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RECEIVERS FOR COTENANTS.

THE appointment of receivers in partition suits and in other actions between cotenants is an exercise of jurisdiction which is of much importance in view of the landed and moneyed interests often involved. An investigation of the authorities reveals also that there are many elements and considerations of legal consequence developed by the cases in which this power of the courts is discussed.

The power to appoint receivers of the common property at the instance of one of the cotenants has been characterized as an extraordinary one, which the court should not exercise except in the clearest cases: *Low* v. *Holmes*, 14 N. J. Eq. 148. See also *Norway* v. *Rowe*, 19 Ves. 159; *Scurrah* v. *Scurrah*, 14 Jur. 847; *Spratt* v. *Ahearne*, 1 Jones Ir. Exc. 50. Hence we find it laid down that the court will not grant a receiver against a tenant in common in possession, at the suit of another tenant in common, unless in cases of destructive waste or gross exclusion: Kerr on Receivers 106. See also to same effect *Ex parte Billinghurst*, Amb. 164; *Ex parte Radcliffe*, 1 J. & W. 619. So in the case of *Verplank et als.* v. *Caines et ux.*, 1 Johns. Ch. 57, Chancellor KENT says: "The exercise of this power (to appoint a receiver) must depend upon sound discretion, and in a case in which it must appear fit and reasonable that some indifferent person, under approved security, should receive and distribute the issues and profits, for the greater safety of all parties concerned.

Despite these restrictions the power to appoint a receiver in a partition suit has been recognised and enforced in England from an early date. In *Evelyn* v. *Evelyn*, 2 Dickens Ch. Rep. 800, a receiver was appointed to an undivided estate.

So in *Street* v. *Anderton*, 4 Brown's Ch. Rep. 305, the lord chancellor ordered that the cotenant, who, according to the statement of counsel in *Archdeacon* v. *Bowes*, 3 Anst. 752, had taken more than his share of the profits, should give security to account for one-third of the rents, otherwise the order to go for a receiver. So also *Calvert* v. *Adams*, 2 Dick. 478. It has been remarked of the early English cases that there is no indication of the ground of the decisions: Freeman on Cotenancy and Partition, sect. 327. But in *Milbank* v. *Revett*, 2 Merivale 404, it was held that the court refuses to grant a receiver of estates, as between tenants in common, except in gross cases of exclusive possession. See also Brown's Ch. Rep. 35, note. Another instance is afforded by *Holmes* v. *Bell*, 2 Beav. 298, where a receiver was appointed at the instance of a party seeking to foreclose a mortgage against both cotenants, one of whom was in possession of the whole rents.

But there are more recent instances of such appointments. Thus in *Hargrave* v. *Hargrave*, 9 Beav. 549, a receiver was appointed to take possession of a moiety of an estate, claimed by plaintiff as tenant in common with the defendant who was in possession of the whole. The contest was between parties claiming to be heirs; the plaintiff being an infant whose legitimacy was disputed.

So in *Sandford* v. *Ballard*, 33 Beav. 401, a receiver of the whole property was granted at the hearing as between tenants in common, there being evidence that the defendant, one of them, had excluded the rest. The application had previously been denied, except as to plaintiff's moiety, for want of proof of such exclusion. See same case, 30 Beav. 109.

It will be noted that in several of the cases it was regarded as indispensable that there should be an exclusion of the cotenant: *Sandford* v. *Ballard*, *supra*; *Milbank* v. *Revett*, *supra*. Yet it has been laid down that even in such cases there is room for other remedies. Thus it is stated that it was doubtful whether a court of equity would appoint a receiver even in the case of an exclusion of one tenant in common by another. For if it were an exclusion which amounted to an ouster at law, the party complain-

ing was bound to assert at law his legal title. Again, if it were not such an exclusion, a court of equity would compel the tenant in common to account for the rent to his companion, but would not act against his legal right to possession, for the reason that the party complaining might at law relieve himself by the writ of partition: *Tyson* v. *Fairclough*, 2 Sim. & Stu. 143, per Sir JOHN LEACH, M. R. But it is said of these remarks that they do not seem to be borne out by the cases, if indeed they have not been misunderstood. See *Searle* v. *Smales*, 3 W. R. 437; Kerr on Receivers 115.

So the American case of *Low* v. *Holmes*, 17 N. J. Eq. 148, though not attempting to go as far as the case last cited, also holds that there is no ground for the appointment of a receiver, unless the complainant is by the act of his cotenant excluded from the enjoyment of his share of the property.

But in many of the American cases more liberal views of the functions of courts of equitable jurisdiction prevail. Thus in the case of *Rutherford, Receiver, &c.*, v. *Jones*, 14 Ga. 521, which was a bill for partition, the court say: "But equity can do more than seems to be imagined by those who have instituted this proceeding. It can not only direct a sale of some of the lots and a partition of some of the others, in whole lots or in parcels, and decree compensation to equalize the allotments, *but it can appoint a receiver* to rent out this property, the whole or any part of it, and pay over the profits to the cotenants, according to their respective rights and interests. Yea, it may do more than this; it can order any one or more of these twenty-five lots to be held and enjoyed for a certain length of time by one of the cotenants, and then by the other, and so on successively."

This question of the equitable control over such appointments, recently underwent a thorough discussion in the case of *Goodale* v. *The Fifteenth District Court et al.*, decided by the Supreme Court of California, Sept. 22d 1880, and now reported in 56 Cal. 26. In the state in which the controversy arose, the Code of Civil Procedure provides for the appointment of receivers in certain specified instances pertaining to mortgages, partnerships, judgments, insolvent corporations, &c. Finally it is declared that receivers may be appointed in all other cases where receivers have heretofore been appointed by the usages of courts of equity. The contest as to the construction of this last provision arose in this wise: a suit of

partition was brought in the court below, and an interlocutory decree entered therein, and three referees were appointed to make partition of the lands in controversy. Subsequently an order was made appointing a receiver with power to take possession of the lands and lease them in parcels, to collect the rents, issues and profits of the lands pending the action, and therefrom to pay the taxes and such other expenses as the court might direct, as well as to exercise the powers and duties of receiver in like cases. This action of the court below was reviewed on certiorari. The principal opinion notes that from the manner in which the case came before the appellate court, the question involved was one of jurisdiction only, and that court was not called upon to inquire into the correctness of the order of the court below. Indeed in the argument of the petitioners (it was pointed out) this was admitted, and the following language used: "We do not ask the court to inquire into the sufficiency of the proofs upon which the court below founded its action, nor to inquire into any mistakes of law or fact which the court may have possibly fallen into in the course of its consideration of the case before it, but whether it had any right to consider it at all, whether it had any right in a case of this impression to reach that result at all." In other words, is it competent for a court *in any particular suit*, to appoint a receiver to take possession of the property, collect the rents, pay the taxes, lease the property, &c. It very clearly appears that a suit in partition is an equitable proceeding, because it is not competent for a court of law to carry into effect the various and complicated provisions of the statute on the subject.

After reviewing the authorities, the opinion proceeds: "The foregoing cases show that it is competent for a court of equity, in some cases, to grant a receiver in partition suits, and we can readily understand why such a power should be vested in the court. Take, for example, the case of a mine containing precious metals. It is in the possession of one tenant in common and is being worked by him to the exclusion of the other cotenants. He is insolvent and unable to respond in damages. Here we have a case in which the value of the property is being rapidly exhausted by an irresponsible cotenant, and the cotenants out of possession are threatened with an entire destruction of their estate. Would it not be eminently just and proper for the court in which a suit was pending for the partition of such property to wrest it from the possession of the

tenant holding and working it, and to put it into the hands of a receiver? Or suppose the estate consisted of land, the only value of which was in the timber upon it, and the tenant in possession was cutting down and disposing of such timber and appropriating the proceeds to his own use. He is insolvent too and unable to respond in damages. Would it not be within the jurisdiction of a court of equity in which a suit for the partition of such land was pending, to appoint a receiver to take possession of the property and hold it for the joint benefit of all parties in interest? It seems to us that it would. It is sufficient for us to hold that there are cases of this impression in which it is competent for the court to appoint a receiver."

A special concurring opinion in substance adhered to the opinion of the majority, because in some cases of partition a receiver may be appointed, contrary to the contention of the petitioner, and it therefore *did not appear* that the court exceeded its jurisdiction. But it would be otherwise if it had been made manifest, as was claimed to be the fact, that there were several persons owning the entire estate as tenants in common, all acting in good faith, and for the common interest, and a receiver had been appointed to take possession of the land as against them, and authority had been given to such receiver to turn out of possession a tenant in common who had properly preserved his share of the property and had not done or suffered any act inconsistent with the rights of his cotenants. There was also a dissenting opinion to the effect that by the usages of courts of equity, receivers were never appointed in other than equity cases, of which the action of partition, under the local statute, was not one, it being rather a special proceeding. The ground was further taken that it was a fallacy to hold that because courts of equity did appoint receivers in some cases of partition, therefore the jurisdiction of the court to appoint one could not be questioned in this instance; for the statute referred to cases, not to actions, wherein equity usages could be invoked, and no such exceptional case had been shown. These opinions, though based on local regulations, have been presented in detail because they so thoroughly open up the entire field of controversy. The suggestion of the principal opinion, that a receiver would be properly appointed in cases where the cotenant working the mischief is insolvent, is sustained in the case of *Williams et al.* v. *Jenkins*, 11 Ga. 595. There the court says, "The plaintiff herein insists that

a court of equity will not interfere and appoint a receiver at the instance of one tenant in common against another, who is in possession, because the party complaining may relieve himself at law by a writ of partition. This position is evidently taken in conformity with the views advanced in *Tyson* v. *Fairclough*, *supra*. Concede that the complainant in this case might have a writ of partition at law for his share of the property, what adequate remedy has he at law in the meantime for the profits of the mills, while in the possession of the defendants who are *insolvent?* We entertain no doubt that a court of equity has jurisdiction to appoint a receiver at the instance of one tenant in common against his cotenants, who are in possession of undivided valuable property, receiving the whole of the rents and profits, and excluding their companion from the receipt of any portion thereof, when such tenants are insolvent. See to same effect 2 Wait's Prac. 216. So in *Ware* v. *Ware*, 42 Ga. 408, the appointment of a receiver was directed against an insolvent party who had misappropriated funds which should have been so invested as to secure to the complainant an undivided interest in certain lands.

But in regard to the disposal of rents, it is not always made a pre-requisite that the cotenant controlled should be insolvent. When in an action for partition it is shown that a portion of the property cannot be rented, in consequence of the refusal of one of the tenants in common to unite with the others, and that the rents of the remaining portions cannot be collected because of the interference of such cotenants, a receiver may be appointed to preserve the property from loss *pendente lite*: *Pignolet* v. *Bushe*, 28 How. Pr. 9.

Again, the aid of a receiver is sometimes granted in action for the partition of real estate between tenants in common, when it is apparent to the court that the relief is necessary to protect all parties in interest, and in such an action, when the defendants not only deny the plaintiff's title, but have endeavored to entangle the whole title, and not disposed to account for the rents and profits, equity may interfere by a receiver: *Duncan* v. *Campau*, 15 Mich. 414, per CAMPBELL, J.; High on Receivers, sect. 607.

Another instance in which a receiver of the property of cotenants is appointed, is based upon the analogy of partnership cases. When the interest which the parties have in the land is held for the purposes of trade, and their relation to each other resembles that

of partners, a receiver may be appointed, though the facts would not justify that action if the parties were ordinary tenants in common. So when a party was interested in unimproved city lots jointly with another who held the legal title and died, having given his executors a power of sale, it was held that the power was subject to the control of the court for the benefit of such party, and a receiver may be appointed: *Marvin* v. *Drexel's Ex'rs*, 18 P. F. Smith 362.

A colliery or a mine is in the nature of a trade, and where differents persons have interests in it, it is to be regarded as a partnership. Therefore, when there are several shares, as each partner cannot employ a separate manager or set of workmen, the court will appoint a manager or receiver for them all, under the same circumstances which would justify such appointment in the case of a regular copartnership: Freeman on Cotenancy and Partition, sect. 327, citing *Jefferys* v. *Smith*, 1 Jacob & W. 298; *Fereday* v. *Wightwick*, 1 Russ. & M. 46.

Of course the case is still stronger where the purchaser of a mining claim at judicial sale is the applicant and the defendant is the judgment-debtor, who remains in possession working the claim and rapidly exhausting it, and is insolvent. The working of the mines, and the extraction of the gold therefrom, is something more than the common ordinary use of real estate by one in possession, and requires more than the ordinary remedies to protect the rights of the purchaser: *Hill* v. *Taylor*, 22 Cal. 193, 194. See also *Roberts* v. *Eberhardt*, Kay 159, where Lord HATHERLEY explains that the co-ownership or partnership may be in the working or in the land.

As in the case of tenants in common, so in actions between joint tenants, a receiver will be appointed, as a matter of course, when the joint property is in danger through the acts of one or more of the joint tenants: 2 Wait's Pr. 216.

In case some of the tenants in common are infants, a receiver may be appointed, with directions to pay such as are of age their share of the rents; and if one of the infants becomes of age after the appointment of a receiver, he may apply for the payment of his share to himself: *Smith* v. *Syster*, 4 Beav. 227; *Ramsden* v. *Fairthorp*, 1 N. R. 389.

It will be perceived on a consideration of the authorities discussed, that the extraordinary power to appoint a receiver is but

rarely exercised, but is invoked in cases of exclusion from the premises or the rents thereof, of obstruction to the collection of the rents, of attempts to entangle the title, and of practical copartnership in mines which are being worked to exhaustion; and that in all cases of insolvency of the mismanaging tenant aggravates the case and perfects the grounds of the application. But pending a suit for the sale of lands for division among cotenants, equity will not, by appointing a receiver, interfere with the lawful possession of one of the cotenants, who is not shown to dispute the title or to disturb the possession of his cotenants; especially if there is no sufficient averment of insolvency: *Cassetty* v. *Capps*, 3 Tenn. Ch. 524.

But what constitutes exclusion in the sense intended by the cases which require such conduct? The answer will be apparent from a few illustrations. It constitutes an exclusion when the tenant in common receives the whole rents and profits and refuses to pay over to the other the share due to him: *Sandford* v. *Ballard*, 33 Beav. 401. A peculiar instance of exclusion is given in the notes to 4 Bro. C. C. 414, of an anonymous case. where a receiver was appointed on the motion of a younger brother, whom the elder brother and heir declined to treat as a tenant in common upon the ground that he was intoxicated when he made the agreement of compromise which created such cotenancy. But when a tenant in common advertised the estate for sale, and gave notice to the tenants to pay their rents to him alone, an application for a receiver was denied on the ground that the conduct complained of did not amount to an exclusion: *Tyson* v. *Fairclough*, 2 Sim. & Stu. 142.

The rule in regard to an exclusion is equally applicable to a tenancy in common in equitable estates, and if there be no exclusion, a receiver may be appointed of the applicant's share: *Sandford* v. *Ballard*, *supra*. The other grounds for the appointment of receivers for cotenants have been sufficiently explained. It is to be noted, however, that the alternative of giving security may be offered to the offending cotenant. Thus, where personal property is in the exclusive possession of one of the cotenants who refuses to divide or sell it, or to allow his cotenant to participate in its enjoyment, a receiver may be appointed, unless the defendant gives adequate security to reimburse the plaintiff for the deterioration or destruction of the property by use, and compen-

sate him for the value of the beneficial enjoyment of such property: *Low* v. *Holmes*, 17 N. J. Eq. 150. See, also, *Delaware, &c., Railroad Co.* v. *Erie*, 6 C. E. Green 298. So the court may order the tenant in common in possession to give security for the payment of the due proportion of the rents to his cotenants: *Street* v. *Anderton*, 4 Bro. C. C. 414.

As between tenants in common of personal property, the courts are usually averse to appointing a receiver over the joint property upon the application of one cotenant against the other: *Low* v. *Holmes*, 2 C. E. Green 148. And one cotenant cannot, on the ground of a refusal of the other to divide the property, maintain a bill in equity for a receiver and for a sale and division, when it is not shown that the chattels were agreed to be or were used in carrying on any business for the joint benefit of the parties, as partners or otherwise; or that the tenancy in common was of such a nature as to require a sale of the chattels or a termination of the tenancy; and when it does not appear that there is any necessity for the division of the property on account of the death or insolvency of one of the cotenants. And this is true, even though the bill charges the defendant with having the sole and exclusive use of the property, and that he is diminishing its value and refuses to make a division thereof; since the remedy for such grievances, if they amount to a conversion of the property, must be sought by an action at law: High on Receivers, sect. 20; *Blood* v. *Holmes*, 110 Mass. 546. So in the case of joint-owners of the machinery and material of a printing office, upon a bill by one joint-owner or tenant in common against the other for a partition of the property, which is in defendant's possession, the court will, as already noted, refuse a receiver if the defendant in possession will give adequate security for the rents and profits *pendente lite*: *Low* v. *Blood*, 2 C. E. Green 148. In case of the dissolution of a partnership by proceedings in bankruptcy against one member of the firm, the assignees of the bankrupt partner become, as to his interest, tenants in common with the solvent partner. And in such a case, upon an application of a receiver on the ground of exclusion, a court of equity will proceed upon the same principles by which it is governed in all cases where some members of a firm seek to exclude others from that share in the management of the business to which they are entitled: *Wilson* v. *Greenwood*, 1 Swans. 483.

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