AN ANALYSIS OF THE ECONOMIC RELATIONS BETWEEN COTENANTS

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This article will attempt to articulate the policy considerations that should govern the various economic relations between cotenants,[1] where, as is almost always the case, there is no agreement between the parties involved as to how the relations should be handled.[2]

The problems typically arise when one (or more) cotenant is in possession of the land and one (or more) cotenant is not in such possession or control. As examples, should the possessing cotenant (1) be able to live on the property rent-free, (2) be permitted to keep profits earned from its productive use, (3) be permitted to keep the rents if he leases the land to a third party, or (4) be entitled to contribution from the nonpossessing cotenant for expenditures for repairs, improvements, realty taxes, insurance, mortgage interest and amortization, and the like? As we shall see, the answers to these questions involve considering and weighing some of the most fundamental premises and policies of a private property system. The rules of law as they have actually developed will first be discussed. A legal and economic analysis of suggested approaches to the problems will then follow.

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1. We deal here with such incidents as they relate to the common law cotenancies—tenancy in common, joint tenancy, and to a lesser extent the tenancy by the entirety. Tenancy by the entirety, since it exists only between husband and wife, has special rules growing out of that relationship and will not be covered in detail here.

2. *See generally* 2 AMERICAN LAW OF PROPERTY §§ 6.14, 6.17, 6.18 (A.J. Casner ed. 1952) [hereinafter cited as ALP]; W. BURBY, REAL PROPERTY 228-31 (1965); 4 G. THOMPSON, REAL PROPERTY §§ 1803-1807 (J. Grimes ed. 1961); 2 H. TIFFANY, REAL PROPERTY §§ 450, 458-462 (B. Jones 3d ed. 1939); Reynolds, *Co-Ownership of Property in Oklahoma*, 27 OKLA. L. REV. 585, 603-10 (1974); Weible, *Accountability of Cotenants*, 29 IOWA L. REV. 558 (1944); Comment, *Liability of a Cotenant to Other Cotenants for Rents, Profits and Use and Occupation*, 42 MARQ. L. REV. 363 (1959) [hereinafter cited as Marq. Comment]; Note, *Accountability of a Cotenant for Use and Occupation*, 12 WYO. L.J. 156 (1958); Note, *Right of Cotenant to Contribution From Other Cotenants for Unauthorized Repairs and Improvements Made to the Common Property*, 32 NOTRE DAME LAW. 493 (1957); Comment, *Tenancy in Common in Tennessee*, 24 TENN. L. REV. 853, 858-60 (1957).

THE RULES AS THEY HAVE DEVELOPED

The cases in this area have tended to run into relatively predictable patterns with the usual occasional difference of view among jurisdictions, but they are notably without analysis of underlying policy. No coherent overall theory on how to handle the entire area seems to have been developed either by the courts or the secondary authorities. The rules, however, are relatively easily stated and follow here.

Liability of Possessing or Appropriating Cotenant for Rents and Profits

Under the common law notion of unity of possession, each cotenant had a right to possess the whole parcel; yet neither could exclude the other from his equal right to possession.[3] Since translating that verbal formulation into a physical reality presented obvious problems for those cotenants who happened to be hostile to each other, the judicial remedy of partition was invented early.[4] Through partition, one cotenant could force the other into a physical division that resulted in sole ownership by each cotenant of a separate parcel; if physical division was not feasible, then the court could order a sale, dividing the proceeds according to the interest of each person.[5]

From the rule allowing a cotenant possession of the entire parcel was deduced the common law principle that he had no duty to account to his fellow cotenants for the rental value of his own occupancy unless he had ousted them, he was their trustee, or he had agreed to be so liable.[6] Further, on the same theory, a cotenant exercising dominion was permitted to keep the rents collected from third parties.[7]

The injustice of the above common-law rules to the nonpossessing cotenant was partially ameliorated by the passage of the Statute of Anne[8] in 1704. It provided for an accounting by a cotenant receiving more than his just share.[9] The statute was not terribly clear on what the other cotenant was entitled to a "just share" of. As Congress sometimes does, Parliament left it to the courts to fill in the blanks. In one case, an English court interpreted the statute rather narrowly to mean that a cotenant had no duty to account for the rental value of his own

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3. 2 H. TIFFANY, *supra* note 2, § 449 n.6.
4. *See* 2 ALP, *supra* note 2, §§ 6.19-.26, at 86-118.
5. *Id.* § 6.26, at 112.
6. *Id.* § 6.14 nn.1-4, at 57-58.
7. *Id.* § 6.14 n.5, at 58-59.
8. 4 Anne 200, c.16, § 27 (1704).
9. [A]ctions of Account shall and may be brought and maintained against the Executors and Administrators of every Guardian, Bailiff, and Receiver; and also by one Joint Tenant, and Tenant in Common, his Executors and Administrators, against the other, as Bailiff for receiving more than comes to his just Share or Proportion, and against the Executor and Administrator of such Joint Tenant, or Tenant in Common.

Id.

exclusive occupancy or for the crops or minerals he took from the land; his only duty was to account for rents collected from third persons.[10]

In the United States, statutes patterned after the Statute of Anne have been enacted in many jurisdictions;[11] others either have received it into their common law[12] or have modified the English rule by statute,[13] statutory interpretation,[14] or common law pronouncement.[15] Many of the later cases deal with the questions as if they were common law matters even when there is an applicable statute.[16]

The rules presently obtaining in the United States appear to be as follows.[17] In most states where the Statute of Anne has been reenacted, there is no duty to account for the value of the possessing cotenants' own occupancy[18] or even for profits made from crops raised upon the premises[19] unless the possessor has ousted the nonpossessor[20] or has

10. Henderson v. Eason, 117 Eng. Rep. 1451, 1457-58 (1851).

11. For a collection of cases interpreting such statutes see 2 ALP, *supra* note 2, § 6.14 n.1, at 59.

12. Flack v. Gosnell, 76 Md. 88, 89-92, 24 A. 414, 414-15 (1892); Brown v. Wellington, 106 Mass. 318, 319-20 (1871).

13. For example, the Illinois statute provides:

> When one or more joint tenants, tenants in common or copartners in real estate, or any interest therein, shall take and use the profits or benefits thereof, in greater proportion than his or their interest, such person or persons, his or their executors and administrators, shall account therefor to his or their cotenants jointly or severally.

ILL. REV. STAT. ch. 76, § 5 (1973). The Iowa provision states:

> In all cases in which any real estate is now or shall be hereafter held by two or more persons as tenants in common, and one or more of said tenants shall have been or shall hereafter be in possession of said real estate, it shall be lawful for any one or more of said tenants in common, not in possession, to sue for and recover from such tenants in possession, his or their proportionate part of the rental value of said real estate for the time, not exceeding a period of five years, such real estate shall have been in possession as aforesaid.

IOWA CODE § 557.16 (1971). *See* Marq. Comment, *supra* note 2, at 370-73.

14. Early v. Friend, 57 Va. 21, 26-31 (1860); Ward v. Ward, 40 W. Va. 611, 614-15, 21 S.E. 746, 747-48 (1895). These cases held that an occupying cotenant had a duty to account to the other cotenant for fair rental value under statutes similar to the Statute of Anne.

15. Tesar v. Leu, 156 Neb. 528, 531, 56 N.W.2d 803, 805 (1953); Winn v. Winn, 131 Neb. 650, 653-56, 269 N.W. 376, 378-79 (1936); McKnight v. Basilides, 19 Wash.2d 391, 404-08, 143 P.2d 307, 313-16 (1943). These cases, apparently as a matter of common law, held that an occupying cotenant is liable for fair rental value to the nonpossessing cotenant.

16. *See, e.g.*, Jemzura v. Jemzura, 36 N.Y.2d 496, 330 N.E.2d 414, 369 N.Y.S.2d 400 (1975)(court did not mention the governing statute, N.Y. REAL PROP. ACTS. LAW § 1201) (McKinney 1979)).

17. A good summary is contained in 2 ALP, *supra* note 2, § 6.14, at 56.

18. Seesholts v. Beers, 270 So.2d 434, 435-36 (Fla. Dist. Ct. App. 1972); Lovin v. Poss, 240 Ga. 848, 848-49, 242 S.E.2d 609, 610 (1978); Anderson v. Anderson, 62 Ill. App. 3d 468, 473, 378 N.E.2d 1079, 1083 (1978); Baird v. Moore, 50 N.J. Super. 156, 167-74, 141 A.2d 324, 329-33 (1958); Rodesney v. Hall, 307 P.2d 130, 133-34 (Okla. 1957); Roberts v. Roberts, 584 P.2d 378, 380-81 (Utah 1978).

19. Rehfuss v. McAndrew, 250 Ala. 55, 57, 33 So.2d 16, 17-18 (1947); Kennon v. Wright Frazier & Co., 70 Ala. 434, 434 (1881); Black v. Black, 91 Cal. App. 2d 328, 334, 204 P.2d 950, 953-54 (1949); Arnold v. De Booy, 161 Minn. 255, 260, 201 N.W. 437, 438 (1926); Eysenbach v. Naharkey, 110 Okla. 207, 213, 236 P. 619, 624 (1924), *cert. denied*, 269 U.S. 561 (1925); Roberts v. Roberts, 136 Tex. 255, 257-58, 150 S.W.2d 236, 237-38 (1941) (liable only because of agreement); 2 ALP, *supra* note 2, § 6.14 n.12, at 60.

20. Spiller v. Mackereth, 334 So.2d 859, 861-62 (Ala. 1976); Lawrence v. Lawrence, 231 Ark. 324, 329, 329 S.W.2d 416, 419-21 (1959); First Nat'l Bank v. Groussman, 29 Colo. App. 215, 224, 483 P.2d 398, 402 (1971), *aff'd*, 176 Colo. 566, 491 P.2d 1382 (1971); Lohmann v. Lohmann, 50

agreed to account.[21] On the other hand, if the possessor has reduced the value of the property, as by mining, quarrying, oil drilling, and the like, he is required to account for actual profits.[22] In a few states, by statute, there are rules contrary to the above requiring all occupying cotenants to account for the fair rental value of their mere possession.[23]

The trouble with the above conventional statement is not that a person would be unable to find many cases to support each proposition therein, but that there are many other cases that do not fit the formula well at all. First, there is a whole line of cases holding that if the possessing cotenant seeks contribution for such expenses as repairs, interest, taxes, insurance, and amortization of a loan in a partition or accounting proceeding, the nonpossessing cotenant may charge the possessor the fair rental value of the possession as an offset to that contribution.[24] There are a few cases holding to the contrary.[25] The importance of this exception to the old law, however, is that since many instances of cotenant dispute end up in an accounting or partition, there is relatively little left to the original no-liability rule except where the possessor seeks no contribution for expenses at all.[26]

A second departure from the conventionally stated rule pertains to farming done by the possessing cotenant. There are a number of cases holding that if he sells crops raised on the property, he must account to the nonpossessor for the proceeds.[27] In such a jurisdiction, cotenants using property solely for their own residential purposes and not seeking

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N.J. Super. 37, 47-50, 141 A.2d 84, 89-94 (1958); Parceluk v. Knudtson, 139 N.W.2d 864, 873-74 (N.D. 1966); Heyse v. Heyse, 47 Wis.2d 27, 36, 176 N.W.2d 316, 320 (1970). It is clearly an ouster for one cotenant to refuse a sharing of possession with another cotenant after demand. *See* 2 ALP, *supra* note 2, § 6.13 n.7, at 54. The same is true where a cotenant purports to convey the entire title "in circumstances which charge his cotenants with notice." *Id.* § 6.13 n.8, at 54. The cases are in disagreement, however, as to whether a mere demand by the nonpossessing cotenant for the possessor to either vacate or pay rent, followed by continued possession is sufficient to constitute an ouster. *Compare* Spiller v. Mackereth, 334 So.2d 859, 861-62 (Ala. 1976) *with In re* Holt's Estate, 177 N.Y.S.2d 192, 193-94, 14 Misc. 971, 972-73 (1958) *and Re* Estate of Elsinger, 12 Wis. 2d 471, 476-77, 107 N.W.2d 580, 582-83 (1961).

21. Roberts v. Roberts, 136 Tex. 255, 257, 150 S.W.2d 236, 237 (1941).

22. P & N Inv. Corp. v. Florida Ranchettes, 220 So.2d 451, 454 (Fla. App. 1968); White v. Smyth, 147 Tex. 272, 285-87, 214 S.W.2d 967, 975-76 (1948); Rosse v. Northern Pump Co., 353 S.W.2d 287, 297 (Tex. Civ. App. 1961).

23. *See* statutes in note 13 *supra*.

24. Hunter v. Schultz, 240 Cal. App. 2d 24, 31-32, 49 Cal. Rptr. 315, 320-24 (1966); Adkins v. Edwards, 317 So.2d 770, 771 (Fla. Dist. Ct. App. 1975); Taylor v. Taylor, 119 So.2d 811, 813 (Fla. Dist. Ct. App. 1960); Beckham v. Eggleston, 341 S.W.2d 337, 340 (Mo. App. 1960); Lanigir v. Arden, 85 Nev. 79, 81-82, 450 P.2d 148, 149-50 (1969); Gilliland v. Meadows, 351 S.W.2d 656, 657 (Tex. Ct. Civ. App. 1961).

25. Seesholts v. Beers, 270 So.2d 434, 435-36 (Fla. Dist. Ct. App. 1972); Anderson v. Anderson, 62 Ill. App. 3d 468, 473, 378 N.E.2d 1079, 1082-83 (1978); Baird v. Moore, 50 N.J. Super. 156, 167-72, 141 A.2d 324, 330-32 (1958); Manor v. Liles, 319 P.2d 310, 317 (Okla. 1957).

26. *See generally* Suttle v. Seely, 94 Ariz. 161, 382 P.2d 570 (1963).

27. Buschmeyer v. Eikermann, 378 S.W.2d 468, 475 (Mo. 1964); Mastbaum v. Mastbaum, 126 N.J. Eq. 366, 370, 9 A.2d 51, 54 (1939); Few v. Few, 239 S.C. 321, 338, 122 S.E.2d 829, 837 (1961); 4 G. THOMPSON, *supra* note 2, § 1804, at 186 n.14 (cases cited therein).

contribution for expenses are the only ones insulated from some duty to account to the nonpossessor.

Accounting for Interest and Amortization of Mortgage, Taxes, Insurance, Repairs, and Improvements

The conventional statement of the American rules concerning accounting for expenses may be summarized as follows. First, a cotenant not in sole possession who pays realty tax or interest on a preexisting mortgage may get contribution from the other cotenants in possession on the theory that he has protected the estate and all its owners from foreclosure.[28] On the other hand, if the paying cotenant were in sole possession of the realty he may not get contribution if the value of his use exceeds the payments,[29] and if he ousts his cotenant he may get no contribution at all, although he may offset his expenses against his liability for fair rental value.[30]

A cotenant paying the principal of a mortgage or other encumbrance is subrogated to the rights of the mortgagee[31] or may have a judicial lien impressed upon the property.[32] It is said that no personal liability for such payment attaches to the other cotenants unless they were in possession or agreed to be personally liable,[33] but cases directly so holding are difficult to find.

The conventional statement about the possessing cotenant who makes repairs is that while he is not allowed contribution from the other cotenants directly, he may deduct reasonably necessary repairs from his liability for rents or rental value in an accounting or partition action.[34] One case supports this,[35] but there are others with slightly different or opposing views. Thus, one approach allows the offset for

28. *See* 2 ALP, *supra* note 2, § 6.17 n.2, at 74 (cases cited therein). There is some dispute as to whether such contribution may be enforced by personal liability, merely as a lien on the cotenant's interest, or only as an offset against the possessor's liability for rents or rental value. *See* Weible, *supra* note 2, at 563 n.25 (cases cited therein).

29. *See* Hunter v. Schultz, 240 Cal. App. 2d 24, 30-32, 49 Cal. Rptr. 315, 319-21 (1966); First Nat'l Bank v. Groussman, 29 Colo. App. 215, 224-25, 483 P.2d 398, 402 (1971), *aff'd*, 176 Colo. 566, 491 P.2d 1382 (1971); Adkins v. Edwards, 317 So.2d 770, 771 (Fla. Dist. Ct. App. 1975); Colburn v. Colburn, 265 Md. 468, 474, 290 A.2d 480, 483-84 (1972). *But see* Manor v. Liles, 319 P.2d 310, 312 (Okla. 1957). That case held that an occupying cotenant may receive contribution of expenses without offset of fair rental value, the latter being offset only in case of ouster. *Id.* For a compilation of cases on the main point, see 2 ALP, *supra* note 2, § 6.17 n.5, at 76.

30. First Nat'l Bank v. Groussman, 29 Colo. App. 215, 224-25, 483 P.2d 398, 402 (1971), *aff'd*, 176 Colo. 566, 491 P.2d 1382 (1971); Newman v. Chase, 70 N.J. 254, 266-67, 359 A.2d 474, 481 (1976). Another case probably standing for the same proposition is Goforth v. Ellis, 300 S.W.2d 379, 383-84 (Mo. 1957). For additional cases, see 2 ALP, *supra* note 2, § 6.17 n.6, at 76.

31. 2 ALP, *supra* note 2, § 6.17 n.4, at 74 (cases cited therein).

32. Hahn v. Hahn, 297 S.W.2d 559, 567 (Mo. 1957); Heiselt v. Heiselt, 10 Utah 2d 126, 129, 349 P.2d 175, 177 (1960).

33. *See* 2 ALP, *supra* note 2, § 6.17, at 77.

34. *See id.* § 6.18 nn.1-4, at 78 (cases cited therein).

35. *See* Goforth v. Ellis, 300 S.W.2d 379, 383-84 (Mo. 1957).

repairs only if the nonpossessor refuses to comply with a request to participate.[36] Another approach is that the possessor's liability for fair rental value is an offset only and cannot exceed the amount of repairs; otherwise this rule would operate as a device to impose liability for a cotenant's own occupancy.[37] A third approach is that such contribution will lie against the nonpossessor who will not be permitted to offset the fair rental value of the possessing cotenant's occupancy at all unless there has been an ouster.[38] Also it should be emphasized that the distinctions made by the secondary authorities stating differing rules concerning the various categories of expense—interest, repairs, taxes, etc.—are not always supported by the courts. Some cases lump all the expense categories together, seemingly treating them alike.[39]

Lastly, the conventional statement is that a cotenant who makes an improvement upon the realty may not recover its cost from the other cotenants; nevertheless, in a physical partition he may get the improvement itself and in a partition sale he is entitled to the additional amount of sale proceeds attributable to it.[40] It should be noted that there is some authority for the proposition that the measure of recovery in the partition sale should be the cost of the improvement.[41] There is also some indication that, in a proper case, the measure of recovery should be the lesser of the cost of the improvement or the enhancement in value caused by the improvement.[42]

With this brief review of the law we turn to a consideration of matters of policy.

MATTERS OF POLICY

The Basic Hypothetical

In considering the area, it would be well to have a fact pattern in mind that will present many of the major issues. Assume that O, owner of Blackacre, a 640 acre farm, leaves it to his two children, P (possessor) and N (nonpossessor), subject to an existing mortgage. P is interested in living on the farm and working it. N, on the other hand, prefers to work in New York as an advertising executive. In connec-

36. *See* Colburn v. Colburn, 265 Md. 468, 477, 290 A.2d 480, 485 (1972).
37. *See* Lanigir v. Arden, 85 Nev. 79, 81-82, 450 P.2d 148, 149-50 (1969).
38. Baird v. Moore, 50 N.J. Super. 156, 165-173, 141 A.2d 324, 328-32 (1958); Manor v. Liles, 319 P.2d 310, 312-13 (Okla. 1957).
39. Adkins v. Edwards, 317 So.2d 770, 771 (Fla. Dist. Ct. App. 1975); Hahn v. Hahn, 297 S.W.2d 559, 567 (Mo. 1957); Baird v. Moore, 50 N.J. Super. 156, 165, 141 A.2d 324, 328 (1958).
40. Manor v. Liles, 319 P.2d 310, 312 (Okla. 1957); 2 ALP, *supra* note 2, § 6.18 nn.12-17, at 81-84 (cases cited therein).
41. Haas v. Haas, 165 F. Supp. 701, 715-16 (D. Del. 1958).
42. *E.g.*, Buschmeyer v. Eikermann, 378 S.W.2d 468, 479 (Mo. 1964) (holding that the court should look at what is equitable).

tion with this farming operation, P has the following expenditures for 1978:

Seed, fertilizer, etc.	$ 4,000.00
Repairs to farmhouse	500.00
Interest on farm mortgage	15,000.00
Real estate taxes	6,000.00
Property insurance	500.00
Improvements (new fence)	1,000.00
Mortgage amortization	5,000.00
Crop insurance	1,000.00

In the same year, P has revenues of $125,000.00 from the sale of the crops produced. Ignoring depreciation, the net income from the farming operation is thus $98,000.00.[43]

N would like to get half the net income from P but does not particularly want to contribute to the loan amortization or improvements. P, on the other hand, would like N to make such a contribution but does not particularly want to share the net income. Obviously, these positions would be somewhat reversed if there were a loss. There P would want to share the net loss with N and N would prefer to wash his hands of the entire matter.

The Contending Policies

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.[44] It is perfectly clear why these two goals are normally compatible but are not here. In the usual case, an individual is rewarded with income for his efforts. By maximizing his income, he increases his ability to acquire property. A rule of law which protects a property interest is thus in itself a reward for and an incentive toward effort. This is not so clearly the case where cotenancy is involved. It is true that the acquisition of the concurrent property interest might be the result of the joint efforts of the cotenants (or even of the nonpossessing cotenant); nevertheless, it is also true that the possessor is, by hypothesis, actively engaged in husbandry while the nonpossessor is not. A rule which tends to benefit the nonpossessor thus emphasizes the importance of property as such. After all he may have acquired it through the efforts of others by gift or inheritance. On the other hand,

43. The figure is reached by deducting from the revenues all the cash outlays other than the amounts for loan amortization and improvements. Loan amortization represents a reduction of a liability rather than an expense and the outlays for improvements creates an asset rather than an expense.

44. *See* Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 18-20, 30-33 (1943).

a rule benefiting the possessor is clearly aimed at the reward of his present efforts in maximizing the utility of the land. Obviously, the mere statement that there is tension between these two policies does not suggest under what circumstances one or the other of them ought to be preferred. It is important, however, to keep them in mind in thinking about the possible alternative governing rules of law.

Alternative Models

The two policies above mentioned will inevitably lead us to two opposite models as prototypes for decision. If the property interest is to be fully protected and emphasized, then all gains and losses from that property should be shared and the possessor and nonpossessor—viewed as co-enterprisers or co-risk bearers. Perhaps, then, the law of partnership or a variant will serve to light the way. If, on the other hand, the industry of the possessor is to be emphasized, then he must be permitted to reap the full harvest of his efforts, having only to pay the nonpossessor rent for using the land. Here the analogy would be to a lease of realty, with the tenant entitled to all profits but bearing all operating expenses in connection with its use. This is what is called a net lease. It is to these two models then—co-enterprisers and net leases—that we turn for help in attempting to bring order to the problem.

The Co-Enterpriser Approach

In trying to develop a co-enterpriser approach it would be helpful to be able to turn to a ready-made body of law for reference as to possible applicable rules. The law of partnership is such a body and it should be examined for help in solving the problems, although as we shall see, certain differences between partnership and cotenancy preclude wholesale application of that law. We assume here, then, that the cotenants P and N are not deemed in law to be partners, for if they were, those rules would clearly apply anyway. That is not to say that there is a clear bright line between what is a "cotenancy" on the one hand and a "partnership" on the other.[45] A partnership is defined as "an association of two or more persons to carry on as co-owners a business for profit."[46] It is quite possible for a court to hold that what par-

45. For cases discussing the overlap between partnership and cotenancy, see Parmelee v. Brainard, 62 Cal. App. 2d 182, 184, 144 P.2d 381, 383 (1944); Arnold v. De Booy, 161 Minn. 255, 259-60, 201 N.W. 437, 438-39 (1924); Zuback v. Bakmaz, 346 Pa. 279, 281-82, 29 A.2d 473, 474-75 (1943); Anderson v. Anderson, 54 Wis. 2d 666, 669-70, 196 N.W.2d 727, 729 (1972).

46. UNIFORM PARTNERSHIP ACT § 6(1). See also § 7(2) which states: "Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property." *Id.* § 7(2).

ties thought was a cotenancy, was in law a partnership. It is said that the element of engaging in "business" is the crucial factor transmuting a cotenancy into a partnership.[47] That is, if the co-owners are merely involved in a passive investment, they are cotenants only. But if they are actively engaged in a business, they will be partners assuming that the other elements of "association" and "for profits" are met, as they usually will be in such a case.[48] Under the usual rules of partnership law, P and N (assuming they have equal shares in Blackacre) would share equally in the "profits" and "losses."[49] Using that approach, if revenues exceeded expenses, P would have to pay half of the excess to N, but if expenses exceeded revenues, N would have to contribute half of the deficit to P.[50] Initially included in the calculation would be items of income and expense in the accounting sense. In the above hypothetical, these items would encompass the crop sales revenues and the expenditures for seed and fertilizer, repairs, interest on mortgage, real estate taxes, and property and crop insurance.

It would also appear that any equitable accounting on a partnership theory would allow P to recover not only half the out-of-pocket expenses but also the fair market value of his services as manager and caretaker of the property.[51] This value presumably would be measured by what one would have to pay a stranger of similar skills in the open market. Whether such recovery would be available under the strict rules of partnership law is questionable. Section 18(f) of the Uniform Partnership Act denies a partner "remuneration for acting in the partnership business" unless there is an agreement so providing.[52] Nevertheless, a judicial exception seems to have been carved, allowing active partners compensation where another partner was inactive.[53] In any case, no matter what the partnership rule, compensation for those services should be allowed in an accounting between the cotenants. In a partnership, there is by hypothesis a voluntary association of persons

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47. J. CRANE & A. BROMBERG, PARTNERSHIP 61-62 (1968) [hereinafter cited as PARTNERSHIP].

48. The Internal Revenue Service takes a similar position on the question of when a cotenancy shall be treated as a partnership for income tax purposes. *See* Treas. Reg. § 301.7701-3 (1960).

49. UNIFORM PARTNERSHIP ACT § 18(a).

50. *Id.* §§ 18(b), 40(d), 40(b); PARTNERSHIP, *supra* note 47, at 372.

51. The weight of authority seems to be against allowing cotenants fees for their services in caring for co-owned property. Larkin v. McCabe, 211 Minn. 11, 26-27, 299 N.W. 649, 656 (1941); Myers v. Bolton, 157 N.Y. 393, 399, 52 N.E. 114, 115 (1898); Curl v. Neilson, 178 Ore. 343, 349, 167 P.2d 320, 322 (1946). There is some authority allowing recovery where the services are performed on the request of the other cotenant, Sears v. Munson, 23 Iowa 380, 389 (1867), or even without such request. *In re* Gundy's Estate, 14 Misc. 2d 472, 474, 166 N.Y.S.2d 529, 532 (Sup. Ct. 1957). *See generally* 2 ALP, *supra* note 2, § 6.18, at 85 n.24.

52. UNIFORM PARTNERSHIP ACT § 18(f).

53. Davis v. Spengler, 93 So.2d 348, 350 (Fla. 1957); *In re* Levy's Estate, 125 Wash. 240, 248, 215 P. 811, 814-15 (1923). *Contra*, Leslie v. Oakley, 108 W. Va. 64, 66, 150 S.E. 226, 227 (1929).

for the purpose of conducting a profit-making enterprise, and one could draw the inference that each partner is agreeing to perform services for the partnership without expectation of compensation. That is not true in the case of cotenancy where the services of each are not contemplated.

Thus far, we have discussed what the accountant calls income and expense items. The same principles, however, apply under partnership law to capital expenditures—here for the improvements and mortgage amortization. Those rules make no distinction between the partner's right to contribution for expenses on the one hand and capital items on the other. In both cases, recovery is allowed if the liability was reasonably incurred in the ordinary course of business.[54] Under this standard, it seems that P might get contribution from N for the fence and for amortization of the preexisting mortgage. Application of the partnership standard to this type of situation, however, poses some serious analytical problems as is illustrated by the following example. Suppose that after P and N inherited Blackacre, P mortgaged it[55] and used the proceeds to build a new rental housing development on the farmstead. P now sues N to force his contribution for the improvements. The partnership rule—that the liability must be reasonably incurred in the ordinary course of business—really does not fit the situation at all. In a true partnership there is invariably an understanding between the partners with respect to what the scope of their enterprise is,[56] but this is not true of cotenancy. Indeed, where there is an agreed enterprise whose scope is being measured, the cotenancy becomes a partnership in law for all purposes.[57] Where there is not such an agreement, it is obvious that the partnership requirement of ordinary course of business makes absolutely no sense. How can one determine whether an improvement is done in the ordinary course of business when by definition mere cotenants (as opposed to partners) are not engaged in an agreed business at all?

In such a case, the rules of partnership which are premised on the existence of voluntary mutual undertakings to engage in an enterprise do not seem to be helpful. The same infirmity would also be present in attempting to analyze all those cases where one cotenant merely uses

54. UNIFORM PARTNERSHIP ACT § 18(b). "The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property." *Id. See* Hargett v. Miller, 235 Ark. 523, 525, 361 S.W.2d 83, 84 (1962); Quillen v. Titus, 172 Va. 523, 532, 2 S.E.2d 284, 288 (1939).

55. Note here that N, by hypothesis, will not have joined in the mortgage. If he had, he would of course be liable to pay it, and if P paid it P would be subrogated to the rights of the mortgagee against the defaulting N.

56. PARTNERSHIP, *supra* note 47, at 276.

57. *See* text accompanying notes 45-48 *supra*.

the property as a residence, or rents it out to third parties and seeks contribution for repairs, mortgage, and the like. With no agreed enterprise scope, use of the partnership principles becomes impossible. For these reasons, it is doubtful that the partnership analogy as such should be applied to a cotenancy unless there is an agreement between the parties that it should apply.

That is not to say, however, that the whole co-enterpriser model becomes useless. It is merely to say that as constructed, partnership law does not solve some of the difficult problems where the outer boundary of the possessor's power to bind the nonpossessor is at issue. Suppose, however, that the "ordinary course of business" requirement were deleted and the nonpossessor was bound to contribute to any reasonable expenditure in connection with the co-owned realty? If, for example, the decision to convert the farm to a rental housing development were a reasonable one, then under that standard, N would own half the development but would have to pay half its cost—out of his other assets if need be. Of course, under this view, payment of the entire cost would ordinarily not be necessary: if the enterprise were profitable its revenue would amortize the mortgage that financed the cost of construction. But N's share of the revenues would be used to pay that mortgage, and more importantly, P could recover half of any down payment made by him. The difficulty, however, is that this rule would impose personal liability upon an individual for expenditures he in no way authorized. Instead of a right *in personam* against N, perhaps the best compromise then would be to give P a lien on the property for half his reasonable expenditures.[58] This lien would be realized when the property were sold or partitioned. A lien would be far preferable to a rule of personal liability for undertakings never agreed to.

The last issue on the improvement question is the measure of P's recovery as described above. Since, by hypothesis, P and N here are co-enterprisers, P should receive half the cost of the improvement rather than any figure based on increase or decrease in value to the freehold. By this method, profits or losses, because of the effects of the improvements, would be shared equally.

In summary, then, a co-enterpriser model could borrow the basic scheme of the law of partnership—a sharing of expenses and revenues—but with a few modifications. First, the possessor should be entitled to recover for the value of his managerial and other services. Second, he should be entitled to recover any reasonable expenditures he makes in connection with the property, whether it be an expense or capital item. Third, any recovery of the above would be in cash to the

58. There is authority for such an approach. See notes 32-33 *supra*.

extent that there were sufficient revenues from the property to pay it, and in the form of a lien upon the co-owned property to the extent that there were not enough revenues.

The Net Lease Approach

The second possible way to analyze the problem is to analogize the relationship to a net lease, with P, the occupying cotenant, viewed as the tenant and both cotenants, N and P, viewed as the landlord. In the typical net lease, the tenant agrees to pay a rental of a flat dollar sum or a percentage of sales volume or both.[59] In addition, the tenant undertakes to pay for all operating expenses including repairs, maintenance, utilities, insurance, and realty taxes. The landlord typically, however, bears any interest and amortization upon any mortgage on the fee simple. Thus the landlord essentially functions as a passive investor while the tenant functions as an entrepreneur actively engaged in the running of a business.

Since there is no agreement as to the amount of rent, in the basic hypothetical, P under this theory would pay N a sum equal to one-half the fair rental value of the premises as a net lease.[60] This figure, of course, would be based on what the market would bring. As the tenant, P would also bear in full the various expenses for seeds, fertilizer, repairs, insurance, and realty taxes. But P is leasing the property from the cotenants, P and N, and they, as owners of the fee, would bear those costs normally associated with that ownership interest. Thus, clearly P could get contribution from N for interest and amortization of the preexisting mortgage.

A more difficult problem, however, is presented where the improvements were not authorized by N. If the lease analogy is carried through fully, the law of fixtures obviously could be applied. That body of law deals with the circumstances under which a tenant, upon the expiration of his term, may remove improvements affixed by him to the realty during the term. Initially the law essentially forbade removal, but exceptions were engrafted that soon swallowed the original rule.[61] Today, trade and agricultural fixtures may be removed if the parties so intended,[62] the tenant being responsible, at most, to pay the damage to the remaining property caused by the removal. The premise of the law of fixtures was that if the tenant had no right to remove, he

59. H. HOAGLAND, L. STONE & W. BRUEGGEMAN, REAL ESTATE FINANCE 287 (1977).
60. Obviously the fair rental value of the property must be computed, assuming it is rented under a net lease. The fair rental value of property would clearly be lower in a net lease situation where the tenant bears most of the expense, than in the case where the landlord is bearing them.
61. R. BROWN, PERSONAL PROPERTY § 16.8 (W. Rauschenbush ed. 1975).
62. *Id.* §§ 16.8, 16.9.

could not receive compensation from the landlord for the value of the fixtures left behind. On the other hand, if the tenant had the right to remove, the landlord, if he wanted the fixtures to remain, would have to pay a fair figure as agreed upon by the parties.[63] Without such a payment, the tenant would take the improvement away.

There is an obvious economic difference between the lease and cotenancy with respect to the improvements issue. In the lease situation, the tenant has no permanent interest in the land unless he has an option to buy. Therefore it might be in his interest to remove the improvement at the time of lease expiration. In the cotenancy situation, on the other hand, the possessing cotenant still has an interest in the land and therefore has less incentive to remove the improvements. Nevertheless, the landlord-tenant rule seems to fit cotenancy quite well. If the law were that the possessing cotenant (P) had a right to remove the improvement but that the nonpossessing cotenant (N) had no legal duty to contribute to the cost of its acquisition,[64] the rule would in effect leave it to the parties to decide upon the terms, if any, on which the improvement might remain on the land. This would seem to be fair. If P has placed the improvement on the property against N's wishes, why should N be forced to pay for half its value? The answer is he should not be so forced unless he is unjustly enriched thereby, and that problem can easily be avoided by fashioning the rules accordingly. Under such an approach, during the continuance of the cotenancy P would have a duty to pay as rent to N one-half of the net lease fair rental value of the property as if it had not been improved[65] and N would have no duty to pay for the improvement. This result would be analogous to a ground lease where the tenant builds the building. He obviously pays rent based on the value of the land, not on the value of the building. Under this view, upon termination of the cotenancy by partition, P would be entitled to the improved portion if physical partition were feasible. On the other hand, if partition were by sale, due allowance for P's contribution should be made. The better view would allow P compensation based on the enhancement in value to the property caused by the improvement.[66] These rules would be consistent with viewing the arrangement as an arms length net lease. Thereunder, if

63. This is what Professor Calabresi would call a property rule—an entitlement that may be removed only by the agreement of the party benefited by the rule. This is to be compared to a liability rule which may be overturned by incurring a liability whose value will be fixed by a court rather than by agreement. *See* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

64. The cost of acquisition here would include cash outlays such as down payment, and interest and amortization on mortgages whose proceeds were used to acquire the assets.

65. A case taking the view that liability for rental value should not be increased by the occupant's improvements is Moore v. Blount, 160 So. 319, 323 (La. App. 1935).

66. *See* note 40 *supra*.

the enhancement in value exceeded or was less than the cost of the improvement, the concomitant gain or loss would be for P's account, whether the partition was physical or by sale.

The rules stated above are just as appropriate where N wants the improvement to remain and would like to share in any gains or losses attributable to the construction. Using the net lease approach, P has no duty to so share unless the two parties reach an agreement as to how much and under what terms N will contribute to the cost of the improvement; if they do not so agree, P is viewed as a tenant having a right to remove his trade or agricultural fixtures or a right to their full value upon sale.

How would the net lease approach operate in the case where Blackacre is a residence and P is in possession, deriving no income from it? Again P would pay N 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. As noted, the common law had great difficulty in working out the rules for expenses.[67] The net lease approach has two great virtues in the context of this case. The rule has internal consistency and at the same time protects the property interest of the nonpossessing cotenant.

One more fact pattern should be considered in building a net lease theory. Suppose instead of occupying the property himself, P rents it out to a third person, S, without the agreement of N. The rules about contribution for expenses and capital items would be the same as above stated. The only new question presented would be whether P would have to account to N for half the actual rents collected or half the net lease fair rental value. It is submitted that the case should be viewed as a net lease between P and N as landlord and P as tenant, with a sublease to S. Under a sublease, the only duty would be to account for the net lease fair rental value. If a tenant rents leased property out to a subtenant, he is not liable to pay more than the original rent if he is successful in subleasing at a higher figure; nor is he excused if he subleases at a lower one.[68] The same rule should apply here. By taking charge of the property, P should be deemed to bear the loss or make the profit as a result of his leasing efforts.

67. *See* text & notes 28-39 *supra*.

68. Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167, 203-07 (1970).

The Two Models—Questions of Fairness and Efficiency

It would be useful to examine the co-enterpriser and net lease models to determine whether either commends itself as preferable under the basic criteria of fairness and efficiency. If one model were to prove to be more likely to approach those two goals, certainly it should be the basis for a reform of the law in this area.

Unfortunately with respect to the question of fairness, the answer is not all that clear, for it appears that so much depends upon the circumstances and characteristics of the individuals involved. For example, suppose P, age twenty-eight, is industriously farming Blackacre while N, who is P's brother, age twenty-three, refuses P's request to help on the farm and becomes a beachcomber in Pago Pago.[69] Here it seems just to use the net lease model and reward P's industry with the full profits while N receives half the rental value. On the other hand, if there are losses, it might seem inappropriate that P bear them in full, particularly if they result from bad weather rather than poor husbandry. This would militate toward a co-enterpriser approach. Nevertheless, it is clearly unfair to give P all the profits while N shares half the losses. All things considered, the net lease model would probably be preferable on these facts.

But suppose the facts are changed. P, a young person of no particular abilities, luckily finds oil gurgling to the surface of Blackacre. N is aged, infirm, and bed ridden. The net lease approach which rewards P's "enterprise" and gives him all the profits is not as attractive here. Should not N get his half? In answer, it might be pointed out that the net lease approach gives N a great deal anyway—half the net lease rental value. In the case where the land is oil rich, that figure (here its value in oil royalties) would be raised to reflect the newly discovered facts. Still, if P does no more than stumble upon this resource and turn it over to another for exploitation, it seems unfair to give him more than his less fortunate co-owner.

In summary, then, one can dream up hypothetical cases where one or the other of the models for decision seems on fairness grounds to be more appropriate, depending upon the relative degree of effort and luck on the possessor's part and laziness and helplessness on the nonpossessor's. Still, it must be concluded that if one were forced to choose one of the two models on fairness grounds, the net lease would be the more attractive, for it would appear to be relatively rare to have cases factually militating toward the co-enterpriser approach. The

69. For a case emphasizing the policy of encouraging industriousness, see Eysenback v. Naharkey, 110 Okla. 207, 213, 236 P. 619, 624 (1924), *cert. denied*, 269 U.S. 561 (1925).

lucky possessor exploiting his infirm cotenant is probably not an everyday occurrence.

One feels on much firmer ground in attempting to decide which model leads to greater efficiency. If there is any truth to the notion that people are motivated to maximize their own profits and minimize their own losses, then certainly the net lease approach, which allocates these profits and losses (as well as responsibility for capital expenditures) to the possessor, would increase his incentive toward efficient husbandry. As to the co-enterpriser approach, if our experience with bureaucracies tells us anything, it is that people are always willing to spend other people's money in a way that they would not think of spending their own. For that reason, the greater the number of cotenants and the smaller the possessing cotenant's share, the less would be the incentive toward prudent management under the approach. Even where the possessor's share is proportionately very large, however, it would seem that the complete responsibility implied by the net lease model would be a strong motivator toward greater effort and more prudent cost control.

For these reasons this net lease model appears to more nearly approach the twin goals of fairness and efficiency. Adoption of that model would give a much more coherent, predictable, fair, and efficient system of allocation among cotenants.