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ACCOUNTABILITY OF A COTENANT FOR USE AND OCCUPATION

At common law, one cotenant could occupy the whole of the common property and appropriate all the rents and profits without accounting to the other unless his acts amounted to an ouster or unless he agreed to pay rent or committed waste.¹ While this rule was based upon the settled principle that cotenants, though jointly seized of the entire estate, have a several and equal right of entry and possession, its injustices finally became recognized by the English Parliament. The statute of Anne was enacted for the purpose of changing the common law:

Actions of account shall and may be brought and maintained . . . by one joint tenant and tenant in common . . . against the other as bailiff for receiving more than comes to his just share or proportion.²

The English cases decided subsequent to the statute of Anne stressed that the statute refers to what is *received* and not what is *taken* and does not apply to the case where a cotenant is in sole possession of the premises and appropriates all the crops and profits, but is limited to the case where a cotenant receives rents from third persons.³ The statute of Anne has generally been adopted in this country and in several states it has been re-enacted in the same or substantially the same terms. Many of these jurisdictions follow the English construction of the statute and as a result no liability is incurred for mere use and occupation of the common property even though accompanied by the appropriation of the profits.⁴

An exception to this rule is recognized in a few of these jurisdictions. Continued ownership of real estate by two or more persons is likely to prove awkward and unsatisfactory because of a practical impossibility of satisfactory concurrent personal use or occupancy. The difficulty is most acute where the property consists of a single small residence or a small place of business. In such circumstances these courts have held the occupying cotenant liable for the rental value of the property even though he has been guilty of nothing except making normal use of the property.⁵

In other states a different construction has been put on the statute of Anne, or statutes in like terms, to the effect that one tenant in common is liable to account for the use and enjoyment of the common property regardless of the fact that the property is capable of satisfactory occupation by all of the cotenants.⁶

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1. *Lepschutz v. Lepschutz*, 124 Pa.Super. 380, 188 Atl. 556 (1936); *Airington v. Airington*, 79 Okla. 243, 192 Pac. 689 (1920); 24 Marq. L. Rev. 148 (1940).
 2. 4 Anne, c. 16, § 27 (1705).
 3. *Henderson v. Easen*, L.R. 17 Q.B. 701 (1851).
 4. 4 Thompson on Real Property 431 (1940), and cases cited therein.
 5. *Annely v. De Saussure*, 26 S.C. 497, 2 S.E. 490 (1887) (Held that a wharf was incapable of occupancy by both cotenants and occupancy of one necessarily excluded the other.) *Oechsner v. Courcier*, 155 S.W.2d 963 (Tex. 1941) (Tenant in common occupied dwelling house not suitable for occupation by all the cotenants).
 6. 4 Thompson on Real Property 439 (1940), and cases cited therein.

The Wyoming Supreme Court has not had the opportunity to decide the question of whether or not a cotenant must account for mere use and occupation of the common property. The statute in Wyoming concerning this point of law is taken from Ohio's code and provides that:

One tenant in common . . . may recover from another his share of rents and profits received by such tenant in common . . . according to the justice and equity of the case. . . .⁷

It has been determined that Wyoming adopted the common law prior to the enactment of the statute of Anne.⁸ Thus the statute in Wyoming can be treated as a codification of the statute of Anne or a new legislative act subject to a fresh interpretation.

The United States District Court for the District of Wyoming had an opportunity to construe the Wyoming statute in the case of *Clark v. Boysen*.⁹ This case held that a tenant in common who wrongfully excluded his cotenant was liable for the out-tenant's¹⁰ proportionate share of the reasonable rental value of the common property during the adverse occupancy. However, the federal court turned to the law of Minnesota to aid in making its decision instead of applying the applicable Wyoming statute. At the time this case was decided the federal courts were not obligated to follow the common law of the state where the facts arose but they were bound to follow the statutory law of that state.¹¹ Although the court failed to apply the statute in Wyoming, the rule announced is a proper interpretation of the statute and is in accord with the states that have adopted statutes of similar wording. The case of *Sons v. Sons*¹² was cited in the opinion as authority for the court's decision. The Court in the *Sons* case said that the Minnesota statute would require a cotenant in possession of the common property to account to his out-tenant only if he held the property adversely. The court continued by saying that the statute did not intend to change the common law to the extent that a cotenant would be liable if he did not wrongfully exclude the cotenant out of possession. Since this statute is similar to the statute in Wyoming, this decision is of some probative value in determining what rule should be followed in Wyoming.

There are no decisions in Ohio prior to the enactment of the statute in Wyoming to aid in discovering the intent of the legislature when it followed the Ohio code, but subsequent decisions will necessarily be of value in determining what the outcome will be when Wyoming is faced with this problem.

The Supreme Court of Ohio had its first opportunity to construe the

7. Wyo. Comp. Stat. § 3-6919 (1945).

8. The common law was adopted as of the year 1603. *Barber v. Smythe*, 59 Wyo. 468, 143 P.2d 565 (1943).

9. 39 F.2d 800 (1930), cert. denied, 282 U.S. 869.

10. Cotenant not in possession of the common property.

11. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 787 (1938).

12. 151 Minn. 360, 186 N.W. 811 (1922).

statute in the case of *West v. Weyer*.¹³ In this case the cotenant in possession simply occupied pasture land. The cotenant did not cultivate or crop the common land or receive any rent from others or make any use of the same. He did not occupy the common land adversely to any of his cotenants nor did he exclude any of them from possession. He did not occupy the common land under any lease or contract with any of his cotenants to pay rent therefore, nor did any of his cotenants ask or demand possession of the premises or any share of the profits prior to the commencement of the partition suit.

The court held that according to the justice and equity of the case, the profitable use and occupation by a tenant in possession creates a liability to account to the out-tenant for a proportionate share of the profits received. There was no determination of what monetary gain was received as a result of pasturing the cattle on the land or whether the cotenant did in fact realize a monetary gain from the occupation. The out-tenant was awarded a proportionate share of the rental value of the land as a share of the "profits" received. The only conclusion that can be reached from this decision is that the mere use and occupation of the land was considered a "profit" to the tenant in possession even though in reality the occupation may have been an unprofitable venture from an economic standpoint.

This rule was fortified by the recent decision in the case of *Cohen v. Cohen*.¹⁴ Mrs. Cohen, a widow, was a tenant in common with the children of her deceased husband by a prior marriage. The children did not live in the house during the marriage or thereafter, nor did they ask or demand possession of their proportionate share prior to the commencement of the action. The court held that Mrs. Cohen had received value by occupying the undivided interest of her cotenants, rent free, and therefore, under the doctrine of the *West* case, was obliged to account to her cotenants for their share of the fair value of the occupancy.

An examination of the applicable statute in Wyoming will reveal that the Wyoming courts could either follow the construction adopted by the English courts and many of the American courts in construing the statute of Anne and statutes of similar import, or follow the Ohio approach to the effect that the statute is a new legislative act subject to a fresh interpretation.

Before it can be wisely determined which construction should be accepted in this state, if either one, a decision should be made as to whether or not it is according to justice and equity to require a cotenant in possession of the common property to account to his out-tenant for the rental value that may have accrued to him as a result of the use and occupation.

There seems to be little justification for the rule requiring the in-

13. 46 Ohio St. 66, 18 N.E. 537 (1888).

14. 157 Ohio 503, 106 N.E.2d 77, 51 A.L.R.2d 383 (1952).

tenant¹⁵ to account to the out-tenant for mere use and occupation. The right of one tenant in common is to an undivided share of the whole.¹⁶ and this right to occupy and use the common property does not depend on the joint occupation of all the cotenants. The very nature of a cotenancy makes it impossible for a tenant in possession to use the property without benefiting from the out-tenant's undivided interest. If an out-tenant does not want to take advantage of the property there is no just reason why the tenant in possession should be penalized for exercising his own right. Tenants in common should not be required to let their property stand vacant under penalty of paying rent to their out-tenant.¹⁷ The out-tenant can at any moment enter into equal enjoyment of the property and his neglect to do so may be regarded as an assent to the sole occupation of the in-tenant.¹⁸ The tenant in possession receives in truth the return of his own labor and capital to which his out-tenant has no right. If he should happen to lose money in the cultivation of the property he cannot call on the out-tenant for a share of the losses as he would be able to do if the land had been cultivated by the mutual agreement of the cotenants.¹⁹ The fact that the cotenant's occupancy prevents the property from being adversely possessed seems to be a fair recompense for any profits that he might receive.

The rule adopted by many jurisdictions that a cotenant in possession of the common property is not required to account to his out-tenant for mere use and occupation would appear to be the more equitable rule. Such a result can be reached under the Wyoming statute but if it is treated as a new legislative act there is no need to proclaim hard and fast rules of interpretation as developed in construing the statute of Anne. The wording of the statute is such that it will allow the court to make a decision according to the equities of each case, taking into account the feasibility of all the cotenants occupying the common property.

RICHARD J. MACY

RESERVATION OF MINERALS BY WYOMING COUNTIES

The county of Albany, after bidding for certain lands at a tax sale, received a certificate of purchase for the land. Pursuant to statute,¹ four years after the certificate had been issued, the county treasurer issued a tax deed of the delinquent tax land to the county. Subsequently, the county board sold the land to Morgan Probasco, reserving to itself a part of the mineral rights. Probasco later brought an action to quiet his

15. Cotenant in possession of the common property.

16. *Whitton v. Whitton*, 38 N.H. 127, 75 Am.Dec. 163 (1859).

17. *Mastbaum v. Mastbaum*, 126 N.J.Eq. 366, 9 A.2d 51 (1939).

18. *Henderson v. Easen*, L.R. 17 Q.B. 701 (1851); *Pico v. Columbet*, 12 Cal. 414, 73 Am.Dec. 550 (1859).

19. *Ibid.*

1. Wyo. Comp. Stat. § 32-1703 (1945).