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CO-OWNERS' RIGHTS TO OCCUPY TRUST LAND

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FEW lawyers would dissent from the view, voiced by the Law Commission in 1989 in their Report on Trusts of Land,[1] that the trust for sale mechanism, introduced in 1926 to regulate the co-ownership of land, had for long ceased to be appropriate to the conditions of modern home ownership. Every conveyancing practitioner will have experienced the difficulty of explaining to clients about to marry that the matrimonial home which they were so eagerly looking forward to occupying would by law be owned by them as trustees, subject to an immediate binding trust for sale. No doubt in practice discretion played the better part of valour. Soon after qualifying, solicitors learned to abandon any attempt to explore the mysteries of such an apparent absurdity.

Co-ownership of land is very common today, particularly between spouses owning the matrimonial home, or between persons co-habiting in a jointly owned property. House-sharing arrangements are also not uncommon, as where a house is bought by spinster sisters as their home, or a house is conveyed to mother, daughter and son-in-law to live in. Disputes between co-owners have almost invariably involved a proposed sale of the property, which has been opposed by one co-owner, and the courts have been concerned with the now repealed section 30 of the Law of Property Act 1925.[2] Questions as to the nature and extent of co-owners' occupational rights have been raised only indirectly, and never, so far as the author is aware, between co-owners one of whom has acquired his equitable interest after the initial acquisition of the property by the co-owners.

In their Report the Law Commission asserted laconically that it was not clear whether a tenancy in common conferred on beneficiaries as against trustees a right to occupy the land.[3] Their recommendation

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[1] Law Com. No. 181, para. 1.3.

[2] See, for example, *Fuller* v. *Rooney* (1961) 178 E.G. 65 (father and son-in-law); *Lloyds Bank Ltd.* v. *Lake* (1964) 190 E.G. 965 (sisters); *Ali* v. *Hussein* (1974) 321 E.G. 372 (relations by marriage); *Smith* v. *Smith* (1976) 120 Sol.Jo. 100 (sister and brother); *Charlton* v. *Lester* (1976) 238 E.G. 115 (mother, daughter and son-in-law), as well as the well-known case of *Bull* v. *Bull* [1955] 1 Q.B. 234 (son and mother).

[3] Para. 1.3, referring to their Working Paper No. 94, para. 3.22.

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that beneficiaries should have a *right* to occupy trust land has been given statutory effect by sections 12–13 of the Trusts of Land and Appointment of Trustees Act 1996 (hereafter referred to as "the Act"). The Commission took the view that with their proposed new system, beneficiaries under a trust of concurrent interests would be "in a comparatively better position than beneficiaries of current trusts of land" (paragraph 13.6). However, whilst the existence of a statutory right of occupation lays to rest the perceived uncertainty in the law prior to the Act, it is submitted that sections 12 and 13 actually curtail the occupational rights of co-owners compared with their entitlement prior to 1926, and indeed after 1925, had the post-1925 law been correctly understood. Furthermore, there are strong grounds for arguing that these pre-Act rights are still extant, so that co-owners disadvantaged by the Act will be able to ignore its provisions and rely on the superior general law rights. To support these contentions it will be necessary to examine the rights of co-owners, whether joint tenants or tenants in common, not only before the passing of the recent Act, but also before the introduction of the Property legislation in 1926.

I. The Alleged Uncertainty

In his typically forthright manner, Lord Denning confidently asserted in the well known case of *Bull* v. *Bull*[4] that until a sale of the land equitable tenants in common had the same right to enjoy the land as legal tenants in common had prior to 1926—an opinion from which he never resiled,[5] despite the adverse criticism directed against it.[6] Why, then, did the Law Commission still maintain, thirty years later, that the position was unsettled? Could their opinion be justified? It is submitted that it could not. Two principal reasons were advanced to deny tenants in common a right to occupy. Interestingly, the occupational rights of equitable joint tenants seem never to have been questioned,[7] though the alleged justification for denying such rights to equitable tenants in common can hardly not have also applied to equitable joint tenants.

[4] [1955] 1 Q.B. 234, 237. It is frequently overlooked that the two other members of the Court, Hodgson and Parker L.JJ. agreed with him.

[5] See, for example, *Bedson* v. *Bedson* [1965] 2 Q.B. 666, 678A; *Barclay* v. *Barclay* [1970] 2 All E.R. 676, 678h; *Jones* v. *Jones* [1977] 2 All E.R. 231, 235e.

[6] See (1955) 19 Conv. (N.S.) 146; (1955) 18 M.L.R. 303, 408; (1956) 19 M.L.R. 312; [1955] C.L.J. 155. Oddly, the decision attracted no comment in the L.Q.R. at the time. There were also judicial attempts to explain the decision on other grounds; see *Irani Finance Ltd* v. *Singh* [1971] Ch. 59, 80D, *per* Cross L.J; *Jones* v. *Challenger* [1961] 1 Q.B. 176, 183, *per* Devlin L.J. (who, perplexingly, cited *Bull* v. *Bull* as an example of a joint tenancy created for a particular purpose).

[7] Probably the reason for this is that since a joint tenancy is still capable of existing at law, joint tenants could be regarded as being entitled to occupy by virtue of their legal estate. But co-owners could be joint tenants in equity without being joint tenants at law.

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(a) Interests in personalty only

The fundamental changes in the law govering co-ownership of land, introduced in 1926, are well known; there is no need to rehearse in detail the reasons for them. Suffice it to say that for many years the existence of the trust for sale, whether created expressly or implied statutorily, was considered to have radically altered the nature of the occupational rights of beneficial co-owners. The duty to sell imposed on the legal co-owners, the trustees for sale, meant that the interests of the beneficial co-owners were converted into money. Consequently, the equitable interests existing behind the trust for sale were interests in personal property.[8] How could it be said that they had any right to occupy the trust land when, qua beneficial co-owners, they had no interest in the land itself? This strict adherence to the doctrine of conversion was much in vogue in the years following 1925 in a series of cases where the transitional provisions of the Law of Property Act 1925 were applied.[9] A contrary view was expressed by Maugham J. in *Re Warren*[10] that, despite the 1925 Act, the beneficial interests of undivided owners in regard to enjoyment whilst the land was unsold remained unaltered, but this opinion was soon lost sight of.

Eventually, however, the opinion championed by Lord Denning was endorsed at the highest level, culminating with Lord Oliver's robust speech in *City of London Building Society* v. *Flegg,*[11] where he stated that pending a sale of the land the interests of owners in undivided shares retained, by judicial construction, some of the incidents of the legal interest which they displaced. One of these incidents was, or might be "according to the agreement between the beneficiaries or to the purpose for which the trust was originally created,[12] the enjoyment of the property in specie, either alone or concurrently with other beneficiaries". Bearing in mind that *Flegg* was decided in May 1987, some 18 months before the finalisation of the Commission's Report, it is somewhat puzzling as to why no

[8] *Re Landi* [1939] Ch. 828; *Re Price* [1928] Ch. 579, 589, *per* Clauson J., a case concerning a tenant of an undivided ninth share in customary tail special by descent in land formerly of copyhold tenure subject to the custom of gavelkind. What would today's generation of law students make of this complex property holding?

[9] See *Re Price,* above; *Re Kempthorne* [1930] 1 Ch. 268; *Re Newman* [1930] 2 Ch. 409.

[10] [1932] 1 Ch. 42, 47, applied by Denning L.J. in *Bull* v. *Bull.*

[11] [1988] A.C. 54, 78A, 81D. See also *Williams & Glyn's Bank Ltd.* v. *Boland* [1981] A.C. 487, 597C, 510G and 511A, *per* Lords Templeman and Scarman.

[12] This reference to the purpose of the trust introduced a limitation usually of no consequence at common law, and was inconsistent with the unity of possession which existed between all co-owners. See further Section II(a). The one area where the purpose of the trust was relevant to the question of occupation (as distinct from the issue of sale) arose in a testamentary context, where a testator left property to his executors or trustees upon trust for sale and to divide the proceeds between two or more beneficiaries. See, *e.g., Williams* v. *Holland* [1965] 2 All E.R. 157; *Barclay* v. *Barclay* [1970] 2 All E.R. 676 (in which Lord Denning expressly distinguished *Bull* v. *Bull*).

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mention was made in the Report of Lord Oliver's decisive opinion. Had they taken account of it, there would have been much less ground for their uncertainty, justifying a closer look at the pre-1926 common law position.

(b) The Re Bagot's Settlement *argument*

A second reason, favoured by academics, for questioning *Bull* v. *Bull* was its supposed inconsistency with the principle laid down by the Court of Appeal in *Re Bagot's Settlement.*[13] This case held that an equitable life tenant entitled under a marriage settlement to the rents and profits of land vested in trustees on trust for sale had no right to claim to be let into possession, and could only take possession through the exercise of judicial discretion. This decision was regarded as authority for the proposition that beneficiaries under a trust for sale, whether express or statutory, were not entitled to possession as of right, though the trustees should grant it in proper cases.[14]

It is considered that this reliance on *Re Bagot's Settlement* was misplaced. It had no relevance to the totally different situation operating in a co-ownership case. In *Bagot* the beneficiary was a limited owner with no more than a life interest. On the other hand, in an inter vivos trust for sale,[15] unless the legal joint tenants were themselves the only persons beneficially entitled, they would almost invariably be equitable owners, either jointly or in common, *with other beneficiaries.* Suppose A and B were trustees for sale holding for the benefit of themselves and C and D.[16] As equitable co-owners, there existed between them all the unity of possession, whether they were joint tenants or tenants in common in equity. Could it be seriously maintained that A and B were entitled to rely on their legal title as trustees in order to deny C and D a right of occupation, an incident of the equitable co-ownership which they all shared? Pushed to its logical conclusion, the *Bagot* argument amounted to a denial of the very existence of the unity of possession between co-owners.

It is a matter of regret that the Law Commission dealt with the issue of occupation in such a cursory manner.[17] However, if, as the cases show, the rights of beneficial co-owners were essentially no

[13] [1894] 1 Ch. 177. See, similarly, *Re Wythes* [1893] 2 Ch. 369 (equitable life tenant: no trust for sale); *Re Stamford & Warrington (Earl)* [1925] Ch. 162 (legal life tenant).

[14] Crane, (1955) 19 Conv.(N.S.) 146, 147; (1955) 18 M.L.R. 408, 409; (1956) 19 M.L.R. 312; (1966) 82 L.Q.R. 29, 33. It was Professor Crane's criticism of *Bull* v. *Bull* that the Law Commission referred to in their Report, p. 7, n. 43.

[15] Though not necessarily where the trust for sale was created by will.

[16] This was the position in *City of London Building Society* v. *Flegg* [1988] A.C. 54. According to Lord Templeman (at p. 70D) A and B (the spouses) and C and D (the parents) were equitable tenants in common. *Sed quaere.* As between themselves A and B were beneficial joint tenants by virtue of the express declaration to that effect in the conveyance to them.

[17] The issue was dealt with in a single sentence and a three-line footnote (n. 43). See n. 3 above.

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different from those of legal co-owners prior to 1926, it throws into the arena of debate the Commission's claim to have put beneficiaries in a comparatively better position. A closer look at the pre-1926 common law position is now required.

II. Pre-1926 Occupational Rights

(a) Unity of possession

As every land law student soon learns when studying the topic of co-ownership, at common law there existed between joint tenants the four essential unities of possession, interest, title and time,[18] whereas between tenants in common only the unity of possession was necessary. The incidents flowing from this unity of possession were the same, whether the co-owners were joint tenants or tenants in common. Each co-owner was as much entitled to every part of the land as were his co-tenants, and he had the right to occupy it concurrently with them.[19] In the case of tenancies in common, this fundamental right to possession was exercisable by any tenant in common, even by one acquiring his undivided share at a later date. Suppose that before 1926 A and B were legal tenants in common in equal shares. A died, leaving his tenancy in common by will to C, D and E. His devisees individually had the same right to occupy the land as A enjoyed, irrespective of the wishes of B, and even though B possessed a one-half undivided share and C, D and E each possessed merely a one-sixth share. Furthermore, their right to occupy was in no way prejudiced by the fact that A and B had initially purchased the property for their own joint occupation (the so-called purpose of the trust). If B was not happy with this result, his remedy was to seek partition of the land under the various Partition Acts, or a court order for sale under the Partition Act 1868. Similarly, if A desired to sell his undivided share to F, he could do so, but only subject to B's right to remain in possession of the whole of the land.[20] Neither B nor F could object to the other's occupation of the entirety.

[18] The analysis first made by Blackstone, apparently; Bl.Comm. Vol. 2, pp. 180–182; Megarry & Wade, *The Law of Real Property* (5th ed.) p. 419, n. 17. Since there existed two exceptions to the necessity for unity of time, some judges spoke merely of three unities; see, *e.g., Nielson-Jones* v. *Fedden* [1975] Ch. 222, 228B, *per* Walton J. However, since 1926 legal co-owners can only hold as joint tenants; the unities of time and title are, therefore, no longer relevant in the case of legal joint tenancies. Thus, if A and B are legal joint tenants holding as trustees of land, and following A's death B appoints C as a new trustee, B and C will be joint tenants at law, despite the fact that there exists neither unity of time nor title between them. This point seems to be overlooked in the textbooks.

[19] *City of London Building Society* v. *Flegg* [1988] A.C. 54, 77C, *per* Lord Oliver.

[20] *Nullagine Investments Pty. Ltd.* v. *Western Australian Club Inc.* (1993) 177 C.L.R. 635, 644, *per* Brennan J.

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It will be recalled that in certain circumstances equity compelled joint tenants to hold the legal estate on trust for themselves (and maybe others) as tenants in common in equity.[21] The writer has not discovered any pre-1926 case where the occupational rights of equitable co-owners inter se were in dispute. However, it is a familiar maxim that "Equity follows the law". Equitable co-owners, whether joint tenants or tenants in common, enjoyed between themselves unity of possession, and the incidents flowing from it were the same in equity as at law.

(b) Exclusion

This unity of possession resulted in one co-tenant being unable to expel or exclude his co-tenant from the land.[22] So, an action of trespass against a co-tenant was not sustainable unless there had been an ouster. This was certainly the case with tenancies in common.[23] According to Blackstone,[24] one joint tenant could not sue the other in trespass, for each of them had an equal right to enter on any part of the land, but it is questionable whether he was contemplating cases of ouster. In certain Australian jurisdictions the right of an excluded joint tenant to sue for trespass has been recognised.[25]

Similarly, in those trust situations referred to above, the fact that one or more of the equitable co-owners were also trustees at law afforded them no superior right of possession. Equity would not have sanctioned any exclusion from occupation of an equitable co-owner by a fellow co-owner, upon whom equity had imposed a trust.

When ouster occurred, the aggrieved co-owner was entitled to charge an occupation rent; mere non-occupation by one did not impose any liability upon the other to pay rent, even though he occupied the whole of the property.[26] At common law a co-tenant could maintain an action of account against his co-tenant, if he had appointed him his bailiff, and he was answerable not only for rent and profits actually received, but for what he might have received

[21] Megarry & Wade, *op. cit.*, pp. 427–429. And see *Bull* v. *Bull* [1955] 1 Q.B. 234, 237, *per* Denning L.J.

[22] For an interesting application of this principle, see *Meyer* v. *Riddick* (1989) 60 P. & C.R. 50 (non-entitlement of 2 of 3 joint tenants to serve notice terminating tenancy under the Landlord & Tenant Act 1954, s. 41(2)).

[23] *Murray* v. *Hall* (1849) 7 C.B. 441; *Jacobs* v. *Seward* (1872) L.R. 5 H.L. 464, 478, *per* Lord Westbury. For the position where the activity of a tenant in common interfered with the possession of his co-tenants, but not so as to amount to an ouster, see *The Proprietors of the Centre Building Units Plan No. 343* v. *Bourne* [1984] 1 Qd.R. 613.

[24] Bl.Comm., *op. cit.*, p. 183.

[25] *Oates* v. *Oates* (1949) S.A.S.R. 37; *Baxter* v. *Harrigan* [1963] N.S.W.R. 432.

[26] *M'Mahon* v. *Burchell* (1846) 1 Coop.T.Cott. 457; *Jones* v. *Jones* [1977] 2 All E.R. 231, 235, *per* Lord Denning M.R; *Dennis* v. *MacDonald* [1981] 2 All E.R. 632, on appeal [1982] Fam. 63.

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apart from his wilful default.[27] A statute of Queen Anne[28] enabled a joint tenant or tenant in common to recover from his co-tenant if he had received more than his just share or proportion.

(c) Lease by co-owner

Since each co-owner possessed the right to occupy the entirety, the common law saw no need to curtail his right to grant a lease of his share. The consequences differed according to whether the lease was to the other co-tenant, or a stranger.

(i) *Lease to co-tenant.* It has been undoubted law since Lord Coke's time that one joint tenant could let his part to the other.[29] Suppose that A and B were joint tenants, and A granted a lease of the land to B. This transaction operated to create a landlord–tenant relationship between them, with all the usual incidents resulting from it. The lease in B's favour entitled him to exclusive possession of the whole, to the exclusion of A, though A still remained co-tenant with B of the fee simple estate.

The position was exactly the same if A and B were tenants in common. It was held in one case[30] that if B held over after the lease expired, A could treat him as a tenant at sufferance and bring an action for use and occupation. On the other hand B could not sue A to recover the cost of ordinary repairs to the property.

(ii) *Lease to stranger.* What was the position if A granted a lease, not to B, but to a stranger, C? The decision of the Full Court of the Federal Court of Australia in *Catanzariti* v. *Whitehouse*[31] provides an illuminating discussion of this issue. Here, spouses, H and W, were registered as joint tenants of a leasehold house. Subsequently W left. Without W's knowledge, H let it to T for 12 months. T went into occupation. Later W returned to the house and, with T's consent, moved into one of the rooms. Whilst doing so she interfered with his belongings, and he sought damages from her for the loss he sustained. In the course of the court's judgment, certain pronouncements were made as to the respective common law rights of H, W and T. These may be summarised as follows. (1) Each joint tenant of an estate at law was entitled equally to use and occupy the whole

[27] Co.Litt. 172a; *Wheeler* v. *Horne* (1740) Willes 208.

[28] 4 Anne, c. 16, s. 27.

[29] *Cowper* v. *Fletcher* (1865) 6 B. & S. 465, 473, *per* Shee J.; Co.Litt. 186a; *James* v. *Portman* (1593) Owen 102.

[30] *Leigh* v. *Dickeson* (1884) 15 Q.B.D. 60. This is an interesting case. The plaintiffs were trustees for A who was entitled to an undivided 3/4ths of a house in Dover as tenant in common with B. A leased her interest to T for 21 years. T later assigned the lease to the defendant, C, who entered into possession and paid rent. Subsequently C purchased the 1/4th interest in the house from B. After the lease expired C remained in occupation and the trustees successfully claimed rent from him, whereas C's counterclaim for recovery of £80 spent on repairs and improvements was rejected.

[31] (1981) 55 F.L.R. 426; *Baxter* v. *Harrigan* [1963] N.S.W.R. 432.

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estate. (2) If one joint tenant (H in this case) leased (or sub-leased) his share to a third person, T, all that H bound by the lease was his own share. (3) The share of W, his co-tenant, was not bound, so that T was not free to exclude W from occupation. (4) Equally, though W retained her right as joint tenant to use and enjoy the whole estate, she could not prevent T from exercising his right of use and occupation. As a result W was not entitled to damage T's goods and chattels, and she was liable for the resulting damage.

This decision involved a lease granted by a joint tenant. As expected, the position appears to have been the same in the case of tenants in common.[32]

III. Occupational Rights under the New Act

By putting co-owners' occupational rights on a statutory footing, and making detailed provisions for their exercise, the Act of 1996 has radically altered the nature of these rights as they existed at common law. Two basic alterations to the law must be noted at the outset. First, the trust for sale has been replaced by a trust of land, a change which is retrospective and extends to trusts for sale created before the commencement of the Act. Secondly, the doctrine of conversion no longer applies to land formerly subject to a trust for sale. Section 3(1) of the Act provides that such land is now "not to be regarded as personal property". Had these been the only alterations to the law govering concurrent interests, the Act would have constituted no more than a statutory affirmation of the pre-1926 position at common law.

However, the Law Commission's remit was not confined simply to reforming the law of co-ownership. Their concern was to promote a unitary system embracing both concurrent and successive interests in land. The new provisions regulating rights of occupation are of general application. They govern the occupational rights of persons who are beneficiaries under a trust of land, but who are not co-owners. To assess the impact of these provisions on beneficiaries who are co-owners, it will helpful to postulate a hypothetical situation, based on the facts of a decided case.

Suppose that in 1985 two bachelor brothers, A and B, purchased a freehold house to live in with their mother, M. The house was vested in them upon trust for sale and to hold the net proceeds upon

[32] *Moisley* v. *Mahoney* (1950) V.L.R. 318. And see *The Proprietors of the Centre Buildings Units Plan No. 343* v. *Bourne* [1984] 1 Qd.R. 613, 617–618, *per* Derrington J., as to whether the lessee is to be regarded as a tenant in common in respect of his interest. It should be remembered that in the Australian cases noted here and in notes 20, 25 and 31 above, there was no need to consider the possible impact on the co-owners' rights of any trust for sale.

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trust for the two of them as beneficial joint tenants. M died in 1990. Soon afterwards both brothers married and their wives came to live in the house. Then B died in 1995. Prior to his death B severed the equitable joint tenancy, and by will left his entire estate to his widow, who continued living there. After a disagreement between B's widow and A's wife, A, the surviving legal joint tenant, tells B's widow that she must leave the house, but she does not wish to move out. What are her rights?[33] Suppose, alternatively, that B never married. After severing the equitable joint tenancy, he devised his interest in the house to his nephew (the son of another brother). Could the nephew, after B's death, take up residence in the house, along with A and his spouse?

Hitherto cases involving what might be termed co-ownership through inheritance have not often come before the courts.[34] However, the much greater incidence today of divorce and re-marriage, and of cohabitation, may well give rise to increased litigation, since one partner of the relationship will frequently desire to leave his or her share in the co-owned property to his or her offspring by a previous marriage, or to other relatives, rather than to the other partner.

(a) Statutory entitlement to occupy

Section 12(1)[35] of the Act confers a right to occupy on "a beneficiary who is beneficially entitled to an interest in possession in land subject to a trust of land". The creation of an express statutory right was deemed to be advisable because there was thought to be uncertainty as to whether the letting of beneficiaries into occupation would be regarded as a proper exercise of the absolute owner powers conferred on trustees by section 6(1) of the Act.[36] Additionally, in co-ownership cases there was the alleged but, as we have seen, misconceived uncertainty about beneficial occupational rights under a trust for sale. The right is enjoyed qua beneficiary. He is entitled by reason of his interest in the land,[37] *i.e.*, by virtue of his equitable joint tenancy

[33] Readers may detect that these facts are based upon *Greenfield* v. *Greenfield* (1979) 38 P. & C.R. 570, where the issue was principally one of severance. I have added the testamentary gift to the widow, a feature not present in the case itself.

[34] For examples, see *Stott* v. *Ratcliffe* (1982) 126 S.J. 310, and the recent case of *Carr-Glynn* v. *Frearsons* [1997] 4 C.L. 504 (C's aunt instructed defendants, F, to draft will leaving to C aunt's share of co-owned property. Aunt executed will, but died without severing the joint tenancy, so that C received nothing. C's claim against F for breach of duty to a beneficiary was dismissed).

[35] Sections 12 and 13 of the Act, whilst not adopting the wording of the corresponding clause (cl. 7) of the Commission's draft Bill, give substantial effect to it. Neither section attracted any parliamentary debate—a touching example of the legislature's confidence in the Law Commission.

[36] Law Com., *op. cit.*, para. 13.2. But see Whitehouse & Hassall, *The Trusts of Land and Appointment of Trustees Act 1997. A Practical Guide*, para. 2.92 [307], n. 2.

[37] It has been suggested that where there is an express trust for sale, the interest of the beneficiary will usually be an interest in the proceeds and not in the land, so denying him any statutory right to occupy: Kenny, *Current Law Statutes*, 1996, p. 47-15. This must surely be unsound. And see Law Com. Report, *op. cit.*, para. 13.6, n. 152.

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or tenancy in common. To this extent section 12(1) appears to be merely declaratory of the pre-Act law, what may be termed for convenience "the general law position".[38] However, on closer examination this statutory right will be seen to be much less extensive.

Clearly the Act will prevent occupational (as distinct from sale) disputes arising between the original parties to the joint purchase, of the type considered in *Bull* v. *Bull.* But suppose the dispute in that case had been between the son and his sister, to whom the mother had left her equitable interest on death. It is in this type of co-ownership situation, where the beneficiary claiming the right to occupy is a person who succeeds to a beneficial interest by virtue of inheritance,[39] such as the widow or the nephew in the illustration given above, that the provisions of the Act may be difficult to apply.

(b) Purposes of the trust

According to section 12(1) the statutory right is a right—

> to occupy the land at *any* time *if at that time*—(a) the purposes of the trust include making the land available for his occupation (or for the occupation of beneficiaries of a class of which he is a member or of beneficiaries in general) ... (italics added)

The right to occupy is determined by the purposes of the trust. The beneficiary-claimant must establish an occupational purpose for the trust. Under the Act the purposes of the trust must *include* making the land available for occupation. Whether or not this is the case will depend partly on the nature of the land subject to the trust. Thus, commercial property vested in co-owners (usually they would be partners) would not, it is thought, be available for occupation by a beneficiary engaged in a different type of commercial activity. By making the right of occupation dependent on the purpose of the trust, the Act has introduced a qualification that, as we have noticed,[40] did not normally affect the general law right to occupy.

Two questions arise. First, when is this occupational purpose to be ascertained? Secondly, how is it to be ascertained? As to the first, it seems that the purpose is to be established at the time the claimant seeks to exercise the right. The relevant wording of section 12(1) is, "entitled ... to occupy the land at any time if at *that*

[38] By this phrase is meant the occupational rights of co-owners at common law and in equity before 1926. And, as has been argued, the nature of these rights remained unaffected by the Property legislation of 1925.

[39] This was the very situation that arose in *Greenfield* v. *Greenfield,* above, n. 33. The widow claimed to be entitled to occupy as the person entitled on intestacy to her husband's estate. She failed because there had been no severance of the equitable joint tenancy.

[40] See n. 12 above.

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time . . ." This points to the time (*any* time) when the beneficiary actually seeks to enter into occupation. The fact that it might not have been intended to be available for his occupation when the co-ownership was first created is irrelevant. The answer to the second query is not so obvious. Where co-ownership results from an inter vivos transaction, the vast majority of occasions, it is highly unlikely that there will be any express statement of purposes in the conveyance or transfer to the buyers. The purposes will be inferred from the circumstances existing at the time of acquisition, though these may change later.[41] A house will ordinarily be bought for residential purposes, a shop for retail purposes. However, as paragraph (a) makes clear, it is necessary to ask in the case of a house, residence by whom? This may not always be an easy question to answer.

To understand the operation of paragraph (a) in a specific situation, we must now consider the scenario involving B, and his widow and nephew. It may not be possible for B's widow to establish that the house was to be available for her occupation (jointly with others). It would depend on what A and B had in mind when they originally purchased the property. After marriage, however, it would not be difficult to envisage a broadening of the occupational purpose so as to embrace their respective spouses on death.[42] In any event, she would be able to show that she was a member of a class of beneficiary, *i.e.* spouses, whose occupation was one of the trust's purposes.

The nephew would probably be unable to establish any right to occupy under paragraph (a). He would have to show he came within the requisite *class* of beneficiary. The word "class" is not used, it is suggested, in any technical sense. This raises the question—for what class or group of beneficiary was the house bought as a residence? The likely answer would be for A and B, their spouses and immediate family, not remoter relatives who had never been part of the family unit living in the house, so excluding B's nephew. Certainly a complete outsider to whom B left his equitable tenancy in common would not be entitled to occupy. Nor could B's nephew claim that occupation of the house was available for "beneficiaries in general". This category, it would seem, cannot apply to co-ownership situations. The unfettered power of disposal vested in every equitable tenant in common and equitable joint tenant (following an inter vivos severance) makes it impossible to forecast who might in theory

[41] A change of purpose would need the consent of all beneficial co-owners. It would not be open to the trustees to seek to vary the purposes of the trust so as to deprive a beneficiary by succession of the right to occupy.

[42] What if A had remained a bachelor? A change of purpose might be more difficult to establish.

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become a beneficiary by way of succession. Occupation by beneficiaries in general is never likely to be contemplated.

However, paragraph (b) of section 12(1) would appear to assist his nephew. This confers an entitlement to occupy "at any time if at that time ... the land is held by the trustees so as to be so available." Presumably this paragraph is intended to give a right of occupation to a beneficiary who cannot claim under paragraph (a), provided the land is "so available", that is, available for occupation. Property will not be "so available" when it has been acquired as an investment,[43] or for commercial purposes.[44] However, in the situation under consideration this qualification is obviously satisfied, as the house is in fact occupied by other beneficiaries.[45]

(c) Entitlement excluded: unavailability or unsuitability

Section 12(1) of the Act does not confer on a beneficiary any right to occupy land if it is either *unavailable* or *unsuitable* for his occupation: section 12(2). The statutory right of occupation is not, therefore, absolute. It has been suggested[46] that the land will be unavailable if it is tenanted, and that unsuitability may arise either from the nature of the land (what might be termed objective unsuitability) or from the characteristics of the relevant beneficiary (subjective unsuitability). It is not thought that it could be successfully claimed that land is unavailable for occupation because there is another beneficiary (A) already living there, bearing in mind that there is the overriding unity of possession existing between A and his nephew. On the issue of unsuitability, is it open to argument on behalf of existing beneficiary occupants that there exists a lack of compatibility between them and the nephew on the ground of (for example) his addiction to drugs or his criminal record? Is the beneficiary's mental or physical disability relevant in determining suitability?

These are questions that are far from easy to resolve in a co-ownership context. What is clear is that these limitations erode the occupational rights of co-owners under the general law. Inevitably, it becomes necessary to ascertain what has become of the unity of possession existing between co-owners, a question that will be returned to in part (e) below.

[43] See Law Com. Report, para. 13.3.

[44] As in *Re Hyde's Conveyance* (1952) 102 L.J. 58.

[45] The combined effect of paras. (a) and (b) is to deny a statutory right to occupy where under a testamentary trust for sale a testator directs his executors to sell property and to divide the net proceeds between named beneficiaries. The Act thus confirms the decisions reached in *Williams* v. *Holland,* and *Barclay* v. *Barclay*; see n. 12 above.

[46] Whitehouse & Hassall, *op. cit.,* para. 2.93 [308]. As to the effect of a letting by the trustees, see Section III(h), below.

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These issues of availability and suitability are, it seems, to be determined when the beneficiary claims his statutory right to occupy. Once in occupation, the right does not terminate because of subsequent unsuitability. In this event the trustees may be able to take action under section 13.

(d) Trustees' power to exclude or restrict the statutory right

The trustees are given power to regulate the beneficiaries' exercise of the right to occupy. They may reasonably exclude or restrict the entitlement to occupy of any one or more of the beneficiaries, but not all of them: section 13(1), (2). In exercising their discretion they must have regard to certain matters listed in subsection (4).[47] They may also from time to time impose reasonable conditions on any beneficiary in occupation by virtue of section 12, including the payment of outgoings, repairs or expenses: section 13(3), (5). Moreover, where the trustees have exercised their right to exclude or restrict occupation, they are empowered by subsection (6) to impose:

> ... on any other beneficiary[48] ... conditions requiring him to—
> (a) make payments by way of compensation to the beneficiary whose entitlement has been excluded or restricted, or,
> (b) forgo any payment or other benefit to which he would otherwise be entitled under the trust so as to benefit that beneficiary.

The compensation payments referred to in paragraph (a) may, for example, be by way of rent, or an increased share of the income from the land. This important paragraph will require further consideration later in the article.

Section 13 (like section 12) attracted no discussion in its passage through Parliament. It is to be regretted that the Law Commission did not devote more attention to the implications of its own draft clause,[49] especially in its possible operation to co-ownership situations. The section raises far more questions than it seeks to resolve; this can be seen when attempts are made to apply its provisions to the factual scene posed in this article.

One general point can be made at this juncture. Since the Act vests in the trustees a power to exclude or restrict, the exercise of this discretion will work to the detriment of the excluded beneficiary. He has no cause of redress if he is excluded, unless the trustees have

[47] Including (a) the intentions of the trust's creators; (b) the purposes for which the land is held; (c) the circumstances and wishes of each beneficiary entitled to occupy under s. 12.

[48] Despite the words "any other", the beneficiary must, it is assumed, be a beneficiary in occupation.

[49] See Law Com. Report, Appendix A, cl. 7, pp. 50–52. The Explanatory Notes make no attempt to explain the operation of the clause in detail.

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acted unreasonably. Moreover, he has no right to be compensated, only a hope that they will exercise their power to impose terms on a resident beneficiary. If they decline to do so, has the aggrieved beneficiary any remedy, and if so, against whom? This, and other pertinent issues, will be explored shortly.

However, before attempting to apply the Act to the hypothetical case posed above, it is essential to explore a fundamental question that received no attention during the Bill's passage through Parliament.

(e) Effect of the Act on the general law right to occupy

According to the preamble to the Act, it is intended "to make new provision about trusts of land ... and otherwise [amend] the law about trusts for sale of land ...". The Law Commission considered that the effect of their proposals would be to place beneficiaries in a better position than that enjoyed by beneficiaries under the existing law.[50] They perceived the statutory rights of occupation, though circumscribed in various respects, to be superior to the pre-Act rights available under the general law. Consequently, it appears to have been thought that there would be no need in future to have recourse to the old law. This supposed superiority was, as we have noticed,[51] based on the uncertainty surrounding the pre-Act law governing co-owners' occupational rights, due to the existence of the trust for sale and the operation of the doctrine of conversion. It seems to have escaped the notice of the Law Commission that the imposition of a trust of land instead of a trust for sale, coupled with the abolition of the doctrine of conversion for the purposes of co-ownership, would put the law back to the pre-1926 position. It has been shown that before 1926 the occupational rights of co-owners, whether at law or in equity (in those situations where equity imposed a trust—not a trust for sale, be it noted), were in no way limited or restricted in the manner introduced by the Act. It is hard to resist the conclusion that in certain vital respects the statutory rights are but a shadow of the rights enjoyed by co-owners before 1926.

Presumably, it was the intention of Parliament that whatever occupational rights concurrent owners enjoyed before the Act would be replaced by the statutory scheme, so that in future all such rights would be determined solely by reference to it. However, has this objective been achieved? Or, have the rights under the general law

[50] Law Com. Report, para. 13.6, adding in n. 152 that as regards beneficiaries under a trust of concurrent interests, the very nature of their interest would be changed into an interest in the land, not merely in the proceeds of sale.

[51] See Section I, above.

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been preserved? These are fundamental questions demanding an answer.

What section 12 does is to confer a right of occupation in certain situations, subject to various limitations. It does not profess to abolish[52] pre-Act rights of occupation (whatever they were perceived to be). It may, therefore, be fairly surmised that these rights continue to exist, and in so far as they are superior to those available under the Act, an equitable co-owner is entitled to rely on his general law rights.

Furthermore, if the statute is to be interpreted as the sole definitive basis for co-owners' occupational rights, what has become of the unity of possession? This issue was not addressed by the Law Commission. As between co-owners, legal or equitable, there exists unity of possession. No unity of possession, no concurrent ownership. The Act does not, and could not, remove this unity, without re-defining the entire relationship between equitable co-tenants. Unity of possession, as we have observed, entitles each co-owner to every part of the land, and with it the right to occupy it concurrently with the other co-owners. Before 1926 the imposition of a trust, vesting the legal ownership in some (but not all) of the beneficial co-owners,[53] did not affect the rights inter se of any of them in equity. Yet the Act does appear to alter radically the nature of the unity of possession between the equitable co-owners. As has been previously stated, section 12(2) of the Act expressly rules out any statutory right to occupy if either of the conditions operates. Moreover, even where the right exists, a co-owner may be prevented from exercising it, without being guaranteed any right to compensation.

It is, perhaps, too extreme a view to maintain that the Act has destroyed the unity of possession, since this unity entitles each co-tenant to share in the income from the land. But if the land is non-income producing, and the excluded co-tenant has no statutory right to be paid rent by way of compensation, the Act does in fact destroy the unity for all practical purposes. This startling conclusion seems not to have been appreciated by either the Law Commission or Parliament.

In the vast majority of co-ownership cases the trustees, or one of them, will also be beneficial co-tenants in occupation, and so

[52] The draftsman seems to have been disinclined to embark on a policy of positive abolition. See for instance, s. 3(1). Whilst the marginal note is (erroneously) worded "Abolition of doctrine of conversion", this is effected in a negative manner, by enacting that land subject to a trust for sale is not to be regarded as personal property. Contrast the Law of Property (Miscellaneous Provisions) Act 1989, s. 3, which expressly provides for the abolition of the rule in *Bain* v. *Fothergill*.

[53] For example, where A, B and C provided the purchase money in equal shares, but the legal estate was conveyed to A and B alone.

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enjoying the fruits of the unity of possession. It is absurd to maintain that trustees in occupation are exercising a right which they have as legal owners, whereas other non-trustee co-tenants in occupation are there by virtue of their equitable entitlement. Moreover, it is manifestly unjust to confer upon an occupying equitable co-tenant, qua trustee and owner of the legal estate, the right by statute to exclude his equitable co-tenant, when they both enjoy unity of possession attaching to their concurrent equitable interests.[54] This was not something which equity would have tolerated before 1926.

Fortunately, it must be regarded as extremely doubtful whether the Act has been successful in placing the occupational rights of co-owners on an exclusively statutory basis. Whilst this is what was intended, it is submitted that the statute leaves intact these occupational rights under the general law, rights which are essentially superior to the statutory rights. If this is so, an aggrieved co-owner would be free to base a claim to occupation, or to compensation in the event of an ouster, relying on his general law rights without reference to the statute.[55]

The extent to which the Act seeks to cut down a co-owner's rights of occupation can best be shown by a consideration of the respective positions of B's widow and the nephew in the situation posed earlier in this Section. It will be seen that the Act can operate to create significant differences in the position of persons who become beneficial tenants in common through inheritance.

(f) Example 1: single trustee's exclusion of widow or nephew

Let it be assumed that the widow in the one case, and the nephew in the other, are beneficiaries entitled to occupy under section 12, being equitable tenants in common by inheritance. Following B's death, A becomes the surviving trustee. Despite being a single trustee, he enjoys the statutory powers conferred by the Act. Though section 13 refers to "trustees" in the plural, words in the plural include the singular.[56] A can, therefore, relying on the statute, exclude his nephew from occupation, and may well be prevailed upon to do so by his own resident family if they feel that his occupation would be undesirable. In so doing A must not be acting unreasonably.[57]

[54] As in the scenario given in the text, where A holds as trustee for A and B's nephew, who inherits B's tenancy in common.

[55] A not dissimilar situation arose under the Matrimonial Proceedings and Property Act 1970, s. 38, which conferred statutory rights of occupation on a spouse, without interferring with that spouse's right of occupation which he or she enjoyed by virtue of having an equitable interest in the home. See now the Family Law Act 1996, s. 30(9), yet to be brought into force.

[56] Interpretation Act 1978, s. 6(c). See *Re Myhill* [1928] Ch. 100 (statutory references to "trustees" held applicable to a single trustee, applying the Interpretation Act 1889, s. 1(1)(b)).

[57] The views of members of his family, not being beneficiaries with a statutory right to occupy, would not be a proper matter to have regard to under s. 13(4). Would it be reasonable to expect A to share the house with his nephew, if A disliked him? *Cf.* Kenny, *op. cit.*, p. 47–18.

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On the other hand the widow's position is quite different. A has no unfettered power to exclude her. By virtue of section 13(7) the statutory powers cannot be exercised so as to prevent *any person in occupation of land* (whether or not by reason of a section 12 entitlement) from continuing to occupy it. Subsection (7) does not use the words "beneficiary who is in occupation of the land". This change of language is highly significant in this context. The widow was already in occupation prior to B's death, not by reason of any beneficial interest, but because she was B's wife. She is, therefore, protected. A cannot exclude her, unless she consents to go, or the court grants approval.[58]

Since she will remain in occupation by virtue of her beneficial tenancy in common, section 13(5) of the Act enables A, as trustee, to impose on her reasonable conditions requiring her to pay outgoings or expenses in respect of the land. She could be required to make contributions to the mortgage payments, council tax, water rates and other similar outgoings. This is thought to have been the position under the general law since, in the absence of agreement between co-tenants, they would all have to be responsible for outgoings, rateably according to the value of their beneficial interest in the land. Any attempt by A to ask her to pay a disproportionate amount could be resisted. Such a condition would not be reasonable, and her refusal to pay would not entitle A to exclude her.

Repairs were quite a different matter. Pre-1926 there was no obligation, either at law or in equity, on one tenant in common to contribute to the cost of repairs to the property effected by another co-tenant. Despite the apparent unfairness of this rule, the Court of Appeal in *Leigh* v. *Dickeson*[59] was unable to find any basis for imposing any duty to contribute. According to Brett M.R., if the law were otherwise, a part-owner might be compelled to incur expense against his will; a house might be situate in a decaying borough, and it might be thought by one co-owner that it would be better not to repair it.[60] In view of the power conferred by section 13(5), it is not thought that the widow could rely on the old law to resist a reasonable demand to contribute towards the cost of repairs. Perhaps improvements might have to be treated differently. It could well be unreasonable to ask her to pay towards such costs, unless

[58] Having regard to the matters listed in subs. (4)(a) to (c). See n. 47 above. The trustee is also precluded from exercising the powers in a manner likely to result in a person ceasing to occupy: subs. (7)(b).

[59] (1884) 15 Q.B.D. 60. For the facts, see n. 30 above.

[60] At p. 65. See also per Lindley L.J. at p. 69, who observed that tenancy in common was an inconvenient form of tenure, unfit for persons who could not agree; the evils attaching to it could be dealt with only in a suit for partition or sale, when the rights of the various owners could be properly adjusted.

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she could be said to derive some benefit from them, over and above the likely increase in the value of her interest in the land.

To return to the nephew, let it be assumed that A has exercised the power to exclude him. The difficulty here is that A, though a trustee, is also an equitable tenant in common, himself in occupation. His exercise, qua trustee, of the statutory power to exclude another equitable co-tenant from possession would be a denial of the unity of possession existing between him and the other beneficiary, and would be totally inconsistent with the right enjoyed by the nephew under the general law. It would, it is submitted, be open in every case for a beneficiary by inheritance to maintain that the exercise of the power to exclude was unreasonable, and to seek an injunction designed to secure his possession of the property.

What difference will it make if the nephew decides not to resist the exclusion? Can he claim compensation, and if so, from whom? Any compensation payments will have to come from A. However, there is an air of total unreality about the concept of A, as trustee, exercising his statutory power under section 13(6) to impose a condition upon himself, qua "any other beneficiary",[61] to make such payments. In this situation he needs no statutory power to compensate his nephew. But, what if he refuses, or makes an unsatisfactory offer of compensation? There is no provision in the Act enabling a beneficiary to challenge his trustee's decision. Perhaps, none is needed. It is arguable that vis-à-vis the excluded beneficiary, A's refusal to pay compensation would be a breach of trust. Alternatively, A's act of excluding his nephew would, it is conceived, be tantamount to an ouster under the general law. The nephew could, therefore, sue for an occupation rent,[62] assuming, as is maintained, that this right survives the Act.

There appears to be one set of circumstances when it would be highly desirable for the widow to fall back on the general law to obtain adequate financial redress. It is only when the discretion to exclude conferred by section 13(1) has been exercised that the power arises to impose conditions for the payment of compensation. When a beneficiary leaves voluntarily, no compensation is payable, which accords with the general law position. What if A's family make living conditions in the house so intolerable that the widow has to leave for the sake of her health? This would not amount to an exclusion for the purposes of the statute. At common law it would, however, constitute a constructive ouster, resulting in the payment of rent by

[61] For such A would be. See n. 48 above.
[62] See the cases cited in n. 26 above.

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way of compensation.[63] The Act should not be so interpreted as to deprive an aggrieved beneficiary of adequate financial recompense in this situation.

(g) Example 2: exclusion of co-beneficiaries by inheritance

Further difficulties are encountered when seeking to apply the Act to a situation where there are co-beneficiaries by inheritance. Suppose A and B hold property as trustees for themselves and B's mother (M) as beneficial joint tenants. M severs her equitable interest by statutory notice and dies, leaving her one-third share by will, not to A and B, but to C and D (say, adult children of her own deceased sister) as joint tenants. The statute gives A and B, as trustees, the power to allow C to occupy with them, but reasonably to exclude D, thus interfering with the unity existing between C and D as equitable joint tenants.[64] It is far from clear what the rights of C and D are inter se.[65] Moreover, the Act appears to empower A and B to impose conditions on C under section 13(6), designed to provide compensation for D, without themselves making any payment. In certain circumstances this would be most unjust,[66] but it is not clear from the Act what, if any, redress C might have.[67]

Alternatively, what if A and B vacate the property, and they allow C to move in but refuse to permit D to occupy it?[68] As trustees, they can under section 13(6)(a) of the Act require C to make compensation payments to D, though D cannot oblige them to impose such a condition on C. Suppose that C declines to make the required payments to D. He appears to have no claim under the Act against C. He is thus obliged to call upon A and B to take action on his behalf against C. Yet it is uncertain what effective steps they can take against a recalcitrant C.[69] However, it may well

[63] See *Dennis* v. *McDonald* [1981] 2 All E.R. 632 (man forcing mistress to leave co-owned home because of his violent conduct).

[64] If C happened to be living in the house at the time of M's death, the trustees could not under s. 13(7) exclude C, so discriminating against D, who could be excluded. Why should the circumstance of C's occupation create such a difference between the rights of the two equitable joint tenants?

[65] If C consents to D's exclusion, would this amount to an ouster, enabling D to recover compensation from C under the general law?

[66] *E.g.*, where M herself contributed to the original purchase by A and B. If C refused to make the payments, D could not sue C for them; it is unlikely that the court would permit the trustees to enforce the condition against C, if they still declined to contribute themselves. Nor would the court order A and B to make any compensation payments.

[67] The trustees have power to impose reasonable conditions. Vis-à-vis D, the conditions imposed on C may well be reasonable. However, their decision not to subject themselves to the same conditions would constitute an unreasonable imposition of conditions, which is not the same thing. Perhaps C could in such event sue the trustees for a breach of trust.

[68] *E.g.*, because there are reasonable grounds for believing that D's presence in the house would not be conducive to harmonious relations between C and D. The trustees cannot unreasonably exclude D's entitlement to occupy: s. 13(2)(a).

[69] Section 13(6)(a) refers to a condition requiring payments by way of compensation to the excluded beneficiary. This indicates that C has to make his payments direct to D, rather than to A and B for the benefit of C. This provision cannot be interpreted as imposing any statutory

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be that D could short-circuit this procedure. C's own refusal to allow D to occupy would, as previously argued, constitute an ouster, thereby enabling D to claim an occupation rent from C under general principles. Alternatively, he could seek a court order to gain occupation of the property.

(h) Leasing the trust property

In relation to the trust land, the trustees have all the powers of an absolute owner,[70] including full leasing powers. They may purchase land already tenanted for investment purposes, or grant legal leases of trust land when it becomes vacant. In these situations the beneficial co-owners are by section 12(1)(b) and (2) denied any statutory right to occupy. The Act does not interfere with or restrict the right of an equitable co-owner to lease his interest. The lease must necessarily take effect in equity only. As we have seen, such a right existed at common law, and the same power existed in equity, for equity followed the law. The exercise by one equitable co-tenant of his right to lease will not preclude the trustees from dealing with the land by way of sale or lease. The receipt by them of capital money arising on the transaction will operate to overreach the tenant's equitable interest, and he will not be able to enforce his right of occupation against the new purchaser or legal lessee.

The grant of a lease by an equitable co-owner is not likely to happen very often in practice, but the Australian case of *Catanzariti* v. *Whitehouse*[71] furnishes a possible occasion for this to occur. Suppose a house is vested in A and B (perhaps spouses) as legal and equitable joint tenants. They quarrel, and B moves out, leaving A in occupation. Later A grants a lease to T for five years, and T enters into possession. This lease entitles T to occupy the whole, concurrently with B, but excluding A. B, despite being a legal co-owner, has no legal, or even equitable, power to exclude or evict T. Nor yet have A and B any statutory power to exclude T.[72] Any attempt by A, acting alone or with B, to terminate T's lease prematurely would constitute a breach by A of the covenant for quiet enjoyment in the lease.

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duty on C to pay D so as to enable D to sue C if he fails to pay. Nor yet does it appear that the trustees can sue C for non-payment. They can threaten to exercise their power to exclude C, should he maintain his refusal to pay D, but s. 13(7) precludes the exercise of this power unless C consents (which is probably unlikely) or the court gives its approval. The Act is singularly unhelpful in making any provision for the consequences of non-compliance with reasonable conditions imposed by trustees under s. 13(3).

[70] See s. 6(1) of the Act.

[71] (1981) 55 F.L.R. 426, n. 31, above, and the discussion in the text.

[72] Assuming that T ranks as a beneficiary within s. 12(1), he cannot be excluded under s. 13(7) unless the court approves. If he is not held to be a s. 12 beneficiary, then A and B possess no statutory powers to exclude him.

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An interesting question would arise should A die. B would become sole owner at law by survivorship. It might be claimed that B was not bound by T's lease, and so able to evict him, relying on his paramount legal title qua surviving trustee. The success of this argument would appear to depend on the beneficial entitlement after A's death. If the co-ownership continued (because A and B had been beneficial tenants in common and A had devised his interest to a third person), B would be precluded under the general law from excluding a person, T, with whom there existed unity of possession. But what if B became sole owner at law and in equity?[73] The absence of any unity remaining between him and T would, arguably, make it possible for B to terminate the lease, enabling him to re-enter into sole occupation or to sell the land as the sole beneficial owner.

IV. Conclusion

It was 1984 when the Law Commission first directed their attention to the reform of trusts of land.[74] After more than a decade their labours bore fruit when the Trusts of Land and Appointment of Trustees Act 1996 reached the statute book. Despite all the deliberation and consultation, the statute is unlikely to prove to be a resounding success. Several reasons can be advanced for this.

First, the Commission were intent on replacing the existing dual system of trusts for sale and strict settlements with an entirely new single system. The concept of a unified system may be all very well, in theory, but it is being asked to regulate two quite distinct types of beneficial land holding. It has been fairly pointed out[75] that the difficulty with sections 12 and 13 is that they attempt to deal with two very different situations. In the case of the ordinary trust of land by way of succession, the interest in possession is held by beneficiaries with a limited interest, whose rights have to be weighed against those enjoyed by remaindermen and discretionary beneficiaries; moreover, the trustees will often have no beneficial entitlement themselves. With concurrent interests created inter vivos (the majority occasions) the trustees are almost invariably also the

[73] It is uncertain whether the grant of a lease by a joint tenant effects a severance; see Megarry & Wade, *op. cit.*, p. 431. Modern Australian cases have held there is no severance: *Frieze* v. *Unger* (1960) V.R. 230; *Baxter* v. *Harrigan* [1963] N.S.W.R. 432; *Oates* v. *Oates* (1949) S.A.S.R. 37, relying on Cheshire, *Modern Law of Real Property* (5th ed.) (1944), p. 555 (an opinion omitted from the 10th (1967) and later editions). Even if there is an automatic severance, B could still inherit A's interest by will. There are also certain ancient decisions to the effect that the lessee's rights were unaffected by the lessor's death: Megarry & Wade, *loc. cit.*, n. 38. It is extremely doubtful whether these have any relevance to the changed legal situation considered in the text.

[74] Annual Report for 1983–84, Law Com. No. 140, para. 2.41. Their Working Paper was published in October 1985.

[75] Whitehouse & Hassall, *op. cit.*, para. 2.97 [314].

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beneficial owners, and the purpose of the acquisition is usually to provide a home for them. Initially, they will be the only persons beneficially entitled, and occupational disputes between them will be incidental to the wider issue of sale. However, as we have seen, there is no guarantee that they will remain the only beneficial owners. The notion of conferring management powers on co-owners, qua trustees, to control the rights to occupy of other co-owners with *equal* beneficial interests in the land borders on the nonsensical.

Secondly, the Law Commission did not do their homework thoroughly. Their willingness to shelter behind the ambivalent assertion that the existing occupational rights of beneficial tenants in common were uncertain provided a welcome excuse for them to refrain from exploring in any detail what those rights were. Doubtless, they considered that in view of their recommendation to place beneficial rights of occupation on a statutory footing, it did not really matter what the exact position was after 1925. This was, it is suggested, a grave mistake. The argument that the imposition of a trust for sale threw everthing into the melting pot was nothing more than a red herring. It has been shown that the post-1925 occupational rights of beneficial co-owners were in substance no different from those existing at common law, and this had been recognised as the true position by the House of Lords[76] not long before the Commission's Report was published. It did the Commission no credit that it chose to ignore this strong judicial opinion.

Thirdly, it is submitted that the Commission erred in not taking into proper consideration the peculiar incidents of concurrent ownership of land. They claimed that, despite the introduction of a single trust of land, both concurrent and successive interests would remain unchanged.[77] This they signally failed to achieve in the case of concurrent interests. What the Act seeks to do is to impose a regime that is quite hostile to the very nature of co-ownership as it has existed for centuries. If two people, A and B, are co-owners, they enjoy unity of possession. This is the hallmark of their relationship *inter se*. The fact that they happen to be beneficiaries under a trust of land and that the legal estate is vested in others on trust for them is quite immaterial. Parliament has not abolished unity of possession. Indeed, the Act expressly preserves both forms of beneficial co-ownership.[78] Unity of possession, therefore, survives, and with it the incidents attaching to it at common law.

Parliament readily accepted the Commission's proposals for a

[76] See n. 11 above.
[77] Report No. 181, para. 1.7.
[78] See Sch. 2, paras. 3 and 4, which make the appropriate amendments to ss. 34 and 36 of the Law of Property Act 1925, dealing with tenancies in common and joint tenancies respectively.

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statutory basis for the right to occupy. The point has previously been made that sections 12 and 13 passed through the entire legislative process without any comment or discussion. Perhaps these sections will operate successfully for succession trusts of land. What they certainly fail to do is to provide satisfactorily for the occupational rights of co-owners. The statutory rights seriously erode the general law rights to occupy. The Commission's claim to place concurrent interest owners in a comparatively better position is ill-founded. Fortunately, though no doubt unwittingly, the general law rights of co-owners relating to occupation have been preserved. They can be resorted to and enforced in any situation where it is advantageous to do so. In this vital area of occupation, it is submitted that the Act may well turn out to be a dead letter.

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