#H-510 9/8/83

Memorandum 83-85

Subject: Study H-510 - Rights Among Cotenants in Possession and out of Possession of Real Property (Comments on Tentative Recommendation)

The Commission distributed for comment after the May, 1983, meeting its tentative recommendation relating to rights among cotenants in possession and out of possession of real property. The tentative recommendation does not disturb the rule that a cotenant in possession of property need not account to a cotenant out of possession for the use value of the property. The tentative recommendation does provide, however, that the cotenant out of possession may serve on the cotenant in possession a demand for concurrent possession (to which each is entitled); if the cotenant in possession does not offer concurrent possession within 60 days, the cotenant is liable for damages, measured by the reasonable use value of the property.

We received four letters commenting on this proposal. Two of the letters simply indicated approval without further comment, and are not reproduced. (Allen J. Kent; Henry Angerbauer, CPA). The other two letters are attached are Exhibits and analyzed below.

Roger Arnebergh (Exhibit 1) takes exception to the phrase "owned concurrently by several persons" in the draft statute, pointing out that most joint tenants are only two (husband and wife), whereas "several" means more than two. He suggests reference be made instead to "two or more persons." We used the word "several" in the draft because this is the word used in the Civil Code to refer to cotenancy ownership. However, Mr. Arnebergh is technically correct, and in this case accuracy may be preferable to consistency. The staff would make the suggested change.

The Executive Committee of the Real Property Law Section of the State Bar (Exhibit 2) expresses a number of concerns that should be considered. They make the point that cotenancies may be created by donors or decedents who had a specific intent with respect to the rights of the cotenants to possession, and this intent should be recognized. The draft already recognizes this possibility in subdivision (a), which makes the new procedure inapplicable if a cotenant is not entitled to possession under the terms of the instrument creating the cotenancy. The staff would expand this provision somewhat by referring as well to

other written instruments that indicate the possessory rights of the parties and by making clear the new procedure is inapplicable to the extent alternative remedies are provided. We would also emphasize these points in the Comment.

The next point made by the State Bar Committee is that the procedure is intended to establish an ouster if the tenant in possession "does not offer concurrent possession of the property" to the tenant out of possession. The Committee points out, however, that the tenant in possession may offer possession only on conditions that may not be fair or acceptable to the tenant out of possession--"we would expect in most cases that there will not be an unequivocal acceptance or rejection of the demand." Thus in many cases litigation will still be necessary to determine whether an ouster has occurred. This is a good point. The statute should make clear that a demand for possession is satisfied either by an unconditional offer of concurrent possession or an offer on conditions acceptable to the cotenant out of possession. For purposes of certainty, all offers and acceptances should be in writing.

The State Bar Committee notes that the proposal does not address such issues as whether the cotenant in possession is entitled to offset against damages the reasonable value of his or her services in connection with production of income from the property and actual expenses of operating and maintaining the property. There are a few cases in this area, but the law is fairly hazy and some of the decisions do not appear completely satisfactory. However, we decided not to attempt to straighten out the law of damages at this time, but simply to incorporate existing case law relating to ouster. We believe this was a sound decision in light of the Bar Committee's general observation that it is important to recognize that there is a wide divergence in types of properties that may be held in cotenancy, and "any procedure which sets a standard applicable to all situations may result in unfairness with respect to any singular case." The staff would add to the Comment a note that the measure of damages, and any offsets, are determined by the general law relating to damages for ouster.

The draft statute applies the new ouster procedure to property acquired before as well as after the statute goes into effect. The State Bar Committee is concerned that retroactive application may create inequity where the tenant in possession has invested substantial amounts

of time and money in the belief that he or she would be entitled to possession without the obligation to pay rent to the tenant out of possession, with the result that the investment has increased the reasonable use value of the share of the tenant out of possession. The staff does not believe the solution implied by the Bar Committee--make the statute prospective only--would cure this problem, since the same situation would arise in the future with persons ignorant of the law. Likewise, the staff does not believe it is appropriate to try to specify standards, such as an offset for contribution. One possible solution is to make clear that the statute does not abrogate any legal or equitable doctrines that may be applicable in an action for damages, including contribution, unjust enrichment, and laches.

The State Bar Committee concludes that while there appear to be some problems with existing law, they question whether the proposed procedure sufficiently resolves the problems or merely creates a system that will generate litigation and create other inequities. The staff believes this is a fair criticism--the partition remedy already exists to solve the problem of the inability of cotenants to agree, and the notice procedure we are attempting to develop would be of only marginal benefit, partition remaining the ultimate remedy. On the other hand, a clear procedure short of partition would be of some value, and to the extent we are able to address the problems raised by the State Bar, could prove useful. The staff believes that, on balance, it is worthwhile submitting the proposed legislation to the Legislature, as revised to reflect the changes suggested in this memorandum.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Roger Arnebergh
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June 27, 1983

California Law Revision Committee
4000 Middlefield Road, Suite D-2
Palo Alto, California

Re: Rights among Co-tenants in possession and out of possession of real property. Proposed Section 843 of Civil Code.

The first line of the proposed Civil Code, Section 843 reads as follows:

"843 (a) If real property is owned concurrently by several persons . . ."

Most real property held in joint tenancy involves <u>two</u> tenants, such as husband and wife.

The word, "several" means more than two, except where used in connection with a joint and several obligation.

To avoid any possible confusion, or contention that the proposed section only applied where there are more than two co-tenants, I would suggest changing the phrase "several persons" to "two or more persons".

Sincerely yours,

RA:ea

Roger Arnebergh

# REAL PROPERTY LAW SECTION

OF THE STATE BAR OF CALIFORNIA



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August 15, 1983

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

Re: Tentative Recommendation Relating to Rights Among Co-Tenants in Possession and Out of Possession of Real Property

Gentlemen:

The Executive Committee of the Real Property Law Section of the State Bar has received your Tentative Recommendation Relating to Rights Among Co-Tenants in Possession and Out of Possesion of Real Property dated May 6, 1983.

By this letter, we wish to inform you of our comments and concerns with respect to the proposal for your further consideration.

Initially, we believe that it is important to recognize that many co-tenancies are created as a result of gifts or bequeaths, either inter vivos or through wills, etc. In many such cases, the donor or deceased had a specific intent with respect to possession which, to some extent, should be recognized in any procedure devised. Secondly, we believe that it is important to recognize that there is a wide divergence in the types of properties which may be held in co-tenancy. Some of the properties will be commercial or residential income producing properties; others will be owner-occupied residences; while still others will be farms, mines, or other properties that are being "worked" by the tenant in possession. In some cases, the properties will have negative cash flows while in other instances there may be profits generated from the labors of the tenant in possession or from the property itself. We are concerned that any procedure which sets a standard applicable to all situations may result in unfairness with respect to any singular case.

Our specific concerns may be itemized as follows:

1. We question whether the written demand for concurrent possession will, in most cases, actually serve the purpose for which it is intended. In most cases, and particularly in those cases where the tenant in possession seeks legal counsel, the response to the demand will be conditional, such as, "You are welcome to share possession of the farm so long as you plan on working in the field eight hours a day"; or, "You are welcome to come and live in the house so long as you do not bring your children and take the back bedroom". Obviously, the variations are innumerable but we would expect in most cases that there will not be an unequivical acceptance or rejection of the demand. The Recommendation does not address itself to the manner in which a conditional response would be dealt with. We would anticipate that there would merely be created an issue of fact as to whether there had been an ouster or not--which is the same situation which exists under common law and which the proposal attempts to rectify.

2. The proposal does not address whether the co-tenant in possession can setoff against damages expenses for operating and maintaining the property against the share of rental value given to the co-tenant out of possession.

3. The proposal does not address whether a co-tenant in possession will be entitled to setoff the reasonable value of his services in connection with producing income from the property against any rent due as damages to the tenant out of possession.

4. The retroactive application of the proposal may create inequities in cases where the tenant in possession has, for many years, invested time and/or money in the property on the belief that he would be entitled to possession without an obligation to pay the rental value of the tenant out of possession.

In summary, while we recognize that there are instances in which the common law concept of ouster and a tenant out of possession's right to rental value are lacking in certainty and clarity, we question whether the Tentative Recommendation sufficiently resolves those issues or merely creates a system which will encourage litigation and create inequities.

We appreciate your requesting our comment and hope that the above will be helpful to you in your deliberations.

Very truly yours,

J. Tim Konold

J. TIM KONOLD

JTK:gw

cc: Stephen W. Dyer, Esq.
Jerome Fishkin, Staff Counsel
Real Property Law Section