Maryland Law Review

Volume 21 | Issue 2 Article 7

Partition of Land by Grantee of Easement - Baltimore G. & E. Co. v. Bowers

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Partition Of Land By Grantee Of Easement

Baltimore G. & E. Co. v. Bowers[1]

Plaintiff is the grantee of an easement for an electric transmission line conveyed by one of two tenants in common. Defendants are the heirs and successors in title of the two original tenants in common. These tenants in common held the fee between themselves by application of the rule in *Shelley's* Case, subject to a life estate in the whole in the survivor. At the time of the grant of the easement, in 1924, one tenant in common had died, and the survivor held the entire possessory interest by reason of the life estate in the whole. The survivor conveyed the easement without the joinder of the heirs of the deceased tenant in common. Because of this failure, only the heirs of the granting tenant in common, and not the heirs of the deceased tenant in common, had been held bound by the grant as to an undivided one-half interest in the fee.[2]

In resisting an ejectment suit filed by the heirs of the non-assenting tenant in common, the plaintiff sought an order requiring the heirs of the granting cotenant to join as party-plaintiffs in the plaintiff's bill for partition. The Court of Appeals held that the grantee of this easement from less than all of the cotenants had a right in equity to require the grantor or her heirs to seek partition against the non-assenting cotenant's heirs.[3] In reaching this result, the Court did not have to consider the question of prescription since prescription did not begin to run against the remaindermen, heirs of the non-assenting tenant in common, until these remaindermen were vested with possession. Under the deed, vesting of the right to possession could not occur until the death of the survivor in 1943; and prescription could not have been completed before 1963.

The instant suit raises the issue of how the plaintiff can preserve and protect its easement so as to receive the full benefit of its grant and protect itself against the heirs

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[1] 221 Md. 337, 157 A. 2d 610 (1960).

[2] Burnham v. Gas & Electric Co., 217 Md. 507, 144 A. 2d 80 (1958), noted 19 Md. L. Rev. 43 (1959). There, by an application of the rule in Shelley's Case, the Court held that the grant of the easement operated to bind the heirs of the grantor as to an undivided one-half interest in the tract of land as tenants in common with the heirs of the non-assenting tenant in common, but did not bind the latter. Cf. Williams v. Armiger, 129 Md. 222, 98 A. 542 (1916).

[3] *Supra*, n. 1.

of the non-assenting tenant in common, who sued to eject the plaintiff.[4]

The general rule[5] appears to be that where the validity of the easement is in dispute, the party claiming the easement is a proper and even a necessary party to the suit if the conveyance by which the easement was granted is not absolutely void. Previous to the instant suit, the heirs of the non-assenting grantor had challenged the validity of the easement by an ejectment suit, and it was held in the previous litigation between the parties that the conveyance was valid only as to the grantor and her heirs.[6]

The holding in the instant case that the grantee of the easement has a right to require the grantor or her heirs to seek partition against the non-assenting cotenant's heirs is supported by *Mee v. Benedict*,[7] where the Michigan court held that although the grantee had no property right in himself to support a partition suit, he did have a "right in equity to require his grantor to sue for a partition of the land," saying, *inter alia:*

> ". . . the only means of making that conveyance effectual to carry into effect the intent of the parties was for said owners of timber to ask and obtain partition of the lands. This they had the right, and it was their duty, to do, and equity would require and compel *action on their part* to that end. * * *"
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> "We do not depart from the doctrine that such conveyance is void as against the cotenant, but it is void only in so far as it affects the cotenant's rights. * * * It is void so far as the cotenant's interest shall not be injuriously affected by the conveyance; but it is not void as against the grantor, and we think it is competent, under the general equity powers of the court, to compel the grantor of a special interest to take such steps as to make his conveyance effectual."[8]

Likewise, in *Charleston C. & C. R. Co. v. Leech*,[9] the plaintiff, grantee of an easement from a cotenant owning a one-third undivided interest in a tract of land, was held to be entitled to an order requiring partition as upon an appli-

[4] *Supra*, n. 2.

[5] 68 C.J.S. 118, Partition, § 75.

[6] *Supra*, n. 2.

[7] 98 Mich. 260, 57 N.W. 175 (1893).

[8] *Id.*, 175-176.

[9] 33 S.C. 175, 11 S.E. 631 (1890).

cation by the grantor, and, after the grantor's death, by the successors in title.

There is authority in other jurisdictions[10] supporting this view that the grantor can be compelled in equity to "take such steps as having the common property partitioned in order to make his conveyance effectual."[11] In the Fourth Circuit,[12] the grantee of an easement from an owner of a two-thirds interest in land was held entitled "to have the land partitioned" so as to bind the grantor and his heirs by allotting to them the portion of the land on which the burden lies. Other cases cited by the Maryland Court of Appeals in the instant case are to the same or similar effect.[13]

These cases rest on the obvious proposition that an easement would be worthless without a partition for it would be ineffective against a tenant in common who did not assent to the grant by his cotenant.[14] Under the rule adopted in the instant case equity vests a right in the grantee to effectuate his grant by bringing suit through his grantor against a non-assenting tenant in common for a partition.

Inasmuch as the grantor himself could seek partition from his cotenant,[15] it is apparent that a grantee of his entire estate derives this right.[16] The grantee stands in the grantor's shoes, but exercises only a derivative power. This raises the question as to whether a grantee of a par-

[10] Harrell v. Mason, 170 Ala. 282, 54 So. 105 (1911); Pellow v. Arctic Iron Co., 164 Mich. 87, 128 N.W. 918 (1910); Cook v. International & G.N.R. Co., 3 Tex. Civ. App. 125, 22 S.W. 1012 (1893); 75 A.L.R. 1456 (1931).

[11] Saulsberry v. Saulsberry, 121 F. 2d 318 (6th Cir. 1941).

[12] Burdine v. Southern Public Utilities Co., 11 F. 2d 29 (4th Cir. 1926).

[13] Whitton v. Whitton, 38 N.H. 127 (1859); Jeter v. Knight, 81 S.C. 265, 62 S.E. 259 (1908); Hitt v. Caney Fork Gulf Coal Co., 124 Tenn. 84, 139 S.W. 693 (1911); Simpson-Feel Oil Co. v. Stanolind Oil & Gas Co., 136 Tex. 158, 125 S.W. 2d 263 (1939); Thomas v. Southern Settlement & Develop. Co., 132 Tex. 413, 123 S.W. 2d 290 (1939); Jones v. Berg, 105 Wash. 69, 177 Pac. 712 (1919).

[14] Susquehanna Co. v. St. Clair, 113 Md. 667, 672, 77 A. 2d 119, 121 (1910), states the rule that "one tenant in common has no right to alter or change the property to the injury of the other without his assent." See also Dugan v. Baltimore, 70 Md. 1, 16 A. 501 (1889). The authorities appear to be uniform in holding that a cotenant cannot by himself grant an easement that will bind his cotenants. 2 AMERICAN LAW OF PROPERTY (1952), § 6.12, 51; 2 TIFFANY, REAL PROPERTY (3rd ed. 1939), § 456; 86 C.J.S. 517, Tenancy in Common, § 111.

[15] 2 MD. CODE (1957) Art. 16, § 154; Tolson v. Bryan, 130 Md. 338, 344, 100 A. 366 (1917); Shipley v. Tome Institute, 99 Md. 520, 58 A. 200 (1904). See *supra*, n. 10.

[16] Harrell v. Mason, 170 Ala. 282, 54 So. 105, 106 (1911) ("[Grantee] has the right to get the benefit of what he bought."). See also Cook v. Boehl, 188 Md. 581, 53 A. 2d 573 (1947).

tial interest can exercise this power in his own name or in the name of the grantor. The Court of Appeals did not answer this question; it refused to decide whether a grantee of an easement from one cotenant could be considered a concurrent owner, but reached the same result by upholding his right to force his grantor to partition the land. Equity thereby has safeguarded the easement if assent to a partitioning is not forthcoming from a non-assenting cotenant. If the grantee can not do directly in his own name what is necessary to protect his interest, he will be entitled to do it indirectly through his grantor.

The rules governing partition are simple. Where one cotenant conveys in fee simple his interest in an undivided share of a definite parcel of property, the grantee thereof is by right entitled to seek partition, and will be protected in respect to partition proceedings, in cases where the rights of the other cotenants are not prejudiced.[17] The rule applies independent of any statute[18] and is quoted in the instant case with the statement that the "right of partition in kind existed and continues to exist independent of statute" and, at common law, is "a matter of right, except where . . . inconvenience or difficulty would not formerly prevail to prevent it."[19] On the contrary, the rule that persons having interests in the property which do not make them cotenants cannot maintain an action of partition[20] apparently requires that a plaintiff seeking partition have a present possessory interest, legal or equitable, in the land. Lacking such an interest, the plaintiff will be

[17] Highland Park Mfg. Co. v. Steele, 235 F. 465, 470 (4th Cir. 1916); Finley v. Dubach, 105 Kan. 664, 185 P. 886 (1919); Pellow v. Artic Iron Co., 164 Mich. 87, 128 N.W. 918 (1910); Lasater v. Ramirez, 212 S.W. 935 (Tex. 1919); Boggess v. Meredity, 16 W. Va. 1, 28-29 (1879); 2 AMERICAN LAW OF PROPERTY (1952)) §§ 6.21, 6.22; 75 A.L.R. 1456 *et seq.* (1931).

[18] 75 A.L.R. 1456 (1931); 68 C.J.S. 33-35, Partition, §§ 21, 22; 40 Am. Jur. 88-96. Partition, §§ 106-111; 2 TIFFANY, REAL PROPERTY (3rd ed. 1939), §§ 473-476; 4 THOMPSON, REAL PROPERTY (3rd ed. 1939), § 1984; WALKER, LAW OF PARTITION (2nd ed. 1882), 4.

[19] Baltimore G. & E. Co. v. Bowers, 221 Md. 337, 343, 157 A. 2d 610 (1959). At common law, only a coparcener had a right to partition. Later, by 31 HEN. 8, c. 1 (1539), joint tenants and tenants in common were granted the right in their own name. This statute was extended by 32 HEN. 8, c. 32 (1540), to all tenants for life or a term of years. In Maryland, MD. LAWS 1785, Ch. 72, merely declared the common law, as did MD. LAWS 1831, Ch. 311, and other legislation culminating in 2 MD. CODE (1957), Art. 16, § 154. In Hardy v. Leager, 212 Md. 565, 130 A. 2d 737 (1957), the Court held that an absolute right of partition exists independent of the statute. The instant case, moreover, merely amplifies in whom the right exists and the procedure for asserting the right. It does not, however, decide whether the plaintiff is a concurrent owner entitled by statute to partition.

[20] *Supra*, ns. 18, 19. See also 2 AMERICAN LAW OF PROPERTY (1952), § 6.22, 100.

denied the right to sue.[21] Thus, it is manifest that a cotenant of a fee simple interest or his grantee may sue for partition,[22] and that a cotenant of a life estate or estate for years may also sue; but partition, if granted, would not affect the remaindermen.[23]

Although it is not entirely clear from the authorities, a contrary rule has prevailed where a cotenant grants to a third person the timber rights of his moiety.[24] In such a case, the grant cannot, as against the cotenants of the grantor, create a cotenancy in the timber distinct from the land, so as to enable the grantee to sue for partition of the timber but not of the land. "Separate ownership of timber or a stratum of minerals is not a cotenancy and therefore the owner cannot bring a partition suit."[25]

There are two important considerations which the Court leaves unanswered in the instant case. First, is the plaintiff entitled to partition in his own right or must he compel his grantors to bring a partition suit? Second, if partition in kind is not feasible, and a sale is required, how should the sale be made and the proceeds divided?

The Court found it was not required to decide whether the plaintiff could sue for partition in his own name under a Maryland statute giving an equity court the right to:

> ". . . decree partition of any lands . . . or any right, interest or estate therein . . . on the bill or petition of any joint tenant, tenant in common, or any parcener or any concurrent owner. . . ."[26]

The question of whether the grantee of an easement has a right to seek partition by suing in his own name was answered in an Alabama case similar to the present suit.[27] There, plaintiff was a grantee of timber rights from one cotenant, and was held entitled to file a bill for partition, not as a cotenant, but through equity's power to enforce his right to benefit from what he had purchased. The Court said, *inter alia:*

> ". . . there is an old maxim that equity affords a remedy wherever there is a right which cannot be enforced

[21] 2 TIFFANY, REAL PROPERTY (3rd ed. 1939), §§ 475, 476.
[22] Cook v. Boehl, 188 Md. 581, 53 A. 2d 555 (1947); Dugan v. Baltimore, 70 Md. 1, 16 A. 501 (1889); Gittings v. Worthington, 67 Md. 139, 9 A. 228 (1887); Thruston v. Minke, 32 Md. 571 (1870).
[23] *Supra*, n. 16. 40 Am. Jur. 92, Partition, §§ 109, 110.
[24] 40 Am. Jur. 88, Partition, § 106.
[25] 2 AMERICAN LAW OF PROPERTY (1952), § 6.22, 100.
[26] 2 MD. CODE (1957) Art. 16, § 154.
[27] Harrell v. Mason, 170 Ala. 282, 54 So. 105 (1911).

> in a court of law. The complainant having bought the undivided interest in the timber cannot cut and remove it without becoming liable to the other owners of the lands; yet he has the right to get the benefit of what he has bought. * * * He nevertheless has the right to the timber on such part of the land as may be set apart to his grantor, and for the maintenance of this right must be allowed to prosecute a suit against the grantor and the other cotenants, ..."[28]

A denial of partition in kind, however, would not leave the plaintiff without protection of his easement. A sale and division of the proceeds is permissible where the evidence affirmatively demonstrates that the property is not divisible in kind without loss or damage to the parties.[29] The rationale for this rule lies in the fact that the common law right to partition in kind produced many hardships where partition destroyed the value of the land or was impossible because of the location of the land itself. To prevent these hardships, many states, including Maryland, enacted legislation providing for a judicial sale of the land with a division of the proceeds among the various owners.[30] "The proceeds of the sale take the place of the land, and the respective rights of the cotenants to the money are in proportion to the undivided interest of each in the land."[31] To this rule may be added two corollaries, that the person seeking a sale has the burden of proof that the land is not partionable without injury to the parties, and that the criteria for granting or denying a sale is "whether the value of the share of each [co-owner] in case of partition would be materially less than his share of the money equivalent that could probably be obtained for the whole."[32] The early Maryland case of *Earle v. Turton*[33] clearly states the rule which applies today:

> "Or upon proof that the land could not be divided without loss or injury to the parties, [the Court] could have decreed a sale. * * * According to our construction of the 99th section [now § 154] of the 16th Article, to justify the court in passing a decree of sale in such

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[28] *Id.*, 105-106.

[29] Earle v. Turton, 26 Md. 23 (1866).

[30] *Supra*, n. 26.

[31] 40 Am. Jur. 73, Partition, § 83.

[32] *Id.*, 74.

[33] 26 Md. 23 (1866).

> case, it ought to be satisfied by proof that the land cannot be divided without loss or injury to the parties interested."[34]

As a result of this decision, the trial court has been ordered to appoint Commissioners to determine if the land in controversy is partitionable in kind. If it is and partition is decreed, the defendants will become separate owners, and the heirs of the plaintiff's grantor will be assigned that portion of the tract covered by plaintiff's easement, thereby giving plaintiff full protection in the exercise of its rights.

If, on the other hand, the land is not partitionable in kind, a judicial sale can be decreed, whereby the entire tract can be sold subject to plaintiff's easement and the proceeds apportioned among the defendants, after deducting from the share of the heirs of the plaintiff's grantor the depreciation in the sale price caused by plaintiff's easement. Under such a sale, plaintiff would receive full protection in the exercise of its easement as against the purchaser.

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[34] *Id.*, 34.