

## McCORMICK V. McCORMICK.

1921, March 2, April 6. Supreme Court, Napier.  
Salmond, J.

*Partition Suit—Order for sale—Sale—One owner having sole use of property—Claim by other to occupation rent.*

The land the subject matter of the partition suit, which had been the sole property of the husband, was conveyed by him in 1911 to himself and his wife, as joint tenants. The land consisted of about 5 acres with a dwelling-house thereon which was the residence of the parties. Shortly afterwards a deed of separation was executed whereby the husband agreed to pay his wife a yearly sum. In consequence the wife left her husband's house and he had continued ever since to reside in the house and farm the land. The deed of separation contained no provision as to the residence of the parties or the occupation of the property. On a sale made in the suit the wife claimed to charge the husband's share of the purchase money with a sum of money in respect of his use and occupation of the land.

HELD,—Disallowing the claim that there was no general right, even in a partition suit, to charge an occupying owner with an occupation rent. The Court referred to the only cases where one co-owner could recover compensation from another who had had the sole use of the property.

*Rogers* for plaintiff.

*Lusk* for defendant.

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SALMOND, J.—In this suit for partition an order for sale was made by consent on the 15th October, 1920, and the land has been sold for the sum of £2000. It is now necessary to determine a question which on the making of the order for sale was reserved for further consideration—the question, namely, whether the plaintiff is entitled to charge the defendant's share of the purchase-money with the sum of £397 9s. 7d. in respect of his use and occupation of the land.

The plaintiff is the wife of the defendant. The land which is the subject-matter of this partition suit was in 1911 the sole property of the husband. In May of that year, however, he conveyed it to his wife and himself as joint tenants. The land consists of about five acres with a dwelling-house thereon which was the residence of the parties. In November, 1911, a deed of separation was executed by the parties whereby the husband agreed to pay his wife an annuity of £52. In consequence of this separation the wife left her husband's home, and he has continued ever since to reside in the dwelling-house in question and to occupy and farm the land. The deed of separation contains no provision as to the residence of the parties or the occupation of the property so owned by them jointly. His wife, as I have indicated, now claims that his share in the proceeds of the sale effected in the partition suit shall be charged in her favour with an occupation rent in respect of his sole use of the property as from the date of the deed of separation until the date of the order for sale.

The only cases in which one co-owner can recover compensation from another who has had the sole use of the property would seem to be the following:—

(1) When one co-owner has actually excluded the other and wrongfully prevented him from having the use of the common property. In such a case the excluded owner can sue in ejectment and for *mesne profits*: *Goodtitle v. Toms* (3 Wils. 118).

(2) When one co-owner has received more than his share of the rents or other revenues of the common property. In such a case he is liable under the statute of 4 Anne, c. 16, s. 27, to account to his co-owner for the excess so received above his own share. In *Henderson v. Eason* (17 Q.B. 701), however, it was decided that this statutory provision applies only to rents or other revenues actually received by a co-owner from some tenant or other third party, and does

not apply to the profits which a co-owner may make by his own use and occupation of the common property.

(3) When one co-owner occupies and uses the common property under some agreement with the other, whereby the occupying owner becomes the bailiff or agent of the other, so that he must account to him for his share of the profits: *Co. Lit.*, 200 b.

(4) When one co-owner occupies the common property as the tenant of the other's share, and owes rent to him accordingly. In such a case he is answerable to the other, not only during the continuance of the agreed tenancy, but also during any period during which he holds over after the determination or expiry of that tenancy: *Leigh v. Dickeson* (15 Q.B.D. 60).

None of these rules apply to the present case. In particular it has not been suggested that the husband wrongfully excluded his wife from the use and enjoyment of the property, so that proceedings in ejectment would be available, or that there was any agreement between them whereby the husband became the agent or tenant of his wife.

It is contended, however, on behalf of the wife that in a partition suit there exists a special equitable jurisdiction to require an occupying owner to account in all cases for an occupying rent to his co-owner who has been out of possession. I am not satisfied that any such rule exists. Considerations of justice and convenience have led to the recognition of the general principle that one co-owner cannot by failing to exercise his right of use and occupation, establish a claim for compensation against another co-owner for the lawful exercise of his own equal right. These considerations are as cogent in a partition suit as in any other proceeding between co-owners. It is true that there is a certain amount of authority in favour of the exceptional rule suggested as applicable to partition suits. In *Halsbury's Laws of England* (Vol. 21, at p. 851), it is said, speaking of a partition suit: "Where one party has been in exclusive occupation, the Court, if desired, will order that his share will be charged an occupation rent." Similarly, in *Seton on Judgments* (Vol. 2, p. 1809, 7th ed.), it is said: "A defendant may also be charged an occupation rent, but will be allowed all sums properly expended by him in substantial repairs and improvements." So in *Hill v. Hickin* (1897, 2 Ch. 579), Stirling, J., apparent-

ly considered that in a partition suit an occupation rent would be charged against an occupying owner as a matter of course and without proof of any special circumstances such as wrongful exclusion or tenancy. He says: "The defendant not having been tenant or bailiff of his co-owners, nothing could have been recovered from him at law, nor does the statute of Anne (4 Anne, c. 16, s. 27) apply: See *Henderson v. Eason* (17 Q.B. 701). It has, however, long been the practice of the Court of Chancery, and of the Chancery Division to direct such enquiries as have been directed in the present case: See as to occupation rent, *Turner v. Morgan* (8 Ves. 143, 145), and as to expenditure on improvements, *Swan v. Swan* (8 Price 518). The principle on which the allowance for improvements is made is stated by Cotton, L.J., in *Leigh v. Dickeson* (15 Q.B.D. 60). . . The principle laid down by Cotton, L.J., does not apply to occupation rent, and the question does not appear to have been discussed in any case."

I am not satisfied, however, that there is any sufficient authority for the suggested rule that in all cases, and without regard to the principles which ordinarily regulate the rights of one co-owner against another, an occupation rent can be charged in a partition suit which could not be recovered by any other proceedings. There is in fact, direct authority to the contrary. In *Griffies v. Griffies* (8 L.T. 759), which was a partition suit before Kindersley, V.C., a claim for an occupation rent was rejected, the learned Vice-Chancellor saying: "As each party is entitled to enter upon the whole property, there can be no claim by one tenant in common against another for an occupation rent." The cases commonly cited as authorities for the opposite view seem insufficient to support it. *Turner v. Morgan* (8 Ves. 143), was a case in which the co-owner charged with an occupation rent was also a tenant of the property, and was excluding his co-owner, who had taken ejectment proceedings against him. In *Lindley on Partnership* (p. 35, 8th ed.), this case is explained accordingly as one of exclusion. *Pascoe v. Swan* (1 L.T. N.S. 17), another partition suit in which an occupation rent was allowed is similarly to be explained as a case of the ouster of the one tenant by the other. The occupation rent was expressly claimed on the authority of *Goodtitle v. Tombs* (3 Wils. 118), which was a case of ouster, ejectment and *mesne* profits. In his judgment the Master of the Rolls (1 L.T., at p. 17), says:

"I am of opinion that the defendant entered upon the estate of the infant, and therefore he is liable to account, and as he occupied the property himself he must pay an occupation rent." *Story v. Johnson* (2 Y. and C., Ex. 586), in which accounts were ordered on the footing of an occupation rent, is not in point, for it was not a case of one owner being in personal occupation of the common property at all. *Teasdale v. Sanderson* (33 Beav. 534), is merely an authority that if a party to a partition suit claims an allowance in respect of additional value given to the property by the expenditure of his own moneys in repairs and improvements (an allowance to which he is entitled in a partition suit, but which he cannot obtain in any other manner): *Leigh v. Dickeson* (15 Q.B.D. 60), he will be required, as a condition of this equitable relief, to pay an occupation rent for any part of the property of which he has been in personal occupation. It is in this sense that *Teasdale v. Sanderson* is explained by North, J., in *Farrington v. Forrester* (1893, 2 Ch. 461, at p. 478): "He was not to be allowed to have the equitable assistance of the Court to get any part of his expenditure repaid, unless he was willing to be charged with what he could not by the rules of law, as distinguished from equity, be made liable for. It was merely a case of imposing terms."

In this state of the authorities I prefer to follow the express and definite decision in *Griffies v. Griffies* (8 L.T. 758), that there is no general right even in a partition suit to charge an occupying owner with an occupation rent. I think that the obligations of co-owners to account to each other are the same in equity as at law, and are the same in a partition suit as in other proceedings, save only that in a partition suit, if an occupying owner claims an allowance for his expenditure, he can obtain it only if he consents to be charged with an occupation rent.

There will be a declaration accordingly that the plaintiff is not entitled to the occupation rent with which she seeks to charge the defendant.

As to costs, since the interests of both parties in the property are equal, each party will bear his or her own costs of the action, save that the plaintiff will pay to the defendant the costs of the argument of the question to which this judgment relates. For these costs I allow the sum of £5 5s.

Solicitors: for plaintiff: *Dolan and Rogers*, Napier; for defendant: *Kennedy, Lusk and Morling*, Napier.

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