application of the Act of Anne (or similar statutes, locally enacted), and normally hold that there is no liability on the part of a cotenant in possession to account to his fellow cotenants for his use and occupation of the common premises, even though he takes all the rents and profits.[62] A few jurisdictions construe the act so as to make a cotenant in possession liable for use and occupation on the basis of its rental value and profits,[63] as long as these are not the result of the labor and invested capital of the cotenant in possession. Almost all jurisdictions recognize that the tenant will be liable for the use, occupation, and profits of the common premises, if the action of the tenant in possession amounts to an ouster of the other tenants.[64]

The Washington position on the question of accounting for rents and profits is not clear. The supreme court apparently first took the position that a tenant in sole possession was not liable for the use,

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[61] Clay v. Field, 115 U.S. 260 (1885).

[62] Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 52 P.2d 237 (1935); Hill v. Jones, 118 Conn. 12, 170 Atl. 154 (1934); Washington County Irr. Dist. v. Talboy, 55 Idaho 382, 43 P.2d 943 (1935); Thrustin v. Brown, 83 Kan. 125, 109 Pac. 784 (1910); Fenton v. Wendell, 116 Mich. 45, 74 N.W. 384 (1898); Sons v. Sons, 151 Minn. 360, 186 N.W. 811 (1922); Tolen v. Tolen, 96 N.J. Eq. 496, 126 Atl. 211 (1924); Eysenbach v. Naharkey, 110 Okla. 207, 236 Pac. 619 (1925).

[63] Larmon v. Larmon, 173 Ky. 477, 191 S.W. 110 (1917); Daniel v. Daniel, 106 Wash. 659, 181 Pac. 215 (1919).

[64] Johnson v. Covington, 148 Tenn. 47, 251 S.W. 893 (1923); 14 AM. JUR. *Cotenancy* § 34 (1938).

occupation, rents, and profits of the common land, absent an agreement to the contrary, unless the cotenant out of possession had made a demand therefor, and the possessing cotenant's liability, if any, commenced at the time that the demand was made.[65] Subsequently, the court apparently changed its position in *McKnight v. Basilides*,[66] where the defendant was a tenant in common with his stepchildren. The defendant had the exclusive possession and use of the common property for a period of 13 years, when the plaintiffs brought an action for partition and accounting. The court decided first that no adverse possession had been perfected against the plaintiffs since there had been no ouster (the plaintiffs had no actual notice of the defendant's claim to exclusive title); it then decided that it was inequitable to follow the general rule that a cotenant is not liable to his cotenants for his use and occupation of the property owned in common, and so held that he should pay for his personal use of that part of the property owned by his cotenants.

Fulton v. Fulton[67] is a recent Washington case involving an action by two brothers for partition of property once held in partnership, since dissolved, and at the time of the action held in tenancy in common. In the action, one brother asked for an accounting for the other's use and occupation of a portion of the property, the plaintiff relying upon the *McKnight* case. The court followed the general rule that one tenant was not liable to cotenants for use and occupation of the common land, relying upon *American Law Reports* for authority, the court quoting in part from the passage:

> The rule which prevails in the majority of jurisdictions, founded on the plainest principles of property ownership, is that, absent statute construed to work a different result, . . . a tenant in common, joint tenant, or coparcener who has enjoyed occupancy of the common premises or some part thereof is not liable to pay rent to the others therefore, or to account to them respecting the reasonable value of his occupancy, where they have not been ousted or excluded nor their equal rights denied, and no agreement to pay for the occupancy . . .[68]

The Washington court then harmonized its result in the *Fulton* case with the result in the *McKnight* case by referring to the court's express

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[65] Leake v. Hayes, 13 Wash. 213, 43 Pac. 48 (1895).
[66] 19 Wn.2d 391, 143 P.2d 307 (1943).
[67] 57 Wn.2d 331, 357 P.2d 169 (1960).
[68] Annot., 51 A.L.R.2d 388, 413 (1957). See also, People *ex rel.* Breene v. Dist. Ct. of Lake County, 27 Colo. 465, 62 Pac. 206 (1900); Sons v. Sons, 151 Minn. 360, 186 N.W. 811 (1922); Kelly v. Dierks, 131 Okla. 217, 268 Pac. 193 (1928); 2 TIFFANY, REAL PROPERTY § 450 (3d ed. 1939); 14 AM. JUR. *Cotenancy* § 34 (1938).

disapproval of the majority rule in that case as dicta, and holding that the facts of the *McKnight* case put it squarely within the provisions of the above quoted general rule, as, in the view of the court in the *Fulton* case, the possession of the defendant in the *McKnight* case was sole and exclusive. Admittedly the possession of the defendant in the *McKnight* case was sole and exclusive, but the facts stated in that case indicate that the defendant had not denied the rights of the plaintiffs, nor had he excluded them from the premises.

> During the time from the death of his wife, Alice, until a few days prior to the beginning of this action, appellant (the defendant) never made any claim to respondents that he was the sole owner of the property, nor did the respondents make any claim to the property during the same period.[69]

The end result in the *Fulton* case seems the most desirable under the circumstances, since the cotenant owns an undivided share in the property, and is entitled to the possession of it in part or in whole, as long as he does not interfere with the rights of the other cotenants. His sole and exclusive possession is entirely by the leave of the other cotenants, and if they choose not to demand their rights, there seems no reason why the cotenant in possession should be required to pay for the exercise of his own rights. Because of the court's intent expressed in *Fulton* to put Washington in the majority position, it is probably safe to say that henceforth in Washington, a cotenant will not be liable to his cotenants for use and occupation of the common premises, unless his actions amount to an ouster. Nevertheless, since the *McKnight* case, where no ouster in the normal sense occurred, is still the law, it may be that the court in the *Fulton* case was attempting to redefine ouster to mean only exclusive possession.

There seems to be a few exceptions to the general rule that a cotenant is not liable to his other cotenants for profits realized during his sole and exclusive use and occupation of the land. Under the reasoning that the Act of Anne was designed to prevent one cotenant from reducing the value of the other shares, many American courts have found that the tenant in possession is accountable to the other tenants for their shares of the profits, when his activities producing profits had the effect of a permanent reduction in value of the land. Thus a tenant in possession, without an ouster of his cotenants, has

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[69] McKnight v. Basilides, 19 Wn.2d 391, 393, 143 P.2d 307, 308 (1943).

been held liable to them where he operates a mine or quarry,[70] recovers oil,[71] or cuts timber.[72] In addition, it has been held that a joint tenant may be entitled to compensation to the extent that profits from the land have been increased by his own personal and private improvements upon the land, even though he is not in possession.[73]

CONTRIBUTIONS

Carrying Charges of the Property. Where one cotenant has satisfied a debt in the form of a lien or an assessment against the common property or pays the necessary carrying charges of the property, such as taxes and insurance, he is entitled to contribution from his cotenants as a matter of right for their proportionate share of the amount paid.[74] As to repairs, there is a division of authority. If allowed, normally they must be necessary for the preservation of a building or other erection on the land rather than just desirable.[75] The cotenant wishing to make the repairs and wishing to get a contribution from his fellow cotenants must make a demand upon the cotenants to join with him in making the repairs, and the cotenants' refusal to do so makes them open to demand for contribution once the repairs have been completed.[76] In some states and in England, the rule still is that contribution will not be exacted even though the expenditure was absolutely necessary for the preservation of the property.[77]

It seems that the right of a cotenant to contributions should depend on who had possession of the land during the period for which contribution is sought. If a cotenant does choose to make use of his right to sole possession and use, it seems reasonable to expect that he should

[70] Silver King Coalition Mines Co. v. Silver King Consol. Mining Co., 204 Fed. 166 (8th Cir. 1913); McChord v. Oakland Quicksilver Mining Co., 64 Cal. 134, 27 Pac. 863 (1883); White v. Smyth, 142 Tex. 272, 214 S.W.2d 967 (1948).

[71] Davis v. Atlantic Oil Products Co., 87 F.2d 75, (5th Cir. 1936); Payne v. Callahan, 37 Cal. App. 2d 503, 99 P.2d 1050 (Dist. Ct. App. 1940).

[72] Guest v. Guest, 234 Ala. 581, 176 So. 289 (1937); Williams v. Bruton, 133 S.C. 395, 131 S.E. 18 (1925).

[73] Combs v. Ritter, 100 Cal. App. 2d 315, 223 P.2d 505 (Dist. Ct. App. 1950).

[74] Willmon v. Koyer, 168 Cal. 369, 143 Pac. 694 (1914); Botkin v. Pyle, 91 Colo. 221, 14 P.2d 187 (1932); Rippe v. Badger, 125 Iowa 725, 101 N.W. 642 (1904); Hoyt v. Lightbody, 98 Minn. 189, 108 N.W. 843 (1906); Bates v. Hamilton, 144 Mo. 1, 45 S.W. 641 (1898); Carson v. Broady, 56 Neb. 648, 77 N.W. 80 (1898).

[75] Connolly v. McLeod, 217 Miss. 231, 63 So. 2d 845 (1953); Moore v. Maes, 214 S.C. 274, 52 S.E.2d 204 (1949); 2 TIFFANY, REAL PROPERTY § 461 (3d ed. 1939).

[76] *In re* Real Estate of Cochran, 31 Del. Ch. 368, 66 A.2d 497 (Orphans Ct. 1949); Keyser v. Morehead, 23 Idaho 501, 130 Pac. 992 (1913); Cooper v. Brown, 143 Iowa 482, 122 N.W. 144 (1909); Moss v. Rose, 27 Ore. 595, 41 Pac. 666 (1895); Duplesse v. Haskell, 89 Vt. 166, 94 Atl. 503 (1915). Some cases suggest that no actual request to the other tenants need be made, but that such request and obligation is implied in the nature of the cotenancy. See Keyser v. Morehead, 23 Idaho 507, 130 Pac. 992 (1913); Crawford v. Weidemann, 170 Ky. 613, 186 S.W. 509 (1916).

[77] Cosgriff v. Foss, 152 N.Y. 104, 46 N.E. 307 (1897).

pay the normal charges of the land, such as insurance, taxes and ordinary repairs, at least to the extent that these do not exceed the value of the use of the land. This is especially true of joint tenants, who always stand in a fiduciary relationship, so that one should not profit at the expense of the others. The courts, however, do not always concern themselves with the question of who has had possession of the land during the period of time for which contribution is sought, although it is generally held that the cotenant in possession must use the profits from the land for the payment of the normal carrying charges. It has also been held that where all of the cotenants are in possession recovery may be had,[78] and where none of the tenants is in possession recovery may be had, as there is an equal duty to maintain the land.[79] When the tenant in sole possession has paid all of the carrying costs, and the value of the use and enjoyment of the land which he has had equals or exceeds such payments, no action against the other cotenants for the contribution will be allowed.[80] If the tenant has ousted his cotenants, no right to contribution is allowed.[81] When the tenant in possession refuses to account for rents and profits, again no action is allowed.[82] But in all cases, where a cotenant is chargeable for rent he may set off against such claims the normal carrying charges that he has paid.

When a tenant has a claim for carrying charges or repairs, he ordinarily does not have a right of personal recovery against his cotenants; his remedy is to offset his claim in a suit by his other tenants for an accounting for rents and profits, or in the alternative, to enforce an equitable lien upon the interests of his fellow cotenants in the land.[83] In the event that the cotenant has paid off a mortgage or other

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[78] Conley v. Sharpe, 58 Cal. App. 2d 145, 136 P.2d 376 (Dist. Ct. App 1943); Hotopp v. Morrison Lodge, 110 Ky. 987, 63 S.W. 44 (1901); Howland v. Stowe, 290 Mass. 142, 194 N.E. 888 (1935); Newton v. Weiler, 87 Mont. 164, 286 Pac. 133 (1930); Knesek v. Muzny, 191 Okla. 332, 129 P.2d 853 (1942).

[79] Vlancancich v. Kenny, 271 N.Y. 164, 2 N.E.2d 527 (1936).

[80] Gordon v. McLemore, 237 Ala. 270, 186 So. 470 (1939); Ward v. Pipkin, 181 Ark. 736, 27 S.W.2d 523 (1930); Finley v. Keene, 136 N.J. Eq. 347, 42 A.2d 208 (1945); Roberts v. Roberts, 136 Tex. 255, 150 S.W.2d 236 (1941). Some jurisdictions will allow recovery to the occupying tenant where he has paid more than he has received in benefits. Kirsch v. Scandia American Bank, 160 Minn. 269, 199 N.W. 881 (1924); Gearheart v. Gearheart, 213 S.W. 31 (Mo. Sup. 1919). In other jurisdictions, the tenant in possession is not allowed recovery, except to offset rents, no matter what benefits he has received. Gordon v. McLemore, 237 Ala. 270, 186 So. 470 (1939); Schilbach v. Schilbach, 171 Md. 405, 189 Atl. 432 (1937).

[81] Victoria Copper Mining Co. v. Rich, 193 Fed. 314 (6th Cir. 1911); Wistar's Appeal, 125 Pa. 426, 17 Atl. 460 (1889).

[82] Jarvis v. Jarvis, 288 Mich. 608, 286 N.W. 96 (1939).

[83] Johnson v. Washington, 152 Ga. 635, 110 S.E. 889 (1922); Hogan v. McMahon, 115 Md. 195, 80 Atl. 695 (1911); Hurley v. Hurley, 148 Mass. 444, 19 N.E. 545 (1889);

encumbrance upon the land, he is subrogated to the position of the mortgagee for the purpose of compelling payment by his cotenants of their portion,[84] and if the payment discharges a lien, equity will keep it open in order that it may be enforced to compel payment.[85] The general rule seems to be that only where the debt paid was a personal obligation of the other cotenants will the paying cotenant have a personal action against them.[86]

There are a few courts which do allow a personal judgment against the cotenants in an action based upon the right to contribution, but usually these recoveries are allowed in different types of actions, such as assumpsit, rather than in an action for contribution or partition.[87] Other states will only allow charges such as taxes and insurance paid by a tenant in possession as a setoff in a claim for rent.[88] In such a case no lien may be had on the cotenant's interest and no personal judgment may be had against him.

The denial of personal recovery against a cotenant where the contribution is allowed raises a peculiar problem in the case of a joint tenant. If allowance for contribution is only a lien upon the cotenant's interest, upon the nonpaying tenant's death the paying joint tenant will only have a lien upon his own property, probably resulting in a merger and loss of the lien, whereas, a tenant in common would still have a lien upon the interest of the deceased tenant. At first glance this would appear to be a just result, since the joint tenant survivor now owns an entire interest in the land, and supposedly has the whole benefit of any sums expended upon the property. But a closer analysis discloses the fallacy of this assumption, for the deceased tenant during his life has all the advantages of such sums put into the land, and, in the case of taxes and some repairs, the only benefit derived was during

Stone v. Marshall, 52 Wash. 375, 100 Pac. 858 (1909); Leake v. Hayes, 13 Wash. 213, 43 Pac. 48 (1895). But an equitable lien will not be allowed one cotenant against the interest of another where third parties will be adversely affected. Aylward v. Lally, 147 Wash. 29, 264 Pac. 983 (1928).

[84] Scanlon v. Parish, 85 Conn. 379, 82 Atl. 969 (1912); Thurston v. Holden, 45 Idaho 724, 265 Pac. 697 (1928); Hansen v. Cerro Gordo State Bank, 209 Iowa 1352, 230 N.W. 415 (1930); Olson v. Chapman, 4 Wn.2d 522, 104 P.2d 344 (1940); Robinson v. Robinson, 14 Wn.2d 98, 126 P.2d 1090 (1942).

[85] Parsons v. Urie, 104 Md. 238, 64 Atl. 927 (1906); Flack v. Gosnell, 76 Md. 88, 24 Atl. 414 (1892).

[86] Thurston v. Holden, 45 Idaho 724, 265 Pac. 697 (1928); Tucker v. Whittlesey, 74 Wis. 74, 41 N.W. 535 (1889); 2 AMERICAN LAW OF PROPERTY § 6.17 (Casner ed. 1952).

[87] Lach v. Weber, 123 N.J. Eq. 303, 197 Atl. 417 (1938); Weible, *Accountability of Tenants*, 29 IOWA L. REV. 558 (1944).

[88] Gordon v. McLemore, 237 Ala. 270, 186 So. 470 (1939); Ward v. Pipkin, 181 Ark. 736, 27 S.W.2d 523 (1930); Succession of Czarnowski, 151 La. 754, 92 So. 325 (1922).

the life of this tenant. In addition, if a lien had been placed upon his interest, a court must have already decided that he owed the amount, and it seems unjust that he should escape payment simply because the court, to protect him from exorbitant charges and give him the option of paying the amount he owes or forfeiting his interest, limits his liability to a lien upon his interest in the land. The non-paying tenant had the possibility of being the survivor, and if he had survived, the lien of the paying cotenant would survive and could be enforced. There appears to be a dearth of authority upon this question, at least involving joint tenants. One case, *Ratte v. Ratte*,[89] even disallowed recovery from the estate of a deceased joint tenant for the amount of a mortgage paid by the survivor after the death of the other, upon which the deceased tenant was personally liable. The question has been answered more directly in cases involving surviving spouses of tenants by the entireties, there being a division of authority on allowing recovery by the survivor. Some courts feel that the deceased spouse had the benefits of the land during his life, and should not escape the obligations to contribute for rents, profits, and repairs simply by death.[90] Other courts feel that since the surviving spouse has the whole of the former common property, the allowance of a recovery would be unjust enrichment.[91] The Washington court apparently has not made a decision on the question, but since personal recoveries for payments of taxes are limited by statute to persons not claiming ownership of the real property,[92] it seems doubtful that a personal recovery can be had by a cotenant in fee.

Although there are many factors to be considered, the most just result seems to be that where both joint tenants have enjoyed the use of the land during the duration of the tenancy, one tenant should not be allowed to escape his obligations for the normal carrying charges of the land during the period of co-ownership, simply by death. A recovery should be allowed in such a case.

Improvements. A cotenant may not compel his fellow tenants to

[89] 260 Mass. 165, 156 N.E. 870 (1927).

[90] *In re* Keil's Estate, 51 Del. (1 Storey) 351, 145 A.2d 563 (Sup. Ct. 1958); Cunningham v. Cunningham, 158 Md. 372, 148 Atl. 444 (1930); Nobile v. Barletta, 109 N.J. Eq. 119, 156 Atl. 483 (1931); *In re* Dowler's Estate, 368 Pa. 519, 84 A.2d 209 (1951); *In re* Kershaw's Estate, 352 Pa. 205, 42 A.2d 538 (1945).

[91] Durlacher v. First Nat. Bank, 100 So. 2d 73 (Fla. App. 1958); Lopez v. Lopez, 90 So. 2d 456 (Fla. App. 1956); Florio v. Greenspan, 165 N.E.2d 753 (Mass. 1960); Ratte v. Ratte, 260 Mass. 165, 156 N.E. 870 (1927).

[92] RCW 84.56.320. See Olson v. Chapman, 4 Wn.2d 522, 104 P.2d 344 (1940), limiting the application of this statute to persons not having an ownership interest in the land.

contribute toward the cost of improvements he makes upon the land which are not necessary for its repair, and he is not allowed credit for them in an accounting action for rents and profits,[93] provided there is no express or implied contract to that effect. If one tenant were allowed to make improvements on the land chargeable to his cotenants according to their respective shares, the one tenant might well improve his cotenants out of their share of the property by building improvements which would benefit himself much, but benefit the land little. If the improving tenant were allowed to offset the value of the improvements in an action for accounting of rents or profits, he might deprive his fellow tenants of any income or benefit from the property for years.

Of course, the non-allowance of improvements places an additional burden upon the improving tenant and frequently is inequitable, especially when the improvements are needed for the most beneficial use of the land. Recognizing this, the courts have been ready to grant such relief to the improving tenant as is possible without doing injury to his fellow tenants. Accordingly, in partition actions, the courts will determine and allow the improving tenant the amount that the improvements have enhanced the value of the land at its sale,[94] or, if the land can be divided the courts will attempt to give the improving tenant the portion of the land with the improvements on it.[95] Of course, none of these remedies are available to the improving tenant where the court determines that the improvements were made for the purpose of improving the other tenants out of their share or causing them to abandon their interest.[96] There is some authority that Washington, in a minority position, will allow contribution for improvements enhancing the value of the property.[97]

An additional problem arises in the case of an accounting for rent. Since the improvements normally become part of the land, all of the

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[93] Ward v. Pipkin, 181 Ark. 736, 27 S.W.2d 523 (1930); Higgins v. Eva, 204 Cal. 231, 267 Pac. 1081 (1928); Barry v. Barry, 147 Neb. 1067, 26 N.W.2d 1 (1947); Elling v. Kohler, 150 Okla. 129, 3 P.2d 161 (1931); Cobbett v. Gallagher, 339 Pa. 231, 13 A.2d 403 (1940); Minder v. Mottaz, 37 Wash. 474, 79 Pac. 996 (1905); Binning v. Miller, 55 Wyo. 478, 102 P.2d 64 (1940).

[94] Klein v. Maddox, 59 Cal. App. 2d 141, 138 P.2d 28 (Dist. Ct. App. 1943); Fenton v. Wendell, 116 Mich. 45, 74 N.W. 384 (1898); DeBusk v. Guffee, 171 S.W.2d 194 (Tex. Civ. App. 1943); Kubina v. Nichols, 241 Wis. 644, 6 N.W.2d 657 (1942).

[95] Hamlin v. Hamlin, 90 Wash. 467, 156 Pac. 393 (1916); 1 A.L.R. 1193 (1919).

[96] Wolfe v. Childs, 42 Colo. 121, 94 Pac. 292 (1908); Cosgriff v. Foss, 152 N.Y. 104, 46 N.E. 307 (1897); Moore v. Thorpe, 16 R.I. 655, 19 Atl. 321 (1889).

[97] *In re* Foster's Estate, 139 Wash. 224, 246 Pac. 290 (1926). However, the statement by the court that contribution is allowed for improvements actually enhancing the value of the land was not necessary for the decision in the case.

cotenants share in their ownership.[98] Should the improving tenant in sole occupation be required to account to his cotenants for the reasonable rental value of the improvements he has made? It seems inequitable to charge the tenant for the improvements he himself has made, adding to the benefit of the other tenants at no cost to them. The rule seems to be that the rental value will be determined by the value of the property without the improvements.[99] However, somewhat inconsistently, it is the rule that one tenant may not charge his cotenants for personal services connected with the common property.[100]

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[98] 2 AMERICAN LAW OF PROPERTY § 6.18 (Casner ed. 1952).

[99] Hanna v. Carver, 121 Ind. 278, 23 N.E. 93 (1889); Raferty v. Monahan, 22 R.I. 558, 48 Atl. 940 (1901); Cain v. Cain, 53 S.C. 350, 31 S.E. 278 (1898); Williamson v. Jones, 43 W. Va. 562, 27 S.E. 411 (1897).

[100] Harry v. Harry, 127 Ind. 91, 26 N.E. 562 (1891); Sharp v. Zeller, 114 La. 549, 38 So. 449 (1905); Von Herberg v. Von Herberg, 6 Wn.2d 100, 106 P.2d 737 (1940).