#H-510 12/29/82

Memorandum 83-10

Subject: Study H-510 (Resolution of Disputes Where Property Occupied by One of Several Cotenants)

BACKGROUND

The Assembly Judiciary Committee has forwarded to the Commission for review Assembly Bill 2911 (Assemblywoman Moore, 1981-82 Regular Session). A copy of the bill is attached to this memorandum as Exhibit 1. The bill relates to the rights between cotenants in occupancy and out of occupancy of property.

As we understand the procedural status of the bill, it was introduced last session but held under submission in the Assembly Judiciary Committee pursuant to an agreement between the Committee chairman and the author of the bill that the bill would be referred to the Commission for comment.

The Commission, by statute, does not comment on pending legislation, but makes its own reports and recommendations to the Legislature as to needed revisions in the law. The staff has informed Assemblywoman Moore's office of this, and her office has indicated that they are interested in having the Commission study the subject matter of Assembly Bill 2911.

This memorandum analyzes the problem raised by Assembly Bill 2911. The Commission should decide what changes, if any, are necessary in the law. Following our normal procedure, we will then prepare a tentative recommendation and distribute it to interested persons for comment. We should be able to review the comments, prepare a final recommendation, and transmit the recommendation to the 1984 legislative session.

THE PROBLEM

The problem addressed by Assembly Bill 2911 is one aspect of the rights and duties of cotenants between each other--whether there should be an obligation of a cotenant in possession to account to a cotenant out of possession for the use value of the share of the cotenant out of possession. This problem is common to both joint tenancy and tenancy in common, which the law treats identically in this area.

In the ordinary case the problem will be resolved by the cotenancy agreement, which will spell out the possessory and other rights of the parties. However, in some cases there will be no cotenancy agreement.

For example, the owner of property may create a joint tenancy in the property for purposes of passing title at death, without thought of the inter vivos relations of the joint tenants. The owner of property may give the property by will to several persons, with no indication of possessory or other rights, or the property may pass to several persons by intestate succession. A cotenancy may also be created by operation of law in more unusual cases, for example, where community property is not divided at dissolution of marriage, or where title to the same piece of property is acquired by different persons by tax deed and bond foreclosure.

In deciding what changes, if any, are needed in the law, the Commission should bear in mind that the law in this area will govern a fair number of cases, but that in the usual case the parties will specify their rights as cotenants. The Commission should also keep in mind the conflicting public policies involved, neatly identified in a recent article by Professor Lawrence Berger. "In the solution of this problem, two major policies of our legal and economic system, which most often lead in the same direction, become poles pulling in opposition. These policies are the desire to protect private property interests on the one hand and to reward effort and industry on the other." Berger, An Analysis of the Economic Relations Between Cotenants, 21 Ariz. L. Rev. 1015 (1979).

CALIFORNIA LAW

The general rule of California law, subject to a number of exceptions, is that a cotenant in possession need not account to a cotenant out of possession for the use value of the share of the cotenant out of possession, either in law or in equity. "By the common law, one tenant in common has no remedy against the other who exclusively occupies the premises and receives the entire profits, unless he is ousted of possession when ejectment may be brought, or unless the other is acting as bailiff of his interest by agreement, when the action of account will lie. The reason of the doctrine is obvious. Each tenant is entitled to the occupation of the premises; neither can exclude the other; and if the sole occupation by one co-tenant could render him liable to the other, it would be in the power of the latter, by voluntarily remaining out of possession, to keep out his companion also, except upon the condition of

the payment of rent. The enjoyment of the absolute legal right of one co-tenant would thus often be dependent upon the caprice or indolence of the other . . . . The occupation by him, so long as he does not exclude his co-tenant, is but the exercise of a legal right. His cultivation and improvements are made at his own risk; if they result in loss he cannot call upon his co-tenant for contribution, and if they produce a profit his co-tenant is not entitled to share in them. The co-tenant can at any moment enter into equal enjoyment of his possession; his neglect to do so may be regarded as an assent to the sole occupation of the other." Pico v. Columbet, 12 Cal. 414, 419-20 (1859). The Pico opinion, written by Justice Field, goes on to point out:

> We have treated this case as an action of account at law, but to the same result we should come if the proceeding were in equity. There is no equity in the claim asserted by the plaintiff to share in profits resulting from the labor and money of the defendant, when he has expended neither, and has never claimed possession, and never been liable for contribution in cases of loss. There would be no equity in giving to the plaintiff, who would neither work himself, or subject himself to any expenditures or risks, a share in the fruits of another's labor, investments, and risks. 12 Cal. at 422.

For a more recent illustration of these principles, see, e.g., Black v. Black, 91 Cal. App.2d 328, 204 P.2d 950 (1949).

It should be noted that the Pico and Black cases involved an action by the cotenant out of possession to account for the issues and profits derived by the cotenant in possession from the estate (e.g., by operating a farm). The same rule also applies, however, where the tenant in possession does not derive any issues or profits from the estate but simply occupies it, for example by residing in a house; in this case the cotenant out of possession may not recover his or her share of the use value of the property. See, e.g., McWhorter v. McWhorter, 99 Cal. App. 293, 278 P. 454 (1929). "It is a recognized rule that one tenant may not maintain an action against his cotenant who is in sole possession of the property to recover rent for the cotenant's occupancy of the property, or for profits derived from the property by means of the occupant's own labor. [Citations.] Not even in an equitable action for accounting may one tenant maintain an action against his cotenant in the exclusive possession of the property for rents or profits of his own labor. [Citation.] The same rule will prevail in an action for partition between the cotenants." 99 Cal. App. at 296.

The general rule of no accounting is subject to a number of important exceptions. Ordinarily a cotenant in possession has the right to make a reasonable use of the property without having to account to other cotenants except for waste. However, where the cotenancy is of mineral rights, the very nature of the cotenancy invites the cotenant to deplete the property by extraction of minerals. In this case, although the general rule is that a cotenant in possession need not account to cotenants out of possession for issues or profits, the use by the possessory tenants adversely affects the nonpossessory tenants, and an accounting may be required. See, e.g., McCord v. Oakland Quicksilver Mining Co., 64 Cal. 134, 27 P. 863 (1883). In this situation, the duty to account to non-producing cotenants for their fractional interests is generally subject to a charge for their proportion of operation and production expenses. Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 52 P.2d 237 (1935).

A second major area where an accounting may be required is where the cotenant in possession has leased out the whole or a part of the property to a third person. In this situation the cotenant out of possession is entitled to a proportionate share of the rents received. "If A., one tenant in common, occupies the property and cultivates it, investing his own capital and labor, at his own risk, the law says he shall have the product, if he have made no contract with his co-owner; but if he rent the property to others, he is bound to account." Howard v. Throckmorton, 59 Cal. 79, 89 (1881). The reason for this exception is not clear; it is evidently derived from other jurisdictions, which have adopted the statute of Anne. See discussion below. For a good illustration of the rule that a cotenant in possession is liable only for a share of rents received from third parties but not for a share of the profits of a business conducted on the property, see Rutledge v. Rutledge, 119 Cal. App.2d 114, 259 P.2d 79 (1953), involving property which the cotenant in possession occupied in part and rented out in part. Where the cotenant is required to account for rental receipts, any taxes and expenses borne by the cotenant may be offset, although it has been held that the cotenant may not offset a charge for services in managing the property and collecting rents. Goodenow v. Ewer, 16 Cal. 461 (1860).

A third important exception to the rule of no accounting is where a cotenant in possession excludes another cotenant from possession. "And

one cotenant ousted by another is entitled to recover damages resulting from the ouster, which ordinarily amounts to his share of the value of the use and occupation of the land from the time of the ouster." Zaslow v. Kroenert, 29 Cal.2d 541, 176 P.2d 1 (1946). In order for the cotenant to be held to account for a proportionate share of the use value of the property (ordinarily the reasonable rental value), the cotenant must forcibly exclude or prevent use by the cotenant out of possession. See, e.g., Brunscher v. Reagh, 164 Cal. App.2d 174, 330 P.2d 396 (1958); De Harlan v. Harlan, 74 Cal. App.2d 555, 168 P.2d 985 (1946). The reason for this rule is clear; the ouster violates the basic incident of all cotenancies--the right to concurrent possession of the property.

Finally, these rules are of course subject to a contrary agreement of the parties. See, e.g., Nevarov v. Nevarov, 117 Cal. App.2d 581, 256 P.2d 330 (1953). It should also be noted that despite the general rule that the cotenant in possession is not required to account for the use value of the property, if the cotenant seeks recovery in a partition action for expenditures for the common benefit of the property, the share of the use value of the cotenant out of possession may be offset. See, e.g., Hunter v. Schultz, 240 Cal. App.2d 24, 49 Cal. Rptr. 315 (1966).

OTHER JURISDICTIONS

California law is essentially identical to the law of nearly all other common law jurisdictions. At common law a cotenant in possession was not required to account to a cotenant out of possession except in case of ouster or by agreement of the cotenants. Blackstone, Commentaries *183. This rule was modified by Statute of Anne, 4 & 5 Anne, ch. 16, § 27 (1705), which provided that, "Actions of account shall and may be brought and maintained . . . 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." When the issue arose whether the Statute of Anne permits a cotenant out of possession to recover profits derived by a cotenant in possession, the English court held the statute was limited to rents received from third persons. Henderson v. Eason, 17 Q.B. 701, 117 Eng. Rep. 1451 (1851). "There are obviously many cases in which a tenant in common may occupy and enjoy the land or other subject of tenancy in common solely, and have all the advantages to be derived from it, and yet it would be most unjust to

make him pay anything. For instance, if a dwelling-house or room is solely occupied by one tenant in common without ousting the other, or a chattel is used by one tenant in common, and nothing is received, it would be most inequitable to hold that by a simple act of occupation or user, without any agreement, he should be liable to pay a rent, or anything in the nature of a compensation, to his co-tenant for that occupation, to which, to the full extent to which he enjoyed, he had a perfect right. It appears impossible to hold such a case to be within the statute."

Most American jurisdictions have adopted the Statute of Anne and have followed the interpretation placed on the Statute by the English courts, restricting its application and that of similar statutes to the situation where rents and profits have been received from third persons. They have refused to treat the statutes as imposing liability on an occupying tenant for the reasonable rental value of the land or the profits derived from the nondepleting use of the land. See C. Moynihan, Introduction to the Law of Real Property 226-227 (1962); Annot., 51 A.L.R.2d 388 (1957).

Powell summarizes the American law as follows:

> "Unity of possession" is the characteristic attribute of a tenancy in common. In the absence of special facts the possession by one cotenant is deemed a possession by all cotenants . . . . It is a corollary of this basic generalization that one cotenant is privileged to use and to enjoy the whole property in the same manner as if he were the sole owner thereof, provided only that his behavior does not bar other cotenants seeking to share the benefits, and subject to a seldom recognized duty of account to the other cotenants. A tenant in common occupying the whole is normally held not to be liable to his cotenants for the value of its use and occupation, or for the economic benefits so obtained. An exception to this rule is recognized where the property owned in common can only be occupied by one person, since occupancy by one in this situation constitutes an exclusion of the others. An ouster or denial of the rights of the tenant in possession constitutes another exception which requires the payment of rental. In the absence of an express agreement, the relation between an occupying cotenant and the out-of-occupancy of other cotenants is not that of landlord and tenant. 4A R. Powell, The Law of Real Property § 603, pp. 606-09 (1982).

See also the discussion in Weibel, Accountability of Cotenants, 29 Iowa L. Rev. 558 (1944). Although the cotenant in possession cannot be charged for enjoyment of the right of possession, the cotenant is ordinarily liable for carrying charges for the property and to maintain the

property. See, e.g., W. Burby, Handbook of the Law of Real Property § 98, p. 320 (3d ed. 1965). But where the cotenant in possession seeks to recover for these expenses, the cotenant out of possession may offset the reasonable rental value of his or her share. See, e.g., Note, 32 Notre Dame Lawyer 493 (1957). For a thorough exposition of the law, see Berger, An Analysis of the Economic Relations Between Cotenants, 21 Ariz. L. Rev. 1015, 1016-20 (1979).

In a small number of American jurisdictions where an accounting statute has been enacted, it has been broadly construed so that even in the absence of ouster or special agreement to pay rent to the others, a cotenant in possession is accountable for the rental value of the land. See 2 American Law of Property § 6.14, p. 62 (1952). For example, Ohio Rev. Code Ann. § 5307.21 (1981) provides, "One tenant in common, or coparcener, may recover from another tenant in common, or coparcener, his share of rents and profits received by such tenant in common or coparcener from the estate, according to the justice and equity of the case." On the basis of the variation in language of this statute from the Statute of Anne, the Ohio courts have held that a cotenant in possession may be charged with a pro rata share of the rental value of the property. See, e.g., Cohen v. Cohen, 157 Ohio St. 503, 106 N.E.2d 77 (1952).

The few jurisdictions, like Ohio, that take this approach appear to do so on a strict basis of statutory construction rather than on a policy basis. We have been able to discover only one jurisdiction that adopted a rule requiring an accounting by a cotenant in possession for reasonable rental value based on an analytical approach to the problem. This jurisdiction is Washington which, interestingly enough, does not have the Statute of Anne or its equivalent but arrived at its conclusion by court-made exception to the common law.

Originally Washington followed the traditional common law rule that a cotenant in possession is not liable to account unless the cotenant has excluded the other cotenant from possession. See, e.g., Leake v. Hayes, 13 Wash. 213, 43 P. 48 (1895). Then in the 1943 case of McKnight v. Basilides, 19 Wn.2d 391, 143 P.2d 307 (1943), the Supreme Court reversed itself and held that the cotenant in possession was equitably liable for a share of the reasonable rental value, based on an unjust enrichment theory. "No practical or reasonable argument can be advanced

for allowing one in possession to reap a financial benefit by occupying property owned in common without paying for his personal use of that part of the property owned by his cotenants. The fairest method in cases in which the cotenant occupies and uses common property, instead of renting it out, is to charge him with its reasonable rental value." 19 Wn.2d at 407, 143 P.2d at 315. The court was not unanimous, however, and a dissent argued that the cotenants out of possession did nothing to assert their rights, hence the occupancy by the cotenant in possession was presumptively permissive, and that in any case the damages should be strictly limited by the applicable statute of limitation. Nor did the Supreme Court's decision impress the commentators, who pointed out not only that the decision was on shaky legal ground but also that it would create practical problems:

> If the rule of Leake v. Hayes is nevertheless overruled many unsolved points arise . . . . Now will the rental value be set at what it was at the time the tenancy in common was created, or will it continually increase as the tenant in possession makes improvements? When one cotenant leases from another, after expiration of the lease is he liable for the reasonable rental value as in the instant case . . . or for rent at the terms set up by the lease . . .? Note, 19 Wash. L. Rev. 218, 219 (1944).

Evidently the commentator's prediction of problems was accurate, for in 1960 the Washington Supreme Court apparently reversed itself, adopting the rule that a cotenant in possession is not liable for the value of the possession and characterizing the McKnight statement as dictum and distinguishing the case on its facts. Fulton v. Fulton, 57 Wn.2d 331, 357 P.2d 169 (1960). This shift of Washington back to the majority American rule was approved by the commentators:

> 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. Comment, 37 Wash. L. Rev. 70, 81 (1962).

This comment has proved accurate and subsequent Washington cases have followed Fulton rather than McKnight.

LEGAL SCHOLARSHIP

As the preceding discussion has indicated, not only the courts but also legal scholars have accepted the soundness of the rule that a cotenant should not generally be held to account for occupancy of the property. The position of the scholars is generally:

(1) The cotenant in possession should not be penalized for doing that which he or she has a legal right to do. See, e.g., Note, 24 Marquette L. Rev. 148, 149-50 (1940) ("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 depend upon the caprice or indolence of the cotenant.").

(2) Possession by the cotenant has not injured the cotenant out of possession. See, e.g., 2 American Law of Property § 6.14, p. 62, n.19 (1952) ("It seems clear that there is little reason and less justice in requiring the tenant to account for the use and enjoyment of his own property enjoyed without injury or wrong to his cotenant.").

(3) Requiring the cotenant to account would destroy the character of cotenancy, which is a free right to undivided concurrent possession of the property. See, e.g., C. Moynihan, Introduction to the Law of Real Property 226 (1962) ("This view would seem to be a logical consequence of the proprietary nature of the interest of the occupant. All of the occupants are free to enjoy their ownership and non-occupying co-owners should not, by abstaining from the exercise of their right to possession, be able to convert the status of the occupying tenant from that of co-owner to rent paying tenant.").

(4) The law should favor the diligent over those who have chosen not to exercise their rights. See, e.g., Comment, 25 Cal. L. Rev. 203, 211 (1937) ("Practical justice supports the latter rule. In the absence of ouster, the cotenant out of possession has suffered no deprivation; he has voluntarily abstained from exercising his joint right of possession; therefore he should not be heard to complain. The other has invested his labor and capital, and has assumed the risks of operation. The absent cotenant should not profit at the expense of the other. If the opposite conclusion were reached, a penalty would be placed on the full utilization of land. Furthermore, as long as there is no ouster, the tenant in possession is exercising a legal right.").

(5) The cotenant out of possession is recompensed by protection against adverse possession by the cotenant in possession. See, e.g., Note, 12 Wyoming L.J. 156 (1958). The author of the Note concludes, after restating all of the foregoing reasons, "There seems to be little justification for the rule requiring the in-tenant to account to the out-tenant for mere use and occupation . . . 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." 12 Wyoming L.J. at 158-159.

An exception to the general run of scholarly opinion is found in Berger, An Analysis of the Economic Relations Between Cotenants, 21 Ariz. L. Rev. 1015 (1979). Professor Berger believes a better way to view the relation of cotenants in and out of possession than the common law is to apply a "net lease" analysis to their situation. This concept is discussed below under "Possible Solutions."

CRITIQUE

With the overwhelming weight of authority that the proper rule is no accountability by the cotenant in possession, what is the impetus of Assembly Bill 2911? The bill would change existing law so that, "Every cotenant out of possession of real property owned concurrently by several persons shall be entitled to the reasonable rental value of his or her interest in the property from the cotenant or cotenants in possession, unless the parties agree to the contrary or unless the instrument creating the tenancy otherwise provides."

From what we know about the background of the bill, it apparently is intended not so much to permit an accounting between cotenants for past use of the property, but to set up a basis for future relations between a cotenant in possession and a cotenant out of possession; this is not clear from the bill, however. Attached as Exhibit 2 is correspondence we have received from Mrs. Priscilla Kamins that is the source of the bill. We understand that Mrs. Kamins is a tenant in common of an office building as a result of a testamentary disposition, that Mrs. Kamins is a cotenant out of possession while the other cotenants are in possession, and that she is interested not so much in a partition of the property as in receiving her share of the use value of the property on an on-going basis.

Generally speaking, the law leaves the relations between cotenants of property to be worked out between themselves; it does not impose a cotenancy agreement between them other than to specify that each has a right to possession and cannot exclude the other or commit waste. If the cotenants are unable to satisfactorily agree as to their rights to share possession, rents and profits, or other details of the cotenancy, the law provides the remedy of partition. Partition between cotenants is a matter of right. Code Civ. Proc. § 872.710(b). In partition the property may either be physically divided between the cotenants or sold and the proceeds of sale divided. Code Civ. Proc. §§ 872.810 (division), 872.820 (sale).

Is there a need for a remedy short of partition where the cotenants are unable to agree as to the manner of sharing the property? Mrs. Kamins argues that partition is expensive and time-consuming, that partition by division is often unfair to the cotenant out of possession, and that partition by sale may result in adverse tax consequences to the cotenants. "By the time you're through, there's not much left for anybody--the estate has been dissipated against the likely intent of the grantor or testator who probably intended his property to remain intact for his descendants." Mrs. Kamins also points out that the cotenants may not wish to separate, but may wish to retain ownership of the property; the law should facilitate this by providing a remedy short of partition.

The staff believes there is validity to some of Mrs. Kamins' points. Partition is not a simple proceeding, and sale may well result in undesired tax consequences. A remedy short of partition could indeed encourage the parties to work out a sharing arrangement without terminating the cotenancy. On the other hand, a remedy short of partition could prove to be equally as expensive and time consuming as partition, and the availability of partition in the past has proved to be a fair inducement to the cotenants to reach an agreement. Partition has generally been viewed as an adequate remedy where the cotenants have been unable to work out sharing problems.

Assuming for the moment that a remedy other than partition is desirable, if not necessary, what are the possible approaches?

POSSIBLE SOLUTIONS

A number of possible remedies have been suggested or appear feasible. These are analyzed below.

(1) Require a cotenant in possession to account to a cotenant out of possession for the use value of the share of the cotenant out of possession. This is what Assembly Bill 2911 appears on its face to do, although as we point out above the bill is apparently intended to be prospective in application rather than retrospective, i.e., not to govern past relations between cotenants but their future relations.

The reasons that requiring an accounting has met with general disapproval in the law are analyzed at some length above. Professor Berger, however, argues that the interests of both cotenants in and out of possession require protection, and that cotenancy should be viewed as a "net lease," with the cotenant in possession bearing the operating expenses and with the net income (after deducting mortgage principal and interest costs) divided between all cotenants on the basis of their shares. "How would the net lease approach operate in the case where Blackacre is a residence and [a cotenant] is in possession, deriving no income from it? Again [the cotenant in possession] would pay [the cotenant out of possession] one-half the net lease fair rental value of the property and would bear most of the expenses such as repairs, taxes, and insurance, while the parties would share interest on and amortization of preexisting mortgages. Such a rule would of course clash with the common-law approach which held that no rent was due because each cotenant was entitled to possession of the whole property." Berger, An Analysis of the Economic Relations Between Cotenants, 21 Ariz. L. Rev. 1015, 1028 (1979).

The accounting remedy would be analogous to the situation under existing law where a cotenant in possession excludes another cotenant from possession. Here, the cotenant out of possession is entitled to damages based on the cotenant's share of the reasonable rental value of the property. There is a critical difference in the two situations, however. In the case of an ouster the cotenant out of possession has sought to exercise a legal right and has been wrongfully denied possession; the cotenant in possession has knowledge that his or her occupancy is to the detriment of another cotenant and that the cotenants are in duspute over the manner of sharing the property. In a case where there is no

ouster, the cotenant in possession has no notice that his or her occupancy is anything other than acceptable to the other cotenants, who may well be benefited by the maintenance and preservation of the value of the property by the cotenant in possession. The possession is presumptively permissive, an agreement implied by the silence of the cotenants out of possession.

Is it fair, after a cotenant has been in possession of property for a long period without excluding the others, to make the cotenant liable for the accumulated rental value of the other cotenants? Couldn't such a remedy be used by a cotenant out of possession as a practical weapon to force the loss of the share of a cotenant in possession? Shouldn't there at least be a statutory limitation period on such a remedy? If there is a statutory limitation period, would the cotenant out of possession be able to sue periodically to recover rents?

Although the staff recognizes the need identified in Professor Berger's article to accomodate the interests of both cotenants in and out of possession, we believe that in the case where a cotenant has occupied property without objection by the other cotenants, existing law has found the proper result; the equities favor the cotenant in possession. A better remedy, in the staff's opinion, would be to permit a cotenant out of possession to recover damages after a demand for possession has been made.

(2) Require a cotenant in possession to account after the cotenant out of possession has made a demand for possession. This remedy would build upon the common law concept that a cotenant out of possession is entitled to damages in the case of an ouster. However, it would improve the common law in two respects. First, it would enable the tenant out of possession to assert his or her rights by means of a demand, rather than by attempting to take physical possession, with the resultant confrontation and possible violence. Second, it would help define what acts amount to an ouster for purposes of the law. This is significant because existing law is unclear as to the degree of effort the cotenant out of possession must use before denial of occupancy by the cotenant in possession will subject the cotenant to damages. "The practical borderline between privileged occupancy of the whole by a single cotenant and unprivileged greedy grabbing which subjects the greedy one to liability to his cotenant is not crystal clear." 4A R. Powell, The Law of Real Property § 603, p.610 (1982).

Rejection by the cotenant in possession of the demand would be an ouster and would make the cotenant liable for damages, the reasonable rental value of the share of the ousted cotenant. The cotenant in possession would be on notice that either a sharing agreement must be reached by the cotenants or liability will be imposed. The staff believes it would not be inequitable to require the cotenant in possession to account in this situation. The five-year statute of limitation (Code of Civil Procedure Section 336), running from the time the demand is served on the cotenant in possession, appears proper.

(3) Require a cotenant in possession to make payments to a cotenant out of possession for the future use value of the share of the cotenant out of possession. This is apparently the intent of Assembly Bill 2911--to provide a remedy short of partition to a tenant out of possession on a continuing basis. The concept here is that such a remedy would give a means to a cotenant out of possession to protect his or her interest without having to partition the property, and that the very existence of the remedy would induce the cotenants to come to an agreement concerning the manner of sharing the property.

While this goal is laudable, the means of achieving it is not free from problems. The fundamental question is whether it is proper to impose on a cotenant a restriction that the cotenant pay rent in order to enjoy the use of the property. The essence of a cotenancy is the right to possession of the whole, subject to sharing among the cotenants on agreed terms. If the cotenants are unable to agree on the terms, whether by sharing possession or by paying rent, should one cotenant be able to go to court and force another to pay rent? Presumably in this situation the cotenant who would not agree to pay rent and was taken to court and forced to, would simply request a partition; the terms of possession would be unacceptable. In other words, the real remedy for cotenants who are unable to agree, and the ultimate inducement for them to come to terms without going to court, is partition; the right to force payment of rents would appear to add little.

Such a remedy presents practical as well as theoretical difficulties. The major difficulties involve the determination of the reasonable rental value of the property. The determination of reasonable rental value in the ordinary situation is not simple; it is a battle of appraisers and other expert witnesses on a highly speculative matter; reasonable

rental value must ordinarily be ascertained as of a given point in time (usually the time of trial), and even this limited determination is expensive and time consuming. When there has been an ouster by a cotenant in possession, the problem of awarding damages is even more difficult because reasonable rental value must be found not for one point in time for which all data is available, but for a period of time for which all data may not be available and during which factors such as market rates, improvements, etc., may vary. However, at least the determination is only made once, by an accounting in a quiet title, partition, injunction, or similar action. If the task is to determine the reasonable rental value of property for the future, these difficulties are compounded. Presumably the reasonable rental value should not be affected by improvements made in the future by the cotenant in possession at his or her own expense. But what about changes in market rates; should such changes be predicted; should reasonable rental value be recalculated periodically? Suppose the property is damaged; should there be a recalculation? In any case, shouldn't the maintenance and management contributions of the cotenant in possession be offset?

Is reasonable rental value even the proper test to use in this situation? Suppose the property is underutilized by the tenant in possession. A typical example is where the property is a farm, which the cotenant in possession continues to operate as a farm, even though the property has much higher value for industrial or residential subdivision purposes. Or, the property may be a home that the cotenant in possession continues to reside in, even though the property has far greater value for commercial purposes. Once again, it appears that if the cotenant out of possession desires to derive greater value from the property than the cotenant in possession is generating, partition is the proper remedy. The process of partition is probably no more expensive and time consuming, in any case, than the process of determining reasonable rental value.

These types of difficulties are avoided by the common law, which provides damages (in cases where there has been no ouster) not on the basis of reasonable rental value but on the basis of actual rents received by the cotenant in possession. The actual rents approach offers an interesting possibility for a remedy of a different type for the cotenant out of possession.

(4) Permit a cotenant out of possession to lease his or her share of the property without accounting to a cotenant in possession. One way to permit a cotenant out of possession to achieve the full use value of the cotenant's share of the property without having to actually be in physical possession of the property and without an elaborate determination of rental value is simply to permit the cotenant to rent out his or her share of the property without the need to account to the other cotenants.

This is theoretically a very neat approach, but like any other idea in this difficult area, it has its problems. Foremost is the practical problem that the cotenant may find it difficult to lease his or her share to a person who will have to work out a sharing arrangement with the cotenant in possession; it may simply be inviting a lawsuit. In practice, the cotenant in possession and the cotenant out of possession will probably have to work out a physical division of the premises between them, and then the cotenant out of possession will be able to rent out his or her share. If the cotenants are unable to agree on a fair physical division, the partition remedy remains available.

Whether such a rule would disrupt the general law that a cotenant in possession must account for actual rents received is problematic. The statute would have to be carefully drawn, but we believe it could be done.

(5) Arbitration of disputes. Assembly Bill 2911 provides that the right to recover reasonable rental value from a cotenant in possession shall be by an action in superior court that is submitted to arbitration pursuant to the judicial arbitration statute. The intent here is apparently to provide an inexpensive and expeditious means of resolving the difficult valuation questions involved. Does judicial arbitration offer a reasonable means of resolving disputes under the remedies discussed above?

The staff does not know how well the judicial arbitration statute has been working. We suspect judicial arbitration would not simplify or expedite the determination of rental value, and could in fact complicate the determination by building in yet another legal proceeding, followed by a trial de novo pursuant to Code of Civil Procedure Section 1141.20. The Judicial Council is required to report to the Governor and Legislature by January 1, 1984, in a comprehensive review of the effectiveness of the judicial arbitration statute. We think it is advisable to await

this report before making any recommendations concerning the use of judicial arbitration in this area of the law.

(6) Retroactivity of changes in the law. One problem with making changes in the law governing property rights is the constitutionality of retroactive changes in the law. Generally, the staff is of the opinion that so long as the changes are reasonable and do not completely destroy the value of a property right, the changes can be applied to rights created before the operative date of the changes. Whether they should be so applied or not depends, in our opinion, mainly on the extent to which parties have relied on the law as it was in effect and on the extent to which the parties will suffer. Generally, we would like to see any reforms in the law applied retroactively to the greatest degree reasonable. We will make suggestions as to operative date and retroactivity after the Commission has decided what changes in the law, if any, it should recommend.

(7) Do nothing. A final option that the Commission needs to consider is a recommendation that no change be made in the law. It is the staff's feeling that the law governing the rights and duties between cotenants in and out of possession is generally satisfactory. This is not to imply that improvements in the law should not be made where possible, only that it would appear to be no catastrophe if the law were left to continued case development as it is now.

Partition appears to be a satisfactory remedy for most cases where the cotenants in and out of possession are unable to resolve their differences and agree to a manner of sharing the property. We question whether some of the new remedies suggested in this memorandum will add appreciably to the law, other than to create new problems. Partition seems to be generally a simpler, more effective, and more equitable remedy for most purposes.

However, most purposes are not all purposes, and the staff believes this memorandum has identified some areas where improvement is feasible and might be useful. These improvements are (1) requiring a cotenant in possession to account after the cotenant out of possession has made a demand for possession; and (2) permit a cotenant out of possession to lease his or her share of the property without accounting to a cotenant in possession. The staff believes these two reforms might help solve

the problem identified by Assembly Bill 2911 without creating some of the problems that the remedy provided in the bill could create.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

CALIFORNIA LEGISLATURE—1981-82 REGULAR SESSION

ASSEMBLY BILL No. 2911

Introduced by Assemblywoman Moore

March 1, 1982

An act to amend Section 1141.13 of, and to add Chapter 3.8 (commencing with Section 1150) to Title 3 of Part 3 of, the Code of Civil Procedure, relating to real property.

LEGISLATIVE COUNSEL'S DIGEST

AB 2911, as introduced, Moore. Real property: cotenancy.

Under existing decisional law, in the absence of an agreement between them, a cotenant out of possession of real property owned concurrently by several persons has no right against any cotenant in possession of the property for the rental value of the former's interest in the property, unless the cotenant out of possession has been wrongfully excluded from the property.

This bill would establish a right for every cotenant out of possession of real property owned concurrently by several persons to obtain the reasonable rental value of his or her interest in the property from the cotenant or cotenants in possession, unless the parties agree to the contrary or unless the instrument creating the tenancy otherwise provides. Property held by a husband and wife as joint tenants, tenants in common, or as community property would not be subject to this provision. The bill would establish a summary proceeding for obtaining the rent, as specified.

Article XIII B of the California Constitution and Sections 2231 and 2234 of the Revenue and Taxation Code require the state to reimburse local agencies and school districts for certain costs mandated by the state. Other provisions require the Department of Finance to review statutes disclaiming these costs and provide, in certain cases, for making claims to

the State Board of Control for reimbursement.

This bill would provide that no appropriation is made by this act for the purpose of making reimbursement pursuant to the constitutional mandate or Section 2231 or 2234, but would recognize that local agencies and school districts may pursue their other available remedies to seek reimbursement for these costs.

This bill would provide that notwithstanding Section 2231.5 of the Revenue and Taxation Code, this act does not contain a repealer, as required by that section; therefore, the provisions of the act would remain in effect unless and until they are amended or repealed by a later enacted act.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 1141.13 of the Code of Civil Procedure is amended to read:

1141.13. This chapter shall not apply to any civil action which includes a prayer for equitable relief, ~~except that if~~ *unless* the prayer for equitable relief is frivolous or insubstantial ~~; this chapter shall be applicable~~. *This chapter shall apply to an action brought pursuant to Chapter 3.8 (commencing with Section 1150).*

SEC. 2. Chapter 3.8 (commencing with Section 1150) is added to Title 3 of Part 3 of the Code of Civil Procedure, to read:

CHAPTER 3.8. SUMMARY PROCEEDINGS FOR OBTAINING RENT FROM A COTENANT IN POSSESSION OF REAL PROPERTY IN CERTAIN CASES

1150. (a) Every cotenant out of possession of real property owned concurrently by several persons shall be entitled to the reasonable rental value of his or her interest in the property from the cotenant or cotenants in possession, unless the parties agree to the contrary or unless the instrument creating the tenancy otherwise provides.

(b) This section shall not apply to any property held by a husband and wife as joint tenants, tenants in common, or as community property.

1150.1. An action to obtain rent pursuant to Section 1150 shall be brought in the superior court of the county in which the real property, or some part thereof, is situated, and shall be submitted by the presiding judge to arbitration regardless of the amount in controversy. The arbitration shall be carried out in accordance with the provisions of Chapter 2.5 (commencing with Section 1141.10).

SEC. 3. Notwithstanding Section 6 of Article XIII B of the California Constitution and Section 2231 or 2234 of the Revenue and Taxation Code, no appropriation is made by this act for the purpose of making reimbursement pursuant to these sections. It is recognized, however, that a local agency or school district may pursue any remedies to obtain reimbursement available to it under Chapter 3 (commencing with Section 2201) of Part 4 of Division 1 of that code.

SEC. 4. Notwithstanding Section 2231.5 of the Revenue and Taxation Code, this act does not contain a repealer, as required by that section; therefore, the provisions of this act shall remain in effect unless and until they are amended or repealed by a later enacted act.

EXHIBIT 2

Priscilla Kamins
3620 Purdue Avenue
Los Angeles, Calif. 90066
Telephone: *2k3(76906335

June 30, 1981

Mr. John de Moully
4000 Middlefield, Room D-2
Palo Alto, California 94306

Dear Mr. de Moully:

Enclosed please find copy of the letter we discussed over the telephone yesterday, which I promised to send to you.

The enclosed letter requests a change in the law and addresses some basic issues relating to C.C. 683, 685 and 686, among which are:

1. Inequity between co-owners as to possession, use and rent: when the state imposes a law which allows one co-owner to receive the benefit of use and possession of common property without paying his co-tenant for it in the form of rent.
2. Violation by the State of California of the provisions of the Fourteenth Amendment to the U.S. Constitution: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
3. Violation by the State of California of the intent of a testator.

I would appreciate your comments and opinions on each of the points I tried to make, and I will telephone you early next week for that purpose.

Sincerely yours,

Priscilla Kamins

enclosure

Ms. Priscilla Rumins
3620 Purdue Avenue
Los Angeles, Ca. 90066
Telephone: (213) 870-6335

June 30, 1981

Assemblywoman Gwen Moore
3731 Stocker Street, Suite 106
Los Angeles, California 90008

Dear Assemblywoman Moore:

In response to your newsletter (which I enjoyed very much), "there ought to be a change in the law." This letter is to make you aware of some of the inequities, as interpreted by the California Courts, existing in Calif. Civil Codes 683, 685 and 686, pertaining to the laws with regard to owners of property who hold as tenants in common and joint tenants.

I strongly feel there should be statutory changes in the present Calif. Code with regard to use, possession and rents as between tenants in common, and that C.C. 683-686 should be clarified and amended as to the rights of the individual co-tenants, because as things stand now, some of these rights are inequitable, in my opinion.

Present California judicial rulings provide that each cotenant is entitled to equal possession of the whole of the property or properties and no cotenant may exclude another from any part of the property. However, no cotenant is liable for rent to another cotenant for the exclusive, personal use of the entire property or properties or any part(s) thereof, unless he ousts his cotenant(s) in a "notorious and hostile" manner. "Possession by one is possession by all and is 'presumed' permissive" by the cotenant(s) out of possession.

It is precisely this "presumption" of permission that I feel is in VIOLATION of the 14th Amendment of the U.S. Constitution. The state (who does not own the individual co-owner's share) has, in my opinion, usurped the right of decision from that co-owner as to what he can do with his ownership share as between the co-owners. By taking away his right to charge his co-owner for personal use of his share of ownership of the premises, the state has caused loss of income to one co=owner while giving another a free ride. The state has also put the burden of proof on the out-owner instead of the user-owner through the "ouster" provision of the law (which is like saying a person is guilty until proven innocent). This is hardly "equal" protection of the law for the individual rights of citizens as guaranteed by the 14th Amendment, nor is it equitable, in my opinion. No equality of benefit or burden can exist if a law such as CC 683-686 imposes onerous restrictions on one party, while the other party is permitted to perform or to repudiate it according to his pleasure or interest.

Another inequity: As I understand it, as an alternative to possession rentfree, one cotenant may unilaterally lease or license his right to possession to a 3rd party and keep all the rent himself unless the Lessee ousts his cotenant(s) in a "notorious and hostile" manner. Once ousted, and after a long and expensive court battle which MUST end in partition or sale or equal possession (not rent), the out-cotenant may or may not be entitled to damages for market value rent, depending if his ousting was sufficiently "notorious & hostile", but only for the period

of the ouster. (References at end of letter)

This effectively takes away the out-owner's right even to maintain an action for rent, because the law says he is not entitled to rent - only to equal possession.

The out-cotenant may not want equal possession for some of the following reasons:

1. Parties may not get along.
2. There may not be enough space to properly accommodate all cotenants.
3. An occupying cotenant may have sole ownership in a commercial enterprise and need all of the space for same.
4. Out cotenant may want to live in another city.
5. Out cotenant may want property for an <u>income</u>.

The laws of tenancy in common seem also to violate the INTENT of a testator when he leaves the rest and residue of his estate to two or more persons in "equal shares" or "share and share alike" (thereby creating a tenancy in common). The words "equal" or "share alike" would seem to indicate an intent by the writer to leave equal ownership, equal income, equal use of space (or compensation for same) - in other words, equal benefit and equal burden. For if he meant <u>un</u>equal, he would say, "I want Jane to occupy 123 Main St. rent free for her lifetime" (or some such).

An out-cotenant may not have control at the point of acquisition of his share of the property - especially if he acquired it through inheritance, because his cotenant(s) may already <u>be</u> in occupancy. Upon learning from their lawyers that they don't have to pay rent, they probably won't.

The out-cotenant's only remedies are partition or judicial sale. This may or may not be desirable:

1. Partition is usually physically difficult, and frequently economically unfair. Further, Calif. law seems to favor the possessor, who would probably have the desirable location.
2. Judicial partition is extremely expensive - both in time and money (up to 5 yrs. in court, enormous legal fees, appraisals, surveys, etc.)
3. Judicial sale has the added expense of R. E. Broker's fees and possible substantial taxes on gain. RESULT: By the time you're through, there's not much left for anybody - the estate has been dissipated against the likely intent of the grantor or testator who probably intended his property to remain intact for his descendants.

<u>MINORITY RULE</u>

In some states, Washington and Ohio among them, the law has been reversed, both by statute and judicially, to accommodate present social change. In those states, occupying cotenant must account to and pay rent for the use of out-cotenant's share of the reasonable rental value of the premises without an ouster.

In part, the justice in the case of McKnight v. Balisades (143 P 2d 307, 1943 Washington State) reasoned:

"No practical or reasonable argument can be advanced for allowing one in possession to reap a financial benefit by occupying property owned in common without paying for his personal use of that part of the property owned by his cotenants. The fairest method in cases in which the cotenant occupies and uses common property, instead of renting it out, is to charge him with its reasonable rental value.:...

In the Ohio State case of Cohen v. Cohen (106 N.E. 2d 77, 1952) the justice said in part: "We conclude that the voluntary and profitable use, occupation and enjoyment by a tenant in common of the common estate creates a liabiity against him to account to the out-tenant as for his share of the rents and profits received by the former, according to the justice and equity of the case."...

"In the present case it is argued that plaintiff simply occupies a part of the house in which she and her husband lived. However, it must be remembered that any portion of the house she occupied did not belong to her exclusively. She had an undivided one-half interest in the whole premises, and since there had been no partition, she had only an undivided one-half interest in any part of the premises, the other one-half interest belongs to the defendants. It follows that whatever portion of the premises she occupied she was an owner of only an undivided one-half interest therein and, therefore, received a benefit from the one-half belonging to her cotenants."...

"In the present case plaintiff received value by occupying the premises as a home, rent free, and, therefore, under the doctrine of the West case, is obligated to account to her cotenants for their share of the rental value of the occupancy." (See also Ohio Gen. Code #10507-54, 12046; and West v. Wayer 46 Ohio St. 66, 18 N.E. 537)

MINORITY RULE RATIONALE: (From Gilbert Law Summaries - Real Property)
"This rule places the burden on the occupying cotenant to show an agreement by the cotenants that he was not to pay. By putting the burden on the person who will reap the economic gain (the occupying cotenant) and penalizing him if the parties act ambiguously, this rule induces cotenants to come to an agreement as to the payment of rent. An agreement is economically efficient because it lessens litigation over the parties rights."

We have researched this subject as lay people and also consulted with attorneys and believe the above information to be correct.

I want to thank you for your time, and I would very much appreciate a response from you as to your interest in correcting these inequities, as outlined.

Sincerely,

Priscilla Kamins

REFERENCES: (1) De Harlan v. Harlan - 24 C.A. 2d 555; 168 P 2d 985 - 1946;
Hunter v. Schultz - 240 C.A. 2nd 24; 49 Cal Rptr 305 - 1966;
Brunscher v. Reach - 164 C.A. 2d 174; 330 P 2d 996 - 1958;
Zaslow v. Kroenert 29 C 2d 541; 176 P 2d 1 - 1946.

Postscript (or afterthoughts)

Although existing law provides that co-tenants are not entitled to charge each other rent for possession, nor may they sue for rent, existing law does provide that the parties may contract with each other for rent. However, there are many situations in which there is no opportunity for the parties to contract: inheritance, divorce, separation, lack of knowledge of this phase of the law, etc.

Let me give you an example: In an inheritance situation where each of the beneficiaries have exclusively occupied 3000 sq. ft. of commercial space while the parents were alive - each square foot of which each beneficiary has become part owner - and each square foot of which is currently valued at $1.50 per mo., or $18.00 per year ($4,500. monthly, $54,000 yearly value - Value for each co-tenant for each 3000 sq.ft. space: $1500 mo., $18,000 yr.):

One co-owner, for one reason or another feels he can no longer occupy his 3000 sq. ft. separate space. He now finds himself in a prospective position of having neither space, nor the right to charge his occupying co-tenants for their continued use of valuable space he partially owns.

The state "presumes" he will permit his co-tenants to continue to exclusively occupy this valuable space which he partially owns, rent free. Following is what the state is really forcing him to do:

Co-Tenant	Use of Space	Value of Space Mo.	Year	Monthly Cash Rec'd for A's Space	Total Value Rec'd (Rent Rec'd plus use of Space) by ea Co-Tenant Mo.	Year	% of Ownership	% of Yield to ea Owner	Annual Gain or [Loss]
A	No	$4,500.	$54,000	$1,500.	$1,500.	$18,000.	33.33%	11.11%	[$36,000]
B	Yes	$4,500	$54,000	$1,500	$6,000.	$72,000.	33.33%	44.44%	$18,000
C	Yes	$4,500	$54,000	$1,500	$6,000.	$72,000.	33.33%	44.44%	$18,000
TOTALS		$13,500	$162,000	$4,500	$13,500	$162,000	99.99%	99.99%	

According to existing law, A could try to lease his right to possession to a third party without his co-tenant's consent and retain all the rent for himself. But this is risky, because B & C do have a right to sue for rent from third parties, and, depending on the quality of the ouster, B & C might be awarded their share of the rental value from the third party, both during the ouster, and afterward. A could also face damages from his Lessee. A would probably be discouraged from going through that kind of risk and expense.

With re to partition or sale as a remedy for A: A should not be put in a defensive position by the state because of an inequity. Partition should be because the parties want to separate rather than because of inequities which are forced upon them by the state.

From the example in the above chart, if you were A, do you think you would be in an arms-length negotiating position to contract for rent?

If you were B or C, given the knowledge that the law says you don't have to pay rent, would you contract with A to pay him $1,500. a month $(18,000. a year) rent? Probably not.

This is only one of innumerable examples where people get caught in a situation over which they have no control.

In the interest of equity: If the law can be reversed (where owners can charge each other rent for use of their ownership share of space), I would like to make the following suggestion: In the event of a rental dispute, the burden of proof of market-value rent should rest with all co-owners and be subject to arbitration, if they cannot agree.

Priscilla Kamins