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Cotenancy—Liability of Occupying Cotenant for Rental Value; Easements by Implication—Requisites—Estoppel

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RECENT CASES

COTENANCY—LIABILITY OF OCCUPYING COTENANT FOR RENTAL VALUE. Defendant while married to the mother of the plaintiffs bought two houses. The wife died and plaintiffs by inheritance from the wife became tenants in common with defendant. The defendant occupied the "big house" and rented the other. Plaintiffs at no time demanded or were denied the right to occupy. From a decree for plaintiffs in an action for partition and for an accounting, defendant appealed. *Held* for plaintiff, that the occupying cotenant should be charged with the reasonable rental value of the premises occupied and must account to his cotenants for their share of that rental value. *McKnight and King v. Basilides and Allison*, 19 Wn. (2d) 391, 143 P. (2d) 307 (1943). Petition for rehearing denied Dec. 11, 1943.

The general rule quoted by the court from 62 C. J. 446, "One tenant in common who occupies all or more than his proportionate share of the common premises is not liable because of such occupancy alone to his cotenant or cotenants for rent or for use and occupation" is rejected by the court because "it is not an equitable one," *Id.* 19 Wn. (2d) 391 at 404, 143 P. (2d) 307 at 315.

The Statute 4 Anne, c. 16, § 27 (1705) which extended the common law beyond the bailiff relationship in giving one tenant in common or joint tenant the remedy of account against the other has been construed in England and most American courts to give an action only for a share of rents and profits actually received from third persons. Washington has followed this construction; *e.g., Leake v. Hayes*, 13 Wash. 213, 222, 43 Pac. 48, 50 (1895), "If appellants are liable at all for use and occupation, or rents and profits, their liability did not arise until after demand was made therefor by the respondent"; see also *Santmeyer v. Clemmanes*, 147 Wash. 354, 266 Pac. 148 (1928); *Crodle v. Dodge*, 99 Wash. 121, 168 Pac. 986 (1917).

A small minority of jurisdictions deciding contrary to the general rule base their decision on a broad interpretation of their property statutes. See, *e.g., Clarke v. Clarke*, 349 Ill. 642, 183 N. E. 13 (1932), in which the Illinois statute (Revised Statutes of Illinois 1845, c. 2, § 1) similarly worded to the Statute of Anne is given a more liberal interpretation. Other courts feel that in order to reach an equitable decision an accounting must be made. *Gage v. Gage*, 66 N. H. 282, 29 Atl. 543 (1890). In regard to mining property held by tenants in common, an accounting has usually been ordered because the mineral products are part of the land itself and removing the products or not operating the land is considered a diminution of the estate. Note (1911) 29 L.R.A. (N.S.) 224, 226; *accord, Harrigan v. Lynch*, 21 Mont. 36, 52 Pac. 642 (1898). The decision in *Ayotte v. Nadueau*, 32 Mont. 498, 81 Pac. 145 (1905), was based on mining law although the liability involved the reasonable rental value of the buildings on the property. Pennsylvania reached the same result because of an express statute, Laws of Pa. June 24, 1895, No. 138, p. 237; PURDON'S PA. STATUTES (1917), title 20, § 1284; *Lancaster v. Flowers*, 208 Pa. 199, 57 Atl. 526 (1904).

The reasoning of the majority view is that the cotenant has a right to the use of the land, perhaps has made it productive by his labor, and should not be compelled to divide his profits with another who does not choose to exercise his own right of occupancy, 2 Tiffany, *Real Property* (3d ed. 1939) § 450; as long as there is no ouster, the tenant in possession is exercising a legal right to the occupancy and full enjoyment of the premises, Comment (1937) 25 CALIF. L. REV. 203, 211; the presumption is

that the cotenant enters with the consent of the other, and it logically follows that he should not be liable merely because he exercises his legal right to the use of the land since there is no relationship of landlord and tenant, there is no legal basis upon which to base collection of rent, *Badger v. Holmes*, 6 Gray 118 (Mass. 1856.)

Jurisdictions favoring the minority view claim that use of the property by one cotenant alone would be an exercise of exclusive ownership over it, *Ayotte v. Nadueau, supra.* (This might be argued as particularly true where the property is susceptible to joint occupation.) The Statute of Anne, which was to remedy abuses arising because the common law did not provide for an accounting unless there was an actual bailiff relationship, should be broadly construed to extend full protection to the tenant out of possession, *Clarke v. Clark, supra.* The minority might well argue that the tenant in possession should put all profits into account because the property should be used for the joint profit of the owners; that the tenant in possession must be presumed to be acting for the ownership as a whole because of the strong community of interest.

The Washington court states in the *McKnight* case that *In re Foster's Estate*, 139 Wash. 224, 246 Pac. 290 (1926); *Daniel v. Daniel*, 106 Wash. 659, 181 Pac. 215 (1919), and *Eckert v. Schmitt*, 60 Wash. 23, 110 Pac. 635 (1910) are authority for the rule followed in the instant case. Analysis shows, however, that these cases involve either a fiduciary relationship or an actual element of hostility. If the rule of *Leake v. Hayes* is nevertheless overruled many unsolved points arise. After demand, under the general rule, the tenant in possession improved at his own risk. *Stephens et ux. v. Taylor et. ux.*, 36 S. W. 1083 (Tex. Civ. App. 1896). His liability was determined on the basis of the land's value with improvements balanced in the accounting by reimbursement for the improvements. 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 and *Phillips v. Smith*, 214 Ala. 382, 107 So. 841 (1926), or for rent at the terms set up by the lease as in *Vichinich v. Gordon*, 124 P. (2d) 868 (Cal. App. 1942)? H. M. N.

EASEMENTS BY IMPLICATION—REQUISITES—ESTOPPEL. *D* sold *P* an unimproved lot in a subdivision which was originally entirely owned by *D*, who told *P* that the lot would be served with water from *D's* private gravity system. *P* built his house and attached to the water system under the land of his neighbor *B*, next door, with the consent of both *B* and *D*. A dispute arose between *P* and *B* six years later, and *B* cut *P's* water connection at the point between *B's* and *P's* lands. *P* then laid pipe around *B's* lot and connected closer to the source of the water near *D's* residence, interfering with *D's* supply. *D* cut this off, and *P* again connected closer to *B's* property. *B* cut this connection, *P* reconnected, and sued to enjoin *B* and *D* from interfering with his water supply. At the time of the trial, the land upon which the tank stood was owned by another person. From a decree against *B* and *D*, *D* appeals. *Held:* Affirmed; an implied grant of an easement was found, *D* being estopped to assert any difference between availability of water for use and actual use (that is, he was estopped to claim that there was no use of the "easement") prior to severance, as a result of the representations made by *D* when he sold the lot to *P*. *White v. Berg*, 19 Wn. (2d) 294, 142 P. (2d) 260 (1943).

"Three things are regarded as essential to create an easement by

> implication; first 'a separation of title; second, that, before the separation takes place, the use which gives rise to the easement shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent; and, third, that the easement shall be necessary to the beneficial enjoyment of the land granted or retained.' 9 R.C.L. 757." *Bailey v. Hennessey*, 112 Wash. 45, 191 Pac. 863 (1920).

Also herein nominated as a controlling factor is the intent of the parties at the time of the grant, which is presumed to exist from the presence of these elements. *Berlin v. Robbins*, 180 Wash. 176, 38 P. (2d) 1047 (1934), is a case of an implied easement decided on the basis of these three requirements alone, with no reference to the intent, as such, of the parties. But the court in *Rogers v. Cation*, 9 Wn. (2d) 369, 115 P. (2d) 702 (1941), held that the intent or presumed intent of the parties is "the prime factor," and that, citing Tiffany, *Real Property*, 3rd ed., § 780,

> " . . . we should bear in mind that the rule is not a hard and fast one, and the presence or absence of any or all of the stated requirements is not necessarily conclusive."

However, the instant case seems to be based on neither of the above principles; *i. e.*, strict conformity to the three requirements, or the fulfillment of a missing requirement by the controlling intent of the parties. Clearly lacking is the element of user of the water before severance; and, although the intent of the parties was clear, the court did not base its decision upon the holding of *Rogers v. Cation, supra*, which would seem to have been the obvious solution of the problem. In the alternative, perhaps a conventional implied easement could have been found upon the theory that the laying of the pipe itself was a sufficient user before separation to satisfy the requirement; thus the land upon which the tank is situated (apparently regarded by the court as the servient estate) would have been adapted by installation of the water system and the laying of pipes, and the dominant estate would also be adapted to the user as completely as practical under the then conditions.

Estoppel is probably the basis for the doctrine of implied grants that a grantor may not derogate from his own grant. See 17 Am. Jur., *Easements* § 33 at page 947; and *Bailey v. Hennessey, supra*. Thus, in the instant case, we have what amounts to an estoppel to deny an estoppel to deny a grant. But *Cf. Cogswell v. Cogswell*, 81 Wash. 315, 142 Pac. 655 (1914), citing *Nicolas v. Chamberlain*, 2 Crokes, K. B. 121.

It will also be noted that *D* is not now the owner of the servient estate, and his only interest in the proceedings seems to be that of a user of the water supply. Consequently, the question arises whether the above decision would be *res judicata* as to the now owner of the servient estate. Possibly not, as the court may have meant here that the estoppel ran against *D* to deny that *P* had what he, *D*, said *P* had, by reason of representation at the time of sale and *D's* now negligible interest in the subject matter of the suit.

The conception of implied grant is not favored at common law, (Ann. Cas. 1913C, 1113) but it would seem that the reverse is true in this state. At the present time, it appears that the requirements laid down in the *Bailey* case have been the subject of two exceptions; first, by that in the *Rogers* case that not all of the elements need be present if the intent be clear, and, second, by that of the instant case that the grantor may be estopped to assert the absence of one or more of the above requirements by his representation at the time of sale to the effect that such an easement does or would exist. C. R. M.