

First Supplement to Memorandum 83-10

Subject: Study H-510 - Joint Tenancy (Resolution of Disputes Where Property Occupied by One of Several Joint Tenants or Tenants in Common)

Attached as Exhibit 1 is a letter from Professor Jesse Dukeminier in support of existing law that a cotenant out of possession is not entitled to reasonable rental value of his or her share from a cotenant in possession. Professor Dukeminier also believes that it would be appropriate to require rental payments after the cotenant out of possession has made a written demand. This is analogous to one of the staff suggestions made in Memorandum 83-10.

Existing law requires payment of damages (reasonable rental value) where a cotenant in possession has ousted another cotenant from possession. We have taken the liberty of drafting a tentative recommendation to permit recovery of damages after a written demand for possession by the cotenant out of possession has been refused by the cotenant in possession. The tentative recommendation thus defines an ouster to include failure to give possession following the written demand. This procedure may be somewhat risky for the cotenant out of possession, however, since the demand may start the limitation period running for adverse possession in favor of the cotenant in possession.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary



SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

January 17, 1983

Mr. John DeMouly, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear John:

Re: Memorandum 83 - 10
Co-tenants

The above noted memorandum raises the question whether a cotenant in exclusive possession should have to pay a cotenant out of possession a share of the reasonable rental value of the property. As is usual with your staff reports, it is well-researched and excellently written. I have a few comments.

1. In justifying the majority, and California, rule the memorandum does not focus upon one situation commonly giving rise to a cotenancy: inheritance of property by siblings from parents. Suppose that one child stays in the house or on the farm. Should that child have to pay a share of the reasonable rental value to the other children? It might be that you would get different answers to this question depending upon the respondent's income group or race. Poor persons, particularly black persons, might well answer clearly No. Studies in Chicago and the South have shown that blacks, more often than whites, die intestate and do not sell real property they have found so difficult to acquire. The studies indicate that black families often regard property as "family property", to be used by their children who need it and not to be sold outside of the family. It seems to me that the majority rule carries out the expectations of persons who regard a tenancy in common as commons were viewed at early English law, for the use of all without charge. It might come as an unpleasant surprise to a tenant in possession to learn several years later that he owed his cotenants rent. I myself would not change the majority rule.

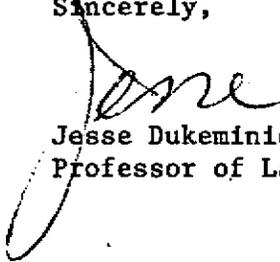
2. Under California law a cotenant in exclusive possession must pay rent when he has ousted his cotenant. I think it a good idea to enact a statute defining ouster to include a written demand for a share of the rental value by the tenant out of possession, as well as hostile acts. This would permit the tenant out of possession to put pressure on the tenant in possession to come to some agreement about rent; it would

induce private agreement by the parties. It would be economically efficient insofar as it reduces litigation over what acts constitute ouster. But I would not require the tenant in possession to pay rent until a written demand for same had been made.

3. I think you should think twice, or three times, before permitting a cotenant to lease his or her share of the property without accounting to a cotenant in possession. Suppose a cotenant executes an oil and gas lease, and because of state law on unitization, only one well can be put on the property. Would your statute permit the leasing cotenant to keep all the royalties? I know of no jurisdiction which does not require a cotenant to account for rents received from third parties. Where a rule has received such universal acceptance, there must be much in its favor. It must work reasonably well, or there would be some defections.

I hope these thoughts will be useful to the Commission in its deliberations.

Sincerely,



Jesse Dukeminier
Professor of Law

JD/690/bd

STAFF DRAFT

TENTATIVE RECOMMENDATION

relating toRIGHTS AMONG COTENANTS IN POSSESSION
AND OUT OF POSSESSION OF REAL PROPERTY

A distinctive feature of joint tenancy and tenancy in common tenure of real property is that each cotenant is entitled to concurrent possession of the entire premises--the cotenants share an undivided possessory interest. Each cotenant is entitled to occupy the premises and neither can exclude the other.¹

In the ordinary case the manner of sharing possession is worked out by agreement of the cotenants. Absent an agreement, a cotenant in possession need not account to a cotenant out of possession for the use value of the property,² unless the cotenant in possession has depleted the property by extraction of minerals,³ has rented the property to a third party,⁴ or has ousted the other cotenant from possession.⁵

The rule against accounting between cotenants except in special circumstances appears generally sound and consistent with the nature of cotenancy tenure that each cotenant is entitled to the occupation of the entire premises. A cotenant should not be required to pay rent as a condition of the exercise of the legal right to occupy the property.⁶

1. See, e.g., *Swartzbaugh v. Sampson*, 11 Cal. App.2d 451, 54 P.2d 73 (1936).
2. See, e.g., *Black v. Black*, 91 Cal. App.2d 328, 204 P.2d 950 (1949); *McWhorter v. McWhorter*, 99 Cal. App. 293, 278 P. 454 (1929).
3. See, e.g., *McCord v. Oakland Quicksilver Mining Co.*, 64 Cal. 134, 27 P. 863 (1883); *Dabney-Johnston Oil Corp. v. Walden*, 4 Cal.2d 637, 52 P.2d 237 (1935).
4. See, e.g., *Howard v. Throckmorton*, 59 Cal. 79 (1881); *Goodenow v. Ewer*, 16 Cal. 461 (1860); *Rutledge v. Rutledge*, 119 Cal. App.2d 114, 259 P.2d 79 (1953).
5. See, e.g., *Zaslow v. Kroenert*, 29 Cal.2d 541, 176 P.2d 1 (1946).
6. *Pico v. Columbet*, 12 Cal. 414 (1859).

California law is the same as nearly all other common law jurisdictions in this respect,⁷ and is supported by the overwhelming weight of legal scholarship.⁸ If the cotenants are unable to agree as to the manner of sharing possession, or for payment of rent by a cotenant in exclusive possession, the remedy of partition is available as a matter of right.⁹

One difficulty with existing law is that, although a cotenant in possession is required to account to a cotenant out of possession in case of an ouster, it is not always clear when an ouster has occurred.¹⁰ If one cotenant exclusively occupies property that is susceptible to occupancy only by one cotenant, is this an ouster? If one cotenant exclusively occupies property and refuses a request by another cotenant to share occupancy, is this an ouster? California law is that in order for the cotenant in possession to be held to account for a proportionate share of the use value of the property, the cotenant must forcibly exclude or prevent use by the cotenant out of possession.¹¹

The Commission recommends that the procedure outlined below be provided by statute so that a tenant out of possession of property may establish an ouster and recover damages, without the need to show that the tenant in possession has forcibly excluded or prevented use of the property by the tenant out of possession. To establish that an ouster has occurred, a cotenant out of possession serves a written demand on a

7. 4A R. Powell, *The Law of Real Property* § 603 (1982); W. Burby, *Handbook of the Law of Real Property* § 98 (3d ed. 1965); Annot., 51 A.L.R.2d 388 (1957); Weibel, Accountability of Cotenants, 29 Iowa L. Rev. 558 (1944); Note, 32 *Notre Dame Lawyer* 493 (1957).
8. See, e.g., C. Moynihan, *Introduction to the Law of Real Property* 226 (1962); 2 *American Law of Property* § 6.14, p. 62, n.19 (1952); Comment, 25 *Calif. L. Rev.* 203 (1937); Note, 24 *Marquette L. Rev.* 148 (1940); Note, 19 *Wash. L. Rev.* 218 (1944); Note, 12 *Wyoming L.J.* 156 (1958); Comment, 37 *Wash. L. Rev.* 70 (1962). For an exception, see Berger, An Analysis of the Economic Relations Between Cotenants, 21 *Ariz. L. Rev.* 1015 (1979).
9. Code Civ. Proc. § 872.710.
10. 4A R. Powell, *The Law of Real Property* § 603, p. 610 (1982) ("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.").
11. 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).

cotenant in possession to share possession of the premises. If the cotenant in possession does not offer to share possession within 60 days, an ouster has occurred. If an ouster is so established, the cotenant in possession is liable for damages either directly or in another action such as for possession or partition of the property. In the ordinary case, damages will be the reasonable rental value of the ousted cotenant's share.

This new statutory remedy would have a number of advantages. It would enable a cotenant 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. It would help clarify the acts that amount to an ouster and give assurance that the ouster could be determined with some certainty; this would also be economically efficient in that it would reduce litigation over whether an ouster has occurred. It would put the cotenant in possession on notice that either a sharing agreement must be reached by the cotenants or liability will be imposed, thereby encouraging private agreement between the cotenants. It would not be inequitable to require the cotenant in possession to account for the value of the possession thereafter if the cotenant refused to share possession or to reach an agreement such as payment of rent to the cotenant out of possession.

The Commission's recommendation would be effectuated by enactment of the following measure.

An act to add Section 843 to the Civil Code, relating to owners of real property.

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

13601

SECTION 1. Section 843 is added to the Civil Code to read:

843. (a) If real property is owned concurrently by several persons, a tenant out of possession may establish an ouster from possession by a tenant in possession in the manner provided in this section. This section does not apply if the tenant out of possession is not entitled to possession under the terms of an agreement between the cotenants or

the instrument creating the cotenancy. This section supplements and does not limit any other means by which an ouster may be established.

(b) A tenant out of possession may serve on a tenant in possession a written demand for concurrent possession of the property. The written demand shall make specific reference to this section and to the time within which concurrent possession must be offered under this section. Service of the written demand shall be made in the same manner as service of summons in a civil action. An ouster is established 60 days after service is complete if, within that time, the tenant in possession does not offer concurrent possession of the property to the tenant out of possession.

(c) A claim for damages for an ouster established pursuant to this section may be asserted by an independent action or in an action for possession or partition of the property or another appropriate action or proceeding, subject to any applicable statute of limitation.

(d) Nothing in this section precludes the cotenants, at any time before or after a demand is served, from seeking partition of the property or from making an agreement as to the right of possession among the cotenants, the payment of reasonable rental value in lieu of possession, or any other terms that may be appropriate.

Comment. Section 843 provides a procedure by which a tenant out of possession of property may establish an ouster and recover damages, without the need to show that the tenant in possession has forcibly excluded or prevented use of the property by the tenant out of possession. Cf. *Brunscher v. Reagh*, 164 Cal. App.2d 174, 330 P.2d 396 (1958); *De Harland v. Harlan*, 74 Cal. App.2d 555, 168 P.2d 985 (1946) (forcible exclusion or prevention of use). One cotenant ousted by another is entitled to recover damages resulting from the ouster, which ordinarily amounts to a proportionate 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). Establishment of an ouster under this section, however, may also mark the beginning of the period required for the tenant in possession to establish title by adverse possession against the tenant out of possession.

045/210

SEC. 2. This act applies to property acquired before, on, or after the operative date of the act.