MIKE RUPTASH AND WILLIAM C. LUMSDEN (*Defendants*) ..... APPELLANTS;

AND

DAVID MICHAEL ZAWICK (*Plaintiff*) ..RESPONDENT;

AND

WILLIAM ZAWICK .....DEFENDANT.

1955
*Nov. 3, 4
1956
*Mar. 2

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Real property—Tenancy in common—Agreement to repair building—Moneys furnished by one tenant and covenant by co-tenant to repay proportionate share—Caveat filed claiming only right of pre-emption given by agreement—Sale of interest by co-tenant before paying share of repair costs—Whether title of purchaser subject to lien or charge for share of repair costs owed by vendor—Land Titles Act, R.S.A. 1942, c. 205, s. 189.

The respondent as to a 213/332 interest and his brother, W.Z., as to a 119/332 interest were the registered owners of a property in Edmonton. They entered into an agreement providing for the managing, renting, improving and repairing of the property; all the costs of the repairs were to be provided by the respondent, and W.Z. covenanted to repay his proportionate share; the agreement also provided for a semi-annual accounting and division of the net rentals. Mutual rights of pre-emption were also provided. The respondent filed a caveat specifying as the interest which he claimed his right of pre-emption. The agreement was later amended to prohibit the sale of the interest of either party without the consent of the other. A caveat was filed by the respondent to protect his interest under the amending agreement but after W.Z. had transferred his interest for good consideration to the appellants and they had received certificates of title. At the time of the transfer W.Z. had not paid his proportionate share of the repairs to the respondent.

The respondent commenced this action after being required by the appellants to take proceedings on the two caveats. The appellants counterclaimed for a declaration that they had acquired a good title and for an accounting. In this Court, there was no question of fraud on the part of the appellants nor of setting aside the transfer to them; but the respondent contended, as was held by the trial judge and the Appellate Division, that the appellants' title was subject to a lien or charge for the proportionate share of the repairs owed by W.Z.

Held: The appeal should be allowed, and it should be declared that the appellants have a good title free from the claims asserted in the caveats and in the agreements.

*PRESENT: Taschereau, Estey, Locke, Cartwright and Fauteux JJ. Estey J. died before the delivery of the judgment.

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The purpose of filing a caveat is to give notice of what is claimed. If an unregistered document gives a party more rights than one in a parcel of land and such party files a caveat claiming one only of such rights, any person proposing to deal with the land is entitled to assume that the claim expressed is the only one made. Even if the caveats were to be regarded as claiming every interest conferred on the respondent by the agreement, on its proper construction, the agreement gave the respondent no interest in or charge on W.Z.'s share in the land other than the first right to purchase, which the respondent no longer seeks to enforce.

Apart from contract the right of a tenant in common who has made repairs to the property of which his co-tenant has taken the benefit is limited to an equitable right to an accounting which can be asserted only in a suit for partition; he does not acquire a lien or charge on the property itself. Even if the respondent had acquired an equitable charge on W.Z.'s interest, s. 189 of the *Land Titles Act* provides in plain words that as purchasers from a registered owner the appellants (fraud having been negatived) would take free from such a charge unless registered, even if they had notice of it.

The fact that the agreement was expressed to be binding upon the assigns of the parties does not assist the respondent, since the covenant to pay for repairs, being positive, would not run with the land and there is no question of novation.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), affirming, with a variation, the judgment at trial continuing a caveat on the appellants' title to an interest in land.

W. G. Morrow, Q.C. for the appellants.

L. D. Hyndman, Q.C. for the respondent.

The judgment of the Court was delivered by:—

CARTWRIGHT J.:—On and prior to June 23, 1951 the respondent was the registered owner of an undivided 213/332 interest in a parcel of land in Edmonton known as the Craig Nair block and his brother William Zawick was the registered owner of the remaining 119/332 interest therein. The building on this land was in a run down condition and the income therefrom was not sufficient to pay the carrying charges. Apparently the respondent had the necessary financial resources to undertake the renovation of the building and William Zawick had not. Following some negotiations they entered into an agreement under seal dated and executed on June 23, 1951, made between

(1) [1955] 15 W.W.R. 518; 4 D.L.R. 195.

the respondent of the first part and William Zawick of the second part, the recitals and terms of which are as follows:—

WHEREAS the parties hereto are now the owners of the Craig Nair Block situate on part of Lot "H" River Lot 10, Plan "A", Edmonton, the said First Party owning an undivided 213/332nds thereof and the Second Party owns the remaining 119/332nds thereof.

AND WHEREAS the First Party also owns the business and assets formerly carried on by Georgia Cafe Limited in the said building;

AND WHEREAS there is pending in the Supreme Court of Alberta an action between the parties hereto and others and the parties hereto have agreed to settle such action;

NOW THEREFOR IN CONSIDERATION OF the mutual covenants and agreements hereinafter set forth the parties hereto mutually covenant and agree each with the other as follows:—

1. Each of the parties hereto agree that the agreement of sale dated 24th August 1948 made by the Second Party as Vendor to the First Party as Purchaser in respect of the Second Parties estate and interest in the said Craig Nair Block premises be and the same is hereby cancelled and determined.

2. It is agreed that as from the date hereof the Party of the First Part shall be the Manager of the said Craig Nair Block premises and shall have full authority and discretion to repair and fix up the said building and to rent the same and/or all parts thereof upon such terms and conditions as the First Party may deem fit; and to collect all rents therefrom and out of the moneys collected pay all taxes, fire insurance premiums and costs of repairs and upkeep thereof, and the Party of the Second Part agrees not to interfere with the Party of the First Part's management thereof so long as such management is efficient.

3. The Party of the First Part will at least twice in each year prepare in writing statements showing all receipts and disbursements which the Party of the First Part may receive or pay out, and deliver a copy thereof to the Party of the Second Part.

4. The Party of the First Part will at least twice in each year divide any net profits from the renting of the said Block, paying 119/332nds thereof to the Party of the Second Part and the remaining 213/332nds thereof to himself the Party of the First Part.

5. The Party of the First Part agrees to open a separate Bank Account in the Bank of Toronto, Edmonton, and deposit therein all rents and other receipts from the said Block and pay all expenses in connection therewith by cheques drawn against said Bank Account.

6. The Party of the Second Part agrees to vacate and deliver up possession of all parts of the said Block now in his possession to the Party of the First Part.

7. The Party of the First Part hereby releases all claims which he may now have or be entitled to against the Party of the Second Part in respect of any and all rents in respect of the said Block up to the date hereof.

8. Each of the parties agree to the said action now pending in the Supreme Court of Alberta, Action No. 40979, be discontinued, including Counterclaim, and that each of the parties hereto pay their own respective costs of their respective solicitors.

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9. The Party of the Second Part agrees to pay and contribute to the Party of the First Part 119/332nd share of all costs of repairing the said Block.

10. It is agreed that the term of this agreement shall be for a term of five years ending on the 31st day of August, 1956 or until the parties hereto mutually agree to the determination thereof prior thereto provided that should either party make a bona fide sale of his interest in said property the party selling may cancel this agreement on thirty (30) days' notice to the other party.

11. If either party desires to sell his interest in said property he shall first offer it for one month to the other party at the price and on the terms he is willing to accept and if the other does not accept such offer within said period the party offering may proceed to sell to any other person, but no sale may be made to any other person at a price or on terms more favourable, without first again offering it to the other at such better price and terms.

12. The terms, covenants and provisions of this agreement shall enure to the benefit of and be binding upon each of the parties hereto and their respective heirs, executors, administrators and assigns.

At the date of this agreement William Zawick was occupying some of the rooms in the Craig Nair Block and he continued to do so for a few months thereafter. The respondent arranged with a contractor to undertake the renovation and repair of the building; the work was done during the period from February 1952 to May 1952 at a cost somewhat in excess of $20,000. According to the respondent's evidence the value of the property before the doing of this work was between $25,000 and $30,000 and after it was done was in the neighbourhood of $50,000.

On November 19, 1951 the respondent filed a caveat giving notice that he claimed an estate or interest in the Craig Nair Block, which was duly described by metes and bounds, and specifying that the estate or interest claimed consisted of the first right to purchase the 119/332 share and interest of William Zawick in the premises described in the event of the said William Zawick desiring or deciding to sell his said share or interest therein, "which said right has been granted by the said William Zawick to David Michael Zawick under an agreement in writing dated the 23rd day of June A.D. 1951, and which said agreement inter alia grants and provides:—" Immediately following the words just quoted the wording of paragraph 11 of the agreement is set out in full in the caveat. Apart from the use of the words "inter alia" the caveat makes no reference to any of the other terms of the agreement of June 23, 1951.

On December 13, 1951, the respondent and William Zawick entered into a further agreement under seal reciting the agreement of June 23, 1951 and providing:—

1. Clause 10 of the agreement between the parties hereto dated June 23rd, 1951 is hereby cancelled and the following clause substituted in its place.

10. It is agreed that the terms of this agreement shall be for a term of twelve years from the 23rd day of June A.D. 1951.

Clause 11 of the said agreement dated June 23rd, 1951 is cancelled and the following substituted in its place—

11. Neither party is to sell his interest in the said property without the consent of the other party.

In all other respects the parties hereto ratify and confirm the said agreement dated the 23rd day of June, A.D. 1951.

By transfer dated January 28, 1953, executed on behalf of William Zawick by his attorney Nicholas Hrehorick, William Zawick transferred his 119/332 interest as to $\frac{2}{3}$ thereof to the appellant Ruptash and as to $\frac{1}{3}$ thereof to the appellant Lumsden. This transfer was apparently executed on the date which it bears as the attached affidavits are sworn on that date. In the affidavits of the transferor and of the transferee it is stated that the true consideration passing between the parties is $19,000 which is fairly apportioned between land and improvements as follows: Land $1,239.65, Improvements $17,760.35. It appears that of the $19,000, $4,637 was paid in cash and the balance of $14,363 by the transfer to William Zawick of a third mortgage held by the appellants on other property.

Before the completion of this purchase the solicitor who was then acting for William Zawick sent four letters to the respondent, dated November 2, 1951, August 5, 1952, September 17, 1952 and September 29, 1952; the last of these read:—

Further to my letter of September 17, 1952, I have been instructed to inform you that William Zawick will be selling his shares in the Craig-Nair Block only for $19,000. If you wish to carry out your option you must notify me within 30 days, otherwise the share will be sold. To date you have ignored my correspondence.

The respondent denied having received any of these letters; the learned trial judge found as a fact that he had received them all, but was of opinion that they failed to comply with the terms as to notice contained in the agreement of June 23, 1951 and were consequently ineffective.

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On May 1, 1953, the transfer from William Zawick to the appellants was registered in the Land Titles Office and on the same day a Certificate of Title was issued certifying that as to an undivided 238/996 interest the appellant Mike Ruptash and as to an undivided 119/996 interest the appellant William C. Lumsden were the owners of an estate in fee simple in the Craig Nair Block, subject to the caveat filed on November 19, 1951, and to an earlier caveat and a lease, as to which two last mentioned instruments no question arises in this appeal.

On May 27, 1953, the respondent filed a further caveat claiming:—

> an estate or interest in the 119/332 thereof formerly registered in the name of William Zawick by virtue of an Agreement in writing made between myself of the one part and William Zawick of the other part, and dated the 23rd day of June, A.D. 1951, as varied and amended by a further agreement in writing dated the 13th day of December, 1951, made between myself and the said William Zawick under which we mutually covenanted and agreed each with the other that neither of us would sell our respective estates or interests in the hereinafter described property without the consent of the other and under such Agreement and amending Agreement I was appointed Manager of the said premises with full power and authority to fix up and repair the building situate thereon and to collect rents and pay liabilities, all as set forth in such agreement as amended and that the terms of such appointment and the other provisions of such agreement should continue and be in force for a term of twelve (12) years from the 23rd day of June, 1951, and whereby the said William Zawick further agreed to pay and contribute to me 119/332 share of all costs of repairing such block.

On August 11, 1953, the appellants served on the respondent notices, pursuant to section 137 of the Land Titles Act, requiring him to take proceedings on both caveats. This action followed; and was tried before Primrose J. without a jury.

It is not necessary to review the pleadings, which were amended at the opening of the trial and again after all the evidence had been heard, as the issues presented to us are considerably narrower than those raised at the trial.

The learned trial judge expressly negatived the charges of fraud made against the appellants although he found that they deliberately refrained from making any inquiry into the state of the accounts between the respondent and William Zawick as to the operation of the block. He found that the appellants knew of the existence of the agreement of June 23, 1951 and the amending agreement of Decem-

ber 13, 1951, to the extent at least of knowing that the respondent was entitled to notice before William Zawick could sell his interest, "although they did not make any specific inquiry or have the terms of the agreements fully explained to them by their solicitor"; and that the appellants intended the four letters referred to above to operate as compliance with the agreement of June 23, 1951 as to notice.

The learned trial judge held that the appellants could not be heard to say that paragraphs 10 and 11 of the agreement of June 23, 1951 were not effective at the date they obtained registered title since they were not willing to accept as effective the paragraphs substituted therefor by the amending agreement of December 13, 1951; that the agreement of June 23, 1951 in its original form must be regarded as binding in toto; that the respondent had a lien on the interest of William Zawick for the latter's proportionate share of the amount, expended by the former in repairs; that this lien bound the interests acquired by the appellants; that both the caveats should be maintained; that, subject to the caveats and subject to the agreement dated June 23, 1951 and all the rights of the respondent thereunder and the provisions therein contained, the title of the appellants to the undivided 119/332 interest was a good and valid title; that the respondent had the right to purchase the title acquired by the appellants from William Zawick at the same price and on the same terms as they had acquired it from William Zawick; that the respondent was entitled to contribution from the appellants of an amount equivalent to 119/332 of the expenditures made by him on the block, such amount to be determined on an accounting by the Clerk of the Court; that all other questions of accounting between the parties should also be referred to the Clerk of the Court; and that the respondent should recover his costs of the action from the appellants. Judgment was entered accordingly.

The appellants appealed to the Appellate Division; and the respondent served a notice of intention to apply to vary the judgment of Primrose J. to provide that the appellants did not acquire a valid title from William Zawick and that the former title of William Zawick should be restored subject to the respondent's rights.

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The Appellate Division (1) varied the judgment of Primrose J. by striking out the declaration that the respondent was entitled to purchase the interest of the appellants in the block, and by depriving the respondent of the costs of the trial because of his having made charges of fraud which he failed to substantiate and because it was only after all the evidence had been heard that he amended the Statement of Claim to ask that it be declared that he had a lien on the appellants' interest, and subject to such variations dismissed the appeal with costs.

From this judgment the appellants appeal to this Court. The respondent did not serve any notice of cross-appeal or of intention to apply to vary the judgment of the Appellate Division but states his position in his factum as follows:—

> Therefore, Respondent's position now is that the judgment of the Trial Judge as amended by the decision of the Appellate Division should be affirmed subject to the restoration to the Respondent of his costs of the trial.

In the result, William Zawick is not made a respondent in this Court; and there is now no question of setting aside the transfer of his interest to the appellants. The question to be determined is whether the title of the appellants is subject to a lien or charge in favour of the respondent for 119/332 of the amount expended by the latter in repairing the buildings.

It is clear that the concurrent findings of fact absolving the appellants from fraud cannot be questioned successfully; and, that being so, the relevant facts are substantially undisputed. The appellants have purchased the 119/332 interest in the block of which William Zawick was the registered owner; accepting as accurate the valuation made by the respondent of the property after the completion of the repairs and improvements, the appellants have paid William Zawick the full value of his proportional interest in the improved property (subject only to the suggestion as to which no finding was made, that the mortgage which they assigned in part payment was not worth its face value); their transfer has been registered and they have received a certificate of title expressed to be subject only to the caveat dated November 19, 1951, referred to above.

(1) [1955] 15 W.W.R. 518; 4 D.L.R. 195.

In these circumstances the appellants rely on the terms of s. 189 of *The Land Titles Act,* which reads as follows:—

189. Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer, mortgage, incumbrance or lease from the owner of any land in whose name a certificate of title has been granted shall be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof, nor shall he be affected by notice direct, implied or constructive, of any trust or unregistered interest in the land, any rule of law or equity to the contrary notwithstanding; and the knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

Fraud having been negatived it is argued for the appellants that they have obtained an indefeasible title to the 119/332 interest in the block free of any unregistered interest of the respondent; that the lien which has been declared by the learned trial judge was not registered when they obtained title; that they had in fact no notice of its existence (if as between the respondent and William Zawick it did exist); and, that if they had had notice direct, implied or constructive, it would have been irrelevant in view of the express terms of s. 189.

To this two answers are made. First, it is said that the caveat of November 19, 1951 sufficiently protected the respondent's alleged lien and, secondly, that, quite apart from the effect of the caveat the provisions of *The Land Titles Act,* and particularly s. 189, have no application to the equities of tenants in common or to their consequent rights to liens. These will be considered in the order in which they are stated.

Section 132 of the *Land Titles Act* provides that every caveat filed shall state, amongst other matters, "the nature of the interest claimed". The words, in which the nature of the interest claimed is stated in the caveat with which we are concerned, have already been quoted and limit the claim to "the first right to purchase the interest of William Zawick". No doubt the caveat protected that right but the respondent no longer seeks to enforce it. While such right was declared by the judgment at the trial it has been disallowed by the order of the Appellate Division and the respondent has not appealed from that order except as to the disposition of costs. It was suggested in argument that as the caveat made reference to the agreement of June 23,

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1951, and stated that it granted the right claimed *"inter alia"*, it had the effect of a caveat claiming every right conferred upon the respondent by such agreement. I am unable to accept this view. The purpose of filing a caveat is to give notice of what is claimed by the caveator against the land described. If an unregistered document in fact gives a party thereto more rights than one in a parcel of land and such party sees fit to file a caveat claiming one only of such rights it appears to me that any person proposing to deal with the land is entitled to assume that the claim expressed is the only one made. *Expressio unius est exclusio alterius.* With the greatest respect for the contrary view expressed by the learned trial judge and the Appellate Division it is my opinion that the filing of the caveat was effective to protect only the respondent's first right to purchase the interest of William Zawick. If, contrary to the view which I have just expressed, the appellants were to be treated as having purchased subject to a caveat claiming every estate or interest in William Zawick's undivided share of the land conferred on the respondent by the agreement of June 23, 1951, I would be of opinion that on its proper construction such agreement gave the respondent no interest in or charge on William Zawick's share in the land, other than the first right to purchase.

For the purpose of construing it, I will assume, as was found by the courts below, that the agreement of June 23, 1951 in its original form remained binding notwithstanding the cancellation of paragraphs 10 and 11 thereof by the amending agreement. It is, I think, too clear for argument that the appellants were unaffected by the terms of the amending agreement of which no notice appeared on the registered title.

The only paragraphs affecting the question whether on its proper construction the agreement conferred upon the respondent any lien or charge on, or other interest in, the share in the land owned in fee simple by William Zawick appear to me to be the following:—

Paragraph 2: The respondent is appointed manager of the premises with full authority (i) to "repair and fix up" the building, (ii) to rent the same, (iii) to collect all rents, (iv) out of the moneys collected, i.e., the rents, to pay all

taxes, fire insurance premiums and costs of repairs and upkeep; but the continuance of this arrangement is to be so long only as such management is efficient.

Paragraphs 3 and 4: There is to be a semi-annual accounting and division of net profits. This appears inconsistent with the view that the respondent was to be entitled to retain all the rents until he had recouped himself for his capital expenditure of over $20,000.

Paragraph 6: William Zawick agrees to vacate possession of all parts of the said building "now in his possession".

Paragraph 9: William Zawick agrees to pay to the respondent 119/332 of all costs of repairing the block.

Paragraph 10: The term of the agreement is to be five years; but it is of significance that either party may terminate it on 30 days notice in the event of making a bona fide sale of his interest.

Paragraph 11: Mutual rights of pre-emption are provided.

It will be observed; (i) that no charge or mortgage on William Zawick's share is given in express terms, nor is his share of the future rents assigned as security for payment of the sum which, in paragraph 9, he covenants to pay; nothing would have been simpler than to insert either or both of such provisions had they been intended by the parties; (ii) that the obligation undertaken by William Zawick under paragraph 9 is to pay 119/332 of all costs of repairing and, as no time is stated in which such payment is to be made, the respondent could have brought action for the amount payable as soon as the repairs were completed; (iii) that the rights of termination of the contract contained in paragraphs 2 and 10 are inconsistent with the view that the respondent was to have a continuing charge on the rents.

With respect, I am unable to accept the view of the effect of paragraph 6 which was taken in the Appellate Division. As to this, Clinton Ford J.A., with whom Porter J.A. agreed, says:—

> The defendant, William Zawick, granted to his co-tenant, the plaintiff, sole possession of the property held in common, thereby relinquishing to him his equal right of possession to the property; and also gave him the right as sole occupant and landlord to rent it and collect the rents, carrying with it the sole right to distrain for rents in arrear. He also gave to his co-tenant the right to repair and improve the property, and charge such

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expenditures to the rents. I think that this created not only the legal right to sole possession, but also an equitable interest in the land, both properly protected by the caveat.

The learned Chief Justice of Alberta took the view that paragraphs 2 and 6 of the agreement constituted a lease of William Zawick's interest.

Read in the context of the whole agreement, paragraph 6 appears to me to provide no more than that William Zawick was to relinquish to the respondent possession of those parts of the building of which he was in actual physical possession so that the contemplated repairs could be carried out. The provisions for termination of the respondent's powers and for periodical accounting and division of the proceeds of the property are, I think, inconsistent with the view that William Zawick was transferring his rights as a tenant in common or leasing his interest.

For the above reasons I conclude that on its proper construction the agreement did not by its terms grant any estate or interest to the respondent in the undivided share in the land owned by William Zawick or give him any charge thereon or any assignment of the future rents. It gave him rather a terminable right to manage the property and collect the rents on behalf of William Zawick as well as on his own behalf and the personal covenant of William Zawick to pay his proportionate share of the cost of the repairs.

This leaves for consideration the respondent's contention secondly mentioned above. This may be briefly stated as follows. Firstly, even if it should be held that the agreement of June 23, 1951, in so far as it relates to the repairing of the building, did not in terms give the respondent any charge on the undivided share owned by William Zawick but only his personal covenant to pay his proportion of the cost, it is clear that the repairs were made and paid for by the respondent with the consent and approval of William Zawick who accepted the benefit of the resulting increase in value of the property, and, in such circumstances, by operation of law an equitable lien on the undivided share owned by William Zawick was conferred upon the respondent until his claim for payment of the proportion of the cost of repairs chargeable to William Zawick was satisfied; and, secondly, even if it should be

held that the caveat of November 19, 1951, was ineffective to protect or give notice of such lien, the title of the appellants is nonetheless subject to it as s. 189 of the *Land Titles Act* has no application to the equities of tenants in common or to their consequent rights to liens.

The first branch of this argument appears to have been accepted by Clinton Ford J.A. but not the second. The learned Justice of Appeal says in part:—

> I do not think that the lack of a restrictive covenant running with the land could be said to over-ride what I have just concluded to be the rights of co-tenants to contract with respect to improvements and repairs to the premises held in common so as to bind themselves and their assignees who had actual knowledge of the agreement under a caveat filed pursuant to Section 131 of the Act.
>
> In this connection I quote from Corpus Juris Secundum, Vol. 86, at p. 460:—
>
> > Recording laws have no application to the equities of tenants in common or to their consequent rights to liens. Where one co-tenant agreed to pay his proportionate share of necessary expenditures, but sold his interest without making payment thereof, his co-tenant has a lien on the interest conveyed for the amount due him.
>
> I think that the last part of this statement is true in this jurisdiction only where the purchaser had, as here, notice in accordance with the provisions of The Land Titles Act.

Immediately after the passage from Corpus Juris Secundum quoted by Clinton Ford J.A. this sentence follows:—

> While a proportionate share of necessary expenditures could have been impressed as a lien on the noncontributing cotenant's interest in the realty prior to conveyance of such interest to a bona fide purchaser for value without notice, on failure to do so, the cotenant making the expenditure is merely a creditor of the noncontributing cotenant as against a purchaser of the latter's interest.

and earlier on the same page there is the following statement:—

> A claim for contribution does not of itself constitute a lien on the premises but only a right to have a lien decreed on a cotenant's interest for the protection of the claim against such cotenant.

In Halsbury's Laws of England, 2nd Ed. Vol. 20, p. 573 under the title "Lien" the learned author says:—

> Thus a tenant in common has been held to have no lien against the share of his co-tenant for payments made for the benefit of the estate.

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I have examined all the cases cited as authority for this statement and they appear to me to support it. The contrary view which was expressed by Lord Hardwicke in *Doddington* v. *Hallet* (1), has been over-ruled by the cases collected in Halsbury at the page mentioned above.

In view of the wording of the passage from Corpus Juris Secundum quoted by Clinton Ford J.A. it may be observed that the following passage from the judgment of the Vice-Chancellor in *Green* v. *Briggs* (2), indicates that a different view of the law was adopted in America:—

> The case of *Doddington* v. *Hallet* was referred to in argument by the plaintiff's counsel, but only (as I understand) for the purpose of excluding the suggestion that the plaintiff relied upon it, or upon the doctrine it contains, for supporting his claim in this suit. I collect from Story on Partnership that upon principles of public policy and convenience, America has adopted *Doddington* v. *Hallett*. But, however that may be, it is certain that Lord Eldon, in *Ex parte Harrison* and in *Ex parte Young* deliberately overruled it.

In the case at bar the respondent had a contractual right to recover from William Zawick the latter's proportionate share of the moneys expended by the former on repairs. I have already stated my reasons for concluding that on its proper construction the contract did not create a lien or charge. The nature of the rights of the respondent apart from contract is, I think, accurately stated in the following passage from the judgment of Cotton L.J. in *Leigh* v. *Dickeson* (3):

> Therefore, no remedy exists for money expended in repairs by one tenant in common, so long as the property is enjoyed in common; but in a suit for a partition it is usual to have an inquiry as to those expenses of which nothing could be recovered so long as the parties enjoyed their property in common; when it is desired to put an end to that state of things, it is then necessary to consider what has been expended in improvements or repairs; the property held in common has been increased in value by the improvements and repairs; and whether the property is divided or sold by the decree of the Court, one party cannot take the increase in value, without making an allowance for what has been expended in order to obtain that increased value; in fact, the execution of the repairs and improvements is adopted and sanctioned by accepting the increased value. There is, therefore, a mode by which money expended by one tenant in common for repairs can be recovered, but the procedure is confined to suits for partition. Tenancy in common is an inconvenient kind of tenure; but if tenants in common disagree, there is always a remedy by a suit for a partition, and in this case it is the only remedy.

(1) (1750) 1 Ves. Sen. 497. (2) (1848) 6 Hare 395 at 401.
(3) (1884) 15 Q.B.D. 60 at 67.

In my opinion, apart from contract the right of a tenant in common who has made repairs to the property of which his co-tenant has taken the benefit is limited to an equitable right to an accounting which can be asserted only in a suit for partition; he does not acquire a lien or charge on the property itself. This view is I think supported not only by the English cases referred to in Halsbury but also by at least some of the American decisions referred to in Corpus Juris. For example, in *Deitsch* v. *Long* (1), one of the questions which arose was whether the purchaser in good faith of the share of one of several tenants in common took such share subject to a claim for contribution to the cost of repairs made prior to the transfer and which could have been enforced against the transferor by his co-tenants. In holding that the purchaser did not take subject to such claim it was said, *per curiam,* at page 917:—

> The persons seeking to impress their claims on the real estate conveyed were not at any time owners of any interest in the real estate conveyed but had only equitable rights for an accounting against the grantor, which, if they had pursued their remedies prior to the transfer, by proper proceedings in equity, could have had impressed as liens on the real estate conveyed. Hence they were creditors.

The second branch of this argument was not accepted by Clinton Ford J.A., as appears from the last sentence in the passage from his reasons last quoted above; he was however of opinion that the interest claimed by the respondent was sufficiently protected by the caveat filed.

I have already indicated my reasons for holding that the caveat noted on the register when the appellants obtained title did not give notice of the claim for the proportionate share of the cost of repairs. It follows that the appellants are in the position of purchasers in good faith and for value who have obtained the legal title to the land formerly owned by William Zawick without notice of an equitable right claimed against him. While in my opinion that right was a personal one only and did not amount to a charge on the land, the appellants having acquired the legal estate would (fraud having been negatived) hold it free of an equitable charge of which they had no notice; this would be so apart from the provisions of the *Land Titles Act;* and s. 189 of that Act appears to me to provide in plain terms

(1) (1942) 43 N.E. (2nd) 903.

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that as purchasers from a registered owner who have received a certificate of title they take free from such a charge, even if they had notice of its existence, unless it is registered. To hold that a purchaser from the registered owner of an undivided fractional share in a parcel of land is put upon inquiry as to the state of the accounts between his vendor and the latter's co-tenants and takes the land subject to a charge for the balance if any in favour of such co-tenants as of the date of purchase would, I think, be to disregard the plain wording of s. 189.

The fact that the contract of June 23, 1951, was expressed to enure to the benefit of and be binding upon each of the parties and their respective assigns does not assist the respondent, in the circumstances of this case, as the covenant to pay for repairs being positive would not run with the land and there is no question of novation. In the result the respondent is left to his rights against William Zawick personally under the contracts referred to above.

For the above reasons I would allow the appeal and substitute for the judgments below a judgment (i) declaring that the title registered in the name of the appellants is a good and valid title free from the claims asserted in caveats Numbers 7063 H.V. and 6823 J.H. and free from the claims of the respondent under the agreements of June 23, 1951 and December 13, 1951, (ii) directing that the said two caveats be expunged from the Register, and (iii) referring it to the Clerk of the Court to take the accounts between the appellants and the respondent in respect of the Craig Nair Block from January 28, 1953, pursuant to the applicable Rules of Court. The appellants are entitled to their costs throughout.

Appeal allowed with costs.

Solicitors for the appellants: *Morrow & Morrow.*

Solicitors for the respondent: *Harvie, Yanda & Nisbet.*