PARTITION—A SURVEY OF THE LAW IN ALBERTA*

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I. INTRODUCTION

This survey of the law of partition is directed to the current law of Alberta which is embodied in three English statutes.[1] The cases cited are primarily those of the Alberta and English courts although reference is made to decisions in other jurisdictions where statutory provisions are or have been similar.

A. Need for the Remedy

Partition is a remedy which may be required where there is concurrent ownership of lands, tenements and hereditaments. Before the reign of Henry VIII all concurrent owners could agree to partition by private arrangement but only coparceners[2] had a legal right to demand partition.[3]

The preamble to the statute of 1539 eloquently states the need for the remedy. It recites that:

> . . . often times, a joint tenant or tenant in common with a perverse covetous and malicious mind has cut all of the woods and trees growing upon the land, destroyed all the buildings and has converted all of the crops and pastures to his own use without regard to his other tenant who has always been without a remedy.

B. Purpose of the Remedy

The purpose of the partition is to put an end to the community of ownership in lands, tenements and hereditaments and to vest in each owner an estate in severalty.[4]

Despite the efforts of the Court of Chancery,[5] physical division of the subject matter was not always possible and in some cases partition caused great hardship. To remedy this situation The Partition Act, 1868, was passed. The object of this Act was described by Lord Hatherley L.C. in *Pemberton* v. *Barnes*:[6]

> . . . it has been found that upon partition the ordinary remedies of the Court are not sufficient to prevent in some cases injustice being done and great inconvenience being sustained. Therefore this Act was passed to assist the Court in making a just and proper arrangement as between parties interested.
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> Now what are the inconveniences connected with partition suits? If tenants in common cannot agree among themselves as to partition or sale, any one of them may apply to the Court for a partition. The very circumstance of being obliged to submit to a partition is a great hardship in some cases, but is it a thing which must be submitted to.
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> . . . one man may prefer a partition because he wishes to be a landed proprietor;

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[1] An Act for Joint Tenants and Tenants in Common (1539) 31 Henry 8, c. 1; Joint Tenants for Life or Years (1540), 32 Henry 8, c. 32; The Partition Act, 1868, 31 and 32 Vict., c. 40.

[2] In Coke upon Littleton [163a] a definition of parceners is found: "Parceners after the course of the common law are, where a man, or woman, seised of certain lands of tenaments in fee simple or taile, hath no issue but daughters, and dieth, and the tenaments descend to the issue, and the daughters enter into the lands or tenaments so descended to them, then they are called parceners and be but one heir to their ancestor. . . ."

[3] *Patel* v. *Premabhai*, [1954] A.C. 35.

[4] It is possible however, for some of the parties to agree to continue their community of ownership while severing that community with others (see *Hobson* v. *Sherwood* (1841), 4 Beav. 184; 49 E.R. 309).

[5] See below.

[6] (1871), 6 L.R. Ch. App. 685 beginning at 691.

another, who is not so anxious to possess land, may prefer a sale of the entirety, as giving the certainty of a fair and equal division. The Legislature saw that all these questions might arise, and it has provided for them by the 3rd, 4th, 5th, and 6th sections of the Act.

C. What May be Partitioned

In Halsbury's Laws of England there appears the following statement as to what may be partitioned:

> All tenements, and hereditaments of whatever kind, whether corporeal or incorporeal, may be partitioned by the court, except those which are in their nature incapable of physical division. . . .[7]

The Courts of Chancery had assumed concurrent jurisdiction with courts of law in partition and as Lord Hardwicke L.C. said in *Baxter* v. *Knollys*,[8] the Courts of Chancery could partition many things that could not be partitioned at law.[9]

There must, however, be an equal right to the possession of every part and parcel of the subject matter of the tenancy. At common law the action for partition was commenced by the writ *de partitione faciende*. The use of this writ was carried over in the first two statutes on partition, the Acts of 1539 and 1540, during the reign of Henry VIII.[10] It is a requirement of the present law that the subject of every partition be held in terms of this old writ, *insimul et pro indivisio*.

D. Loss of the Remedy: Some Considerations

Later in this paper it will be seen that difficulty in making a partition, inconvenience and pecuniary loss are insufficient to bar a co-tenant's right to partition. There are, however, other factors which may withdraw the land from the operation of the Partition Acts. The most important of these other factors is the marriage of the co-owners which is fully discussed elsewhere in the paper. What follows is a brief comment on some of the other considerations which may result in loss of the remedy.

The first consideration arises by reason of section 24 of the Partnership Act,[11] which provides as follows:

> Where land or an interest in land becomes partnership property, it shall, unless the contrary intention appears, be treated as between the partners, including the representatives of a deceased partner, as personal or moveable property and not as real property.

In the case of *Wild* v. *Milne*,[12] several persons who were jointly entitled to several leases of a colliery worked it in co-partnership. The partnership was at will and could therefore be determined at any time by any of the partners. The Master of the Rolls, Sir John Romilly, held that one of the

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[7] *21 Halsbury's Laws of England* 836 (1st ed.). With respect to what should become of indivisible hereditament upon a partition, Lord Coke answers that the eldest parcener shall have the piscary or common, and the rest shall have a contribution; or if the common ancestor left no other inheritance to give anything in allowance, then shall one parcener have the common for a time, and the other for a like period. Or in the case of a piscary, the one parcener may have one fish and the other the second; or the one may have the first draught and the other the second; and if partition be made of a mill, one parcener shall have the mill for a time, and the other for a like time, or the one parcener shall have one toll dish and the other the second. Reference is to Co. Litt. 165(a). (With regard to the discussion above it will be noted that no severance of the ownership is effected.)

[8] (1750), 1 Ves. Sen., 494; 27 E.R. 1163.

[9] In *Mayfair Property Company* v. *Johnston*, [1894] 1 Ch. 508 a wall separating the gardens of two adjoining houses was partitioned vertically. See also *Turner* v. *Morgan* (1803), 8 Ves. Sen. 143; 32 E.R. 307. In this case a house was divided and the plaintiff got neither chimneys nor stairs.

[10] Lord Porter, in *Patel* v. *Premabhai*, [1954] A.C. 35, states at p. 42: "In the two Acts mentioned above the writ is referred to as *de participatione facienda* by what is apparently a clerical error, but it is obviously the same writ." [The common law writ *de partitione faciende* issed by coparceners.]

[11] R.S.A. 1970, c. 271.

[12] (1859), 26 Beav. 504; 53 E.R. 993.

co-owners of the leases could not insist on partition and that the whole assets must be disposed of.[13]

It would seem that under section 24 of the Partnership Act, unless there is a contrary intention, the right to partition would be lost.

A tenancy by entireties is dependent for its creation and continuance upon the marital relations of the co-tenants. While the tenancy by entireties continues, no partition may be had. Upon divorce, and the destruction of the unity of person, the tenancy will be converted into a tenancy in common and then partition may be made.[14]

The right to partition was never intended to interfere with the right of contract between tenants in co-ownership.[15]

Likewise there are many instances where the right to partition is denied because the property has been charged with some trust. Thus a trustee for sale only is not in a position to demand or have a partition.[16] The court will not allow a partition to extinguish active trusts.[17]

In *Boyd* v. *Allen*[18] the will gave trustees power to sell the lands, to make a division between the children, or for any other reason if the majority consented. One son, entitled to 4/15, sought partition. Mr. Justice Fry held that a power of sale in trustees was no bar to the decree for partition. He stated:[19]

> . . . it appears to me that the right of partition, which is an incident to the property in an undivided share, is not taken away by a discretionary power of sale given to trustees. It is suggested that I ought not to over-ride a power given to the trustees; but as they did not think fit to exercise their power before the plaintiff exercised his right to ask for a partition from the Court, it does not appear to me that the persons to whom the property is given are deprived of their right in this court.[20]

There is authority for the proposition that partition will not be allowed where it would be contrary to the public interest or liable to shock the conscience of the court. Thus Lord Coke says:[21]

> If a castle that is used for the necessary defence of the realme, descend to two or more co-parceners, this castle may be divided by chambers and rooms, as other houses be. But yet, for that it is *pro bono publico et pro defensione regni*, it shall not be divided.

In *Brown* v. *Lutheran Church*[22] two churches had united their interests and built a church and graveyard. After more than a generation,

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[13] See also *Crawshay* v. *Maule* (1818), 1 Swans. 495; 36 E.R. 479 where Lord Chancellor Eldon states at p. 526: "The purchase of a lease by a partnership is no more than the purchase of an article of stock which, when the partnership is dissolved, must be sold."

[14] A tenancy by entireties appears to be possible in Alberta, see: The Transfer and Descent of Land Act, R.S.A. 1970, c. 368, s. 6. See also: *Registrar-General of New South Wales* v. *Wood* (1926), 39 C.L.R. 46.

[15] *Peck* v. *Cardwell* (1839), 2 Beav. 137; 48 E.R. 1131 was a case "in which" four persons purchased some land and on the same day executed an agreement regulating the mode in which the land was to be laid out in lots and sold for building purposes. All the parties died and the representatives of one of the parties sought partition. Lord Langdale M.R. held that it would be inconsistent with the agreement to grant partition and the Bill was dismissed. It would appear that the agreement amounts to a waiver of the right to compel partition. Note also that joint title to land may arise under a marriage settlement. Such land is subject to the trusts of the settlement and may not be partitioned under thePartion Act, 1868. See *Re Partition Act 1868 and R. 474 Hicks* v. *Kennedy* (1957, 20 W.W.R. (N.S.) 517 (Alberta A.D.).

[16] *Keefer* v. *McKay* (1881), 29 Gr. 162.

[17] In *Taylor* v. *Grange* (1880), 15 Ch. D. 165 the testator gave the property to his two daughters for life with remainder to their children. The trustees were empowered to work mines and build roads over the estate during the time of the tenants for life. A partition action brought by the life tenant was denied as it would extinguish the active trusts. Lord Justice Cotton did say at p. 168, however: "Though I cannot say that there is no state of circumstances where, although active trusts are to be performed, there may be a partition. . . ."

[18] (1883), 24 Ch. D. 622.

[19] *Id.* at 623.

[20] See *Biggs* v. *Peacock* (1882), 20 Ch. D. 200 where Vice Chancellor Bacon rendered a different conclusion when there was a trust for sale as opposed to a power of sale.

[21] Co. Litt. [165a].

[22] (1854), 23 Pa. St. R. 495.

discord among the parties errupted, and one side sought partition. Mr. Justice Woodward speaking for the Supreme Court stated:[23]

> . . . we hold that a church and burial ground situated as these now under consideration, and owned by distinct religious societies as tenants in common, are not within the spirit and meaning of the statutes of partition . . .

II. WHO MAY DEMAND PARTITION

At common law only coparceners had a legal right to demand partition. It was not until the Statutes of 1539 and 1540 that the right to proceed at law for partition was extended to joint tenants, tenants in common, and holders of particular estates for life and years.

A fundamental requirement of a party seeking partition is that he have an estate in possession which entitles him to enjoy the present rents or possession of the property. The rationale for the rule was explained in *Evans* v. *Bagshaw*.[24] In that case there was an assignment in bankruptcy and then an attempt by the bankrupt to partition. Lord Chancellor Hatherley held that by making the assignment the bankrupt became a reversioner and stated:[25]

> The case, therefore, falls within the ordinary rule that the Court will not allow a partition suit to be maintained by a reversioner. This rule is not merely technical, but is founded on good sense in not allowing the reversioner to disturb the existing state of things.

In *Morrison* v. *Morrison*[26] Meredith C.J.C.P. offered another explanation for the rule. His Lordship stated "that partition is a remedy only available to those who need it," in other words, those entitled to possession.

From this rule it follows that an applicant who has a charge on land arising under his grandmother's will has no right to possession and therefore no right to partition.[27] Likewise a judgment creditor who has registered his judgment in a Land Registry Office is not, without more, entitled to possession and, therefore, not entitled to maintain an action for partition.[28] The same result was reached in the earlier English case, *Dodd* v. *Cattell*[29] where the plaintiff sought to partition lands to which she was entitled subject to a term of one thousand years and also subject to having one moiety of her estate divested by the attaining of a vested interest by others.

A. Lessors and Lessees

By the 1540 Statute, the right to partition was extended to holders of particular estates for life and years. Thus in *Williams* v. *Williams*[30] a tenant for life of one moiety was successful in a partition suit against the owner in fee of the other moiety. In *Heaton* v. *Dearden*[31] one of two tenants in common agreed to lease to the plaintiffs for a period of 21 years all of the mineral rights in his interest together with the right to sink mines. Upon the death of the lessor his co-tenant, as his heir, succeeded to

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[23] *Id.* at 500.
[24] (1870), L.R. Ch. App. 340.
[25] *Id.* at 341.
[26] (1917), 34 D.L.R. 677.
[27] *Re Fidler and Seaman*, [1948] 2 D.L.R. 771.
[28] *Morrow et al.* v. *Eakin and Eakin* (1953), 8 W.W.R. (N.S.) 548.
[29] [1914] 2 Ch. 1.
[30] (1899), 81 L.T.R. 163.
[31] (1852), 16 Beav. 147; 51 E.R. 733.

his estate and was forced to effect a partition in a writ brought by the lessees.[32]

While a tenant for life or years may have partition of his undivided share it only binds during the term of his holding[33] and it appears that the court will not allow such partition if it will effect the reversioner. Thus in *North* v. *Guinan*[34] the court refused partition of a house and premises held for a term of years subject to a rent and covenants. Lord Chancellor Lyndhurst stated:[35]

> The important interest in the estate is in the reversioner, and if the court were to decree a partition, the landlord might apply the very next moment for an injunction to restrain the parties from executing it, by any act amounting to waste.

A lease of the entirety by one co-owner can only affect his share[36] and would seem to be no defence to a bill for partition though it would have some bearing as to whether the relief should be partition or sale.[37] The tenant would be a necessary party to the suit as his interest would be legally and materially affected by partition. Instead of being a tenant of an undivided moiety he would become the tenant of a divided moiety.[38] It would appear that the tenant himself would suffice as the sole defendant.

The results of not joining the tenant are clearly shown in the Ontario case of *Monro* v. *Toronto RW Co.*[39] In that case the plaintiff was a co-owner with his brother and sister who during his infancy had leased the lands to the defendants. The plaintiff sought and obtained partition with his brother and sister only, thus it was not binding on their lessees who remained tenants of two undivided thirds. The plaintiff, therefore, is a tenant in common with the defendants in respect of his one-third and in that probably in proportion of two-thirds to defendants and remainder to him. Had he joined the tenants in his original partition suit he would have been entitled to one-third of the whole in possession.[40]

B. Mortgagors and Mortgagees

The right of a mortgagor to seek partition is determined primarily on whether the mortgagee holds a mortgage on the whole estate or simply on an undivided share.

If the mortgage is on the whole estate then a partition of the equity of redemption cannot diminish or affect the mortgagee's rights[41] and partition may be had by the owners of the equity of redemption.[42] In *Sinclair* v. *James*[43] Mr. Justice North canvassed the authorities and stated:

> The Court will in making the decree direct inquiries as to the parties interested, and, among others, an inquiry as to what mortgages affect the whole property, and in a

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[32] Note that in the Statute 8 & 9 Will. 3, c. 31, "An Act for the easier obtaining partitions of lands in coparceny, joint-tenancy, and tenancy in common", provision was made in section 4 for the protection and preservation of tenants' interests. (This statute which was made perpetual by the statute 3 & 4 Anne, c. 18, section 2, was repealed by The Statute Law Revision in 1867.)

[33] *Baring* v. *Nash* (1813), 1 V. & B. 551; 35 E.R. 214.

[34] [1829] Beat. 343.

[35] *Id.*

[36] *Vasiloff* v. *Johnson* (1932), 41 O.W.N. 139.

[37] *Fitzpatrick* v. *Wilson* (1866), 12 Gr. 440.

[38] *Mason* v. *Keays* (1898), 78 L.T.R. 33.

[39] (1903), 5 O.L.R. 483.

[40] See also the earlier English case *Cornish* v. *Gest* (1788), 2 Cox Eq. Cas. 27; 30 E.R. 13.

[41] *Swan* v. *Swan* (1820), 8 Price 518; 146 E.R. 1281.

[42] See also, *McDougall* v. *McDougall* (1868), 14 Gr. 267.

[43] [1894] 3 Ch. 554 at 556.

> proper case order a sale with the concurrence of such of the mortgagees as will concur. That is no reason for making them parties; if they were made parties and willing to be parties, and bound by the decree, I cannot say they would be improper parties; but, being brought here against their will, I think they are entitled to say that against them no decree can be made. The only case that would justify bringing them here against their will would be a claim for redemption, . . .[44]

Where the mortgage attaches to an undivided share, however, the considerations are different. It cannot then be said that the mortgagee has no interest in a partition of the property. Upon a partition he would become the mortgagee of a divided share, and the nature of his security would be altered. In the early case of *Gibbs* v. *Haydon* Mr. Justice Fry stated.[45]

> As a general rule a mortgagor cannot enforce any rights against the mortgagee unless he is at the same time prepared to redeem the mortgage. It is therefore wrong that the character of the property in the hands of the mortgagee should, upon the application of the mortgagor, be altered and the mortgagee not paid off.

Mr. Justice Fry's reasoning was followed in *Oatley* v. *Oatley and Others*[46] in which it was held that the right to partition was suspended until redemption. In the Ontario case of *McDougall* v. *McDougall*[47] Chancellor Van Koughnet stated:

> The mortgagor has chosen to put the legal estate out of him. Surely when he seeks partition he must bring that legal estate before the Court for the benefit and protection of his co-tenants whom he seeks to bind.

In this case the mortgagor of his undivided share had sought partition without joining the mortgagee, whom the Chancellor allowed to be joined in the Master's office, because none of the other parties objected. In the later case of *Re McCully: McCully* v. *McCully*[48] Mr. Justice Riddell speaking for the Divisional Court noted that in England *Gibbs* v. *Haydon,*[49] appeared to be the rule but:

> In Ontario, it would seem that an order for partition may be made at the instance of the mortgagor of an undivided interest alone; at least such an order has been made; but the practice is not to be commended—and it can be followed only (if at all) when the other parties do not object.

A mortgagee of the whole or of an undivided share only appears to have the right to claim partition, although this is not entirely free of doubt. In Halsbury's Laws of England, the following statement is made:[50]"A mortgagee of a share can sue without the concurrence of his mortgagor." Reference is made to the cases which follow.

In *Fall* v. *Elkins*[51] the suit was brought by the mortgagees of one undivided fifth part of certain hereditaments and premises against their mortgagor and the owners of the other four-fifths of the property for foreclosure and partition. The report, which is very short, deals only with the appointment of a receiver. In this case it must be noted that there was also a claim for foreclosure which would give the plaintiffs possession.

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[44] Likewise an annuitant whose annuity is charged on the whole of the estate would not be a necessary party as his rights would not be affected. (See: *Poole* v. *Poole*, [1885] W.N. 15.)

[45] (1882), 47 L.T.R. 184 at p. 185.

[46] (1898), 19 N.S.W.L.R. (Eq.) 129.

[47] (1868), 14 Gr. 267.

[48] (1911), 23 O.L.R. 156 at 163.

[49] *Supra*, n. 45.

[50] *21 Halsbury's Laws of England* 840 (1st ed.).

[51] (1860), 9 W.R. 861.

In *Davenport* v. *King*[52] the plaintiffs were mortgagees who sought partition against the owners of the equity of redemption and other mortgagees of the property. No issue was taken with the nature of the plaintiff's claim, the issue being solely whether there should be partition or sale.

In *Robinson* v. *Aston*[53] a bill for partition was filed by a mortgagee of a life estate and an undivided reversionary share. The sole issue in the reported case was who would pay the costs of an infant defendant who was the tenant in tail of an undivided share.

In the case referred to, *Davies* v. *Davies*,[54] the defendant was given the option to be foreclosed or to redeem and then submit to partition. (The mortgagee had acquired the equity of redemption in the undivided interests once held by the defendant's brothers and sisters.)

In Ontario the petitioner must have an estate in possession.[55] In *Mulligan* v. *Hendershott et al.*[56] it was held that a mortgagee whose title had not been perfected by foreclosure or otherwise was not entitled to an order for sale or partition upon summary application under Rule 989 (presumably a rule that allowed partition actions to be pursued by notice of motion). This would appear to be the better rule.

C. Life Tenants and Reversioners

Life tenants were also granted the right to seek partition by the Statute of Henry 8.[57] They cannot, however, compel the reversioners to join in the partition, nor can the partition be made binding after the term of the particular estate.[58]

The reversioners, on the other hand, cannot maintain an action because they do not have an estate in possession. The policy is well stated in the Ontario Appellate Division decision in *Bunting* v. *Servos*[59] by Masten J.A.:

> . . . "partition", as used in the statute means actual present physical division, among those entitled, of the very property itself, and does not mean a declaration regarding future rights in specific property of which the parties may at some future date become entitled to possession.

His Lordship referred to the earlier Ontario decision of *Morrisson* v. *Morrisson*, in which Meredith C.J. had stated:[60]

> My opinion is, and always has been, that the law of this Province, in this respect, partition, is in accord with that of England; that all alike, no matter how they take, stand upon a like footing; that not but those entitled to possession, that is, none but those who really need it, are entitled to partition.[61]

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[52] (1883), 49 L.T.R. 92.

[53] (1845), 9 Jur. 224; 5 L.T.O.S. 36.

[54] (1860), 6 Jur. (N.S.) 1320; 3 L.T. 233.

[55] *Laplante* v. *Scamen et al.* (1883), 8 O.A.R. 557.

[56] (1896), 17 P.R. 227.

[57] 32 Henry 8, c. 32.

[58] See *Hobson* v. *Sherwood* (1841), 4 Beav. 184; 49 E.R. 309.

[59] [1931], O.R. 409 at 416.

[60] *Supra*, n. 26 at 171.

[61] The difficulty surrounding the need for possession arose in Ontario because of the section corresponding to s. 3 of the present Act: R.S.O. 1970, c. 338. Chief Justice Meredith commented on the section in the *Morrisson* case at p. 170: "It is easy to see how the present otherwise unexplainable state of affairs may have been brought about. The simple misplacement, or omission, of a comma, by any one concerned in the drafting, copying, or printing of the enactment, might have casused the whole difficulty; the simple process of inserting a comma after the word 'infant' would solve all difficulties even in a most literal interpretation."

D. Dower Interests

An estate in joint tenancy is not subject to dower or courtesy, for upon the death of a joint tenant, the surviving tenant takes his share by *jus accrescendi.* Where an estate is held in common, however, it is subject to courtesy and dower.

Where a husband is a tenant in common, his wife's inchoate right to dower attaches. Her dower right is not, however, paramount to the co-tenants and they may have partition without joining her as a party; her dower right attaches to the share allotted to the husband. It would make no difference whether the partition was made either during or after the husband's life.[62]

A question of some difficulty arises, however, because most statutes on partition provide for a sale of the estate in lieu of division. The question is two-fold: one, does the sale operate to divest the contingent interest of the wife so that the purchaser acquires the entire estate; two, ought a portion of the husband's share of the sale proceeds be set aside and invested for the wife's benefit in case her right should become absolute by surviving him.

The Ohio case of *Weaver* v. *Gregg*[63] is instructive on this point. Mr. Justice Brinkerhoff, speaking for the Supreme Court, stated:

> On the whole, our view of the question is this: The right of dower in the wife subsists in virtue of the seisin of the husband; and this right is always subject to any incumbrance, infirmity, or incident, which the law attaches to that seisin, either at the time of the marriage or at the time the husband became seised. A liability to be divested by a sale in partition, is an incident which the law affixes to the seisin of all joint estates; and the inchoate right of the wife is subject to this incident. And when the law steps in, and divests the husband of his seisin, and turns the realty into personalty, she is, by the act and policy of the law, remitted, in lieu of her inchoate right of dower in the realty, to her inchoate right to a distributive share of the personalty into which it has been transmuted.

E. Creditors

Judgment creditors, not being entitled to possession, are not entitled to maintain actions for partition.[64] They may, however, obtain a sale of the judgment debtor's interest in land and the purchaser of that interest may bring partition proceedings.[65]

III. PARTITION: AS OF RIGHT IN ALBERTA

A. Judicial Construction of the Statutes of 1539 and 1540

The statutes of 1539 and 1540 use the words "shall and may" be compelled to make partition. There is clear authority that these words "shall and may" are to be construed imperatively.[66] In *Crump* v. *Adney and Page*[67] Lord Lyndhurst C.B. said: "We must endeavor to construe the

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[62] This last statement does not take into account the issues surrounding the actual assignment of dower. In Ontario it appears that a widow may, before assignment of her dower, be compelled to make partition, although she cannot demand it, and she may also be compelled to accept a gross sum in lieu of dower. After assignment of her dower, the court would consider her views in deciding whether to order sale and whether to exempt her interest from such sale. In the case of sale, her interest would be dealt with either by payment of a gross sum upon the principles applicable to life annuities or the court may award only an annual sum, the terms of which would be with the court as to investments, etc.

[63] (1856), 6 Ohio St. R. 547 at 552.

[64] *Murrow et al.* v. *Eakin and Eakin* (1953), 8 W.W.R. (N.S.) 543.

[65] In *Re Craig*, [1929] 1 D.L.R. 142; *Sunglo Lumber Ltd.* v. *McKenna*, [1974] 5 W.W.R. 572.

[66] *Attorney General* v. *Lock et al.* 26 E.R. 897.

[67] (1883), 1 Cr. & M. 355 at 361; 149 E.R. 436.

words, so that 'shall and may' may both stand. 'Shall and may' will both stand, by our holding them to be imperative; . . ."[68]

Following the passage of these two Acts and before the passage of the Partition Act, 1868[69] partition was a matter of right and the court had no discretion to refuse partition or to order sale in lieu thereof.[70]

The position of the co-owners is eloquently stated by Sir Thomas Plummer V.C. in *Baring* v. *Nash*:[71]

> It is clear, the absolute owner of a tenth part may compel the owners of the other nine to concur with him; and there would be no objection from the minuteness of this interest, the inconvenience, or the reluctance of the other tenants in common if no objection could be taken to the plaintiff's title: partition being matter of right; whatever may be the inconvenience and difficulty. . . .

The action for partition was complicated in the extreme and a statute[72] attempted to simplify the procedure under the writ "*de partitione faciende*". The writ was finally abolished by the Real Property Limitations Act of 1833.[73]

Meanwhile the Court of Chancery had assumed a concurrent jurisdiction with courts of law upon partition.[74] The principal difference, aside from the simplified procedure, was that the common law judgment vested the legal estate, and the decree in equity directed the parties themselves to execute the conveyance necessary to pass the legal estate.[75]

The *Baring* v. *Nash* case,[76] confirms that partition was a matter of right whether at law or equity.

The Partition Acts of 1539 and 1540 and the Partition Act, 1868, are in force in the Province of Alberta and the Province of Saskatchewan.[77]

B. A View of the Alberta Cases

The Alberta case *Wikstrand & Mannix* v. *Cavanaugh & Dillon*[78] confirms that partition is still a matter of right in the Province of Alberta. In that case Mr. Justice Ford states:

> Apart from such discretion as is given by the Partition Act as to sale in lieu of partition, a decree or judgment of partition is a matter of right and not dependent upon the discretion of the court, except where certain acts may be required to be performed as a condition precedent by the doctrine that he who seeks equity must do equity. For example, a party seeking partition may be required to reimburse his co-tenants for his share of money expended for the benefit of the property. . . .[79] The right to partition may, however, be limited, modified or waived by agreement express or implied.[80] Where there is no specific agreement as to the duration of the joint ownership, the purpose or idea which the owners may have had in acquiring property does not preclude either of them from determining it by action for partition; but if the implication of an agreement to postpone partition is to be gathered from the circumstances and purpose of such acquistion it may be given effect to, but only by way of contract.[81]

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[68] See also, *In Re Kelly*, [1895] 1 Q.B. 180 to the same effect.

[69] 31 & 32 Vict., c. 40.

[70] Sir Thomas Clerke M.R. in *Parker* v. *Gerard* (1754), AMB, 236; 27 E.R. 157.

[71] (1813), 1 V. & B. 551 at 554; 35 E.R. 214.

[72] (1697), 8 & 9 Will 3, c. 31.

[73] 3 & 4 Will 4, c. 27, s. 36.

[74] *Manaton* v. *Squire* (1677), 2 Freem. 26; 22 E.R. 1036.

[75] *21 Halsbury's Laws of England* 834 (1st ed.).

[76] *Supra*, n. 71.

[77] *Grunert* v. *Grunert* (1960), 32 W.W.R. (N.S.) 509.

[78] [1936] 1 W.W.R. 113 at 114.

[79] *Infra*, part VII.

[80] *Supra*, part I.

[81] The case of *Cohen et al.* v. *Livingstone* (No. 1), [1949] 2 W.W.R. 553 while not exactly on point, is illustrative of the situation Ford J. had in mind in the *Wilkstrand* case. In this case plaintiff and defendant owned adjoining

There are two cases, subsequent to the *Wikstrand* case, which affirm that partition is a matter of right. In both cases, however, partition was refused and no sale in lieu of partition was allowed.

The first case is *In Re Partition Act, 1868, and Rule 474, Robertson* v. *Robertson*[82] a decision of Mr. Justice Egbert. In this case the issue was raised whether, if the land is a homestead within the meaning of the Dower Act, 1948[83] the right to partition or sale is lost if the applicant fails to acquire the consent of his spouse. His Lordship held that it was, citing with approval the decision of the Manitoba Court of Appeal in *Wimmer* v. *Wimmer*[84] where it was held that the property was a "homestead" under the Dower Act and that the plaintiff was not entitled to partition without the consent of his wife.[85]

There have been two cases subsequent to the *Robertson* case dealing with the same issue that Mr. Justice Egbert considered in the latter case. These cases are: *McWilliam* v. *McWilliam & Prudential Insurance Company of America*[86] and *Wagner* v. *Wagner*.[87]

In the *McWilliam* case, in the Alberta Supreme Court, Smith J. (as he then was) expressly disagreed with the *Robertson* case and held that a sale under the Partition Act was not a "disposition" within the Dower Act, and therefore the consent of the spouse was not required on a partition application. Alternatively it was held even if it were a "disposition", the court was prepared to dispense with the husband's consent to the "disposition". In the Appellate Division, the court refused to consider the correctness of the *Robertson* case.

In the *Wagner* case Mr. Justice Kirby agreed with the view of Smith J. that "a sale of land pursuant to the Partition Act, 1868, was not a "disposition" within the meaning of the word used in the Dower Act."

The second Alberta case for consideration is *Clark (Clarke)* v. *Clark*.[88] It is in the appeal that Mr. Justice Allen deals with the husband's application for partition. He states:

> The proposition that because partition is a matter of right sale must be ordered when physical division is impracticable is one which I am not prepared to accept. I think it is clear enough from the sections quoted that in such a situation the remedy of sale is discretionary and the court is not bound to make such an order unless, 'it thinks fit', or 'sees good reason to the contrary.' Perhaps however, I am aided in arriving at a decision on this point by the fact that the appellant did not ask for partition in his originating notice.[89]

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lots and together built an office building covering both lots; the building was not suitable for partition in that one side had the heating system and the other the elevator and staircase. In a suit brought by the plaintiff for partition of the building it was held that the facts were all consistent with and only with the idea of a building owned and used in common as a joint venture. (See also *Steele* v. *Steele* (1967), 67 Man. R. 270 where a separation agreement was held to bar the right to partition.)

[82] (1951), 1 W.W.R. (N.S.) 183.

[83] Dower Act, R.S.A. 1970, c. 114.

[84] [1947] 2 W.W.R. 249.

[85] The consequences of the *Wimmer* case were changed in Manitoba by an amendment to the Law of Property Act, R.S.M. 1940, c. 114, in 1949. For a discussion of the amendment see *Fritz* v. *Fritz*, [1950] 1 W.W.R. 446.

[86] (1960), 31 W.W.R. (N.S.) 480 (affirmed (1961), 34 W.W.R. (N.S.) 476.

[87] (1970), 73 W.W.R. 474.

[88] [1974] 1 W.W.R. 488 (affirmed [1974]) 5 W.W.R. 274 at 278.

[89] I have some difficulty with the reasoning of Mr. Justice Allen in this case. The Partition Act, 1868 was passed specifically to deal with the problems of the impractical division of the subject matter of a partition. The earlier cases all concluded that partition was a matter of right no matter how impractical the partition might be. There is some justification for the award on the ground that the husband did not claim a partition in his originating notice, a point noted in the decision of Mr. Justice Allen. Two English cases are instructive on this point. In *Teall* v. *Watts* (1871), L.R. 11 Eq. 213 there was no prayer for partition but only for a sale. Mr. Jessel, Q.C., for the plaintiff, stated at p. 213 in his argument, "The Partition Act, 1868, s. 3, only enables the court to decree a sale in a suit for partition, where if the Act had not been passed, a decree for partition might have been made. The bill does not pray for partition, and a question may be raised whether the Court has jurisdiction; we

The rule in these cases, re footnote 89, was abrogated by the Partition Act, 1876,[90] which is *not* the law in the Province of Alberta. That section provides:

> 7. For the purpose of the Partition Act, 1868, and of this Act, an action for partition shall include an action for sale and distribution of the proceeds, and in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition.[91]

Since writing this paper the case of *Kornacki* v. *Kornacki*[92] has been reported. In that case, unlike in *Clarke*,[93] there was an application for both remedies, partition or sale. Mr. Justice Moir speaking for the Alberta Appellate Division declared, without citing authorities, that the courts of Alberta have a discretion to refuse both partition and sale.

These two cases show that notwithstanding *Wikstrand*,[94] in cases involving the matrimonial home, there is a discretion to refuse either partition or sale.

IV. COURT'S DISCRETION TO ORDER SALE IN LIEU OF PARTITION

The court, as well as having a discretion in some cases to grant or refuse an application for partition, has a discretion to grant a sale of the land in lieu of partition.

A. Analysis of Sections 3, 4 and 5 of the Partition Act, 1868[95]

Shortly after the passing of the Partition Act, 1868 there was some doubt as to how sections 3, 4 and 5 were to be interpreted.[96] It is now settled that the three sections are independent of one another. In *Drinkwater* v. *Ratcliffe* Sir George Jessel M.R. said the following:[97]

> I think I ought in this case to say a few words as to what, in my opinion, is the meaning of the Act.

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therefore propose to amend the prayer." The Master of the Rolls: "I think the bill had better be amended. . . ." and in the case of *Holland* v. *Holland* (1872), L.R. 13 eq. 406 there was no prayer for partition. It was argued that the decisions upon the point were not uniform. Sir John Wickens V.C. however required that the bill be amended by adding to it a prayer for partition as well as sale.

[90] 39 & 40 Vict., c. 17, s. 7.

[91] (Note: The British Columbia Partition Act, R.S.B.C. 1960, c. 276, s. 4, adopts this provision.)

[92] (1975), 53 D.L.R. (3d.) 159.

[93] *Supra*, n. 88.

[94] *Supra*, n. 78.

[95] 3. In a Suit for Partition, where, if this Act had not been passed, a Decree for Partition might have been made, then if it appears to the Court that, by reason of the Nature of the Property to which the Suit relates, or of the Number of the Parties interested or presumptively interested herein, or of the Absence or Disability of some of those Parties, or of any other Circumstance, a Sale of the Property and a Distribution of the Proceeds would be more beneficial for the Parties interested than a Division of the Property between or among them, the Court may, if it thinks fit, on the Request of any of the Parties interested, and notwithstanding the Dissent or Disability of any others of them, direct a Sale of the Property accordingly, and may give all necessary or proper consequential Directions.

4. In a Suit for Partition, where, if this Act had not been passed, a Decree for Partition might have been made, then if the Party or Parties interested, individually or collectively, to the Extent of One Moiety or upwards in the Property to which the Suit relates, request the Court to direct a Sale of the Property and a Distribution of the Proceeds instead of a Division of the Property between or among the Parties interested, the Court shall, unless it sees good Reason to the contrary, direct a Sale of the Property accordingly, and give all necessary or proper consequential Directions.

5. In a Suit for Partition, where, if this Act had not been passed, a Decree for Partition might have been made, then if any Party interested in the Property to which the Suit relates requests the Court to direct a Sale of the Property and a Distribution of the Proceeds instead of a Division of the Property between or among the Parties interested, the Court may, if it thinks fit, unless the other Parties interested in the Property, or some of them, undertake to purchase the Share of the Party requesting a Sale, direct a Sale of the Property, and give all necessary or proper consequential Directions, and in the case of such Undertaking being given the Court may order a Valuation of the Share of the Party requesting a Sale in such Manner as the Court thinks fit, and may give all necessary or proper consequential Directions.

[96] See Lord Hatherley L.C. in *Pemberton* v. *Barnes* (1871), 6 Ch. App. 685.

[97] (1875), L.R. 20 Eq. 528 at 530.

The 3rd section gives power to the Court to sell for certain reasons. These reasons are specified in every case but one. The reasons specified are, the nature of the property, the number of the parties interested, the absence or disability of some of the parties. The reasons are unspecified in one case, *viz.*, where, by reason "of any other circumstance," a sale of the property and distribution of the proceeds would be more beneficial to the parties interested than a division of the property between or among them. Whenever that happens, and any party interested applies for a sale, the Court may direct a sale. It is an absolute power of sale on the request of anybody, provided the Court is satisfied that it would be more beneficial for the parties interested than a division. Then the 4th section provides that if the parties interested, to the extent of a moiety or upwards, request a sale, the Court shall sell, unless it sees good reason to the contrary—that is, irrespective of the nature of the property, irrespective of the number of persons, irrespective of absence or disability, irrespective of any special circumstances which make the Court think it beneficial. The parties interested to the extent of one moiety are entitled to a sale as of right, unless there is some good reason to the contrary shewn; they have not to shew any reason for the sale, but a reason to the contrary must be shewn. The 5th section provides that, if any party interested in the property requests the Court to direct a sale of the property instead of a division, the Court may, if it thinks fit (this is discretionary again), unless the other parties interested in the property undertake to purchase, give all necessary and proper directions for such sale. What does that mean? Under the 4th, where the parties requesting a sale have got more than a moiety, you do not want that; it consequently applies to the case of the owners of less than a moiety making the request. Now that case is provided for by the 3rd section; in every possible case where the Court thinks a sale is proper and for the benefit of the parties interested. Therefore the 5th must apply to a case where the Court sees no reason for preferring a sale to a partition. That case is not provided for by the 3rd, nor is it provided for by the 4th section. Where the Court sees no reason at all, still any party interested may apply; and then there is a limit imposed, and the limit is this, that the Court shall not exercise the new power given by the 5th section, which depends entirely upon the caprice of the party asking, without any opinion of the Court being expressed, if other people will buy. That is a check upon the new power—not, as it has been supposed to be, a limitation of the 3rd and 4th sections—but it is a new power given to any party, whether Plaintiff or Defendant, to apply, with or without any reason whatever, to the Court for a sale, and he is entitled to ask for it unless somebody is going to buy; and then *Williams* v. *Games* [(1875), 10 Ch. APP. 204] says that if he does apply for it, and somebody does offer to buy his share, he may withdraw his request.[98]

Following the *Drinkwater* case the House of Lords had the opportunity to comment on section 5 of the Act in *Pitt and Others* v. *Jones and Others*.[99] Lord Blackburn put the same construction on the Act as did the Master of the Rolls but further clarified the effect of section 5 as follows:[100]

But, I think, the party declining to accept this undertaking for a valuation is not hereby prevented from pressing for a sale under the other sections of the Act if he can bring himself within them. The Court cannot, under section 5, order a sale merely on the request of a party if the opposing party is willing to buy him out.

Lord Watson said the following:[101]

[98] In the *Drinkwater* case the party offering to purchase under the 5th section was a married woman, separated in fact, but not in law, from her husband, and he had not joined in the undertaking. The Master of the Rolls held that she was not a party capable of giving a valid undertaking and thus not within section 5.

Foster, Edward John, "The Law of Joint Ownership and Partition of Real Estate", London: Stevens & Sons 1878 XXVI, 245 pp. appendix index at page 120 states: "Difficulties having occurred with respect to requests for sale and undertakings to purchase when the parties requesting or undertaking were under disability, it was provided by section 6 of the Amendment Act [Partition Act, 1876, 39 & 40 Vict., c. 17] as follows: 'In an action for partition a request for sale may be made, or an undertaking to purchase given, on the part of a married woman (k), infant (l), person of unsound mind (m), or person under any other disability, by the next friend, guardian, committee in lunancy (if so authorized by order in lunancy), or other person authorized to act on behalf of the person under such disability, but the court shall not be bound to comply with any such request or undertaking on the part of an infant unless it appears that the sale or purchase will be for his benefit'." See prior to the Act as to married women, *Higgs* v. *Dorkis*, L.R. 13 Eq. 280, *Drinkwater* v. *Ratcliffe*, L.R. 20 Eq. 528. And as to infants, *Grove* v. *Comyn*, L.R. 18 Eq. 387; *France* v. *France*, L.R. 13 Eq. 173; *Davey* v. *Wietlisbach*, L.R. 15 Eq. 269; *Watt* v. *Leach*, 26 W.R. 475.

British Columbia in section 10 of the Partition Act has adopted the wording of this 1876 statute section 6. BUT NOTE: The law of Alberta was not changed by the 1876 statute and it is therefore governed by the earlier case law and other statutory provisions where applicable.

[99] (1880), 5 App. Cas. 651.

[100] *Id.* at 659.

[101] *Id.* at 663.

> . . . without doing any violence to its language the clause may be read as a new and substantive enactment, empowering any party who has made up his mind to sell his own share at a valuation, to insist for and obtain a decree of sale, unless some of the other parties give an undertaking to purchase his interest; . . .

and later

> From that construction of the clause which I adopt, it necessarily follows, in my opinion, that the provisions of section 5 cannot be enforced, except at the instance of a party requesting a sale, and voluntarily offering, as an alternative, to sell his own shares to the other parties interested, at a price to be fixed by the Court, and also that he may retract that alternative at any time before a judicial contract has been completed by these parties, or any of them, giving the requisite statutory undertaking to purchase. The result of retraction will be to deprive him of the right to insist for a sale under section 5, leaving him to seek his remedy, either by proceeding under section 3 or 4, if he can bring his case within them, or by decree of partition.

Finally in *Richardson* v. *Feary*[102] the plaintiff was absolutely entitled to one undivided eighth (1/8) share and her counsel argued that following *Pitt* v. *Jones,*[103] she was allowed "to insist for and obtain a decree of sale, unless some of the other parties give an undertaking to purchase her interest." Mr. Justice North compared the language of the 4th section:[104]

> Under section 4 it is not open to the Court to refuse a request for a sale made by a party or parties interested to the extent of a moiety in the property, 'unless it sees good reason to the contrary' . . . Then section 5 says that, if any party interested requests a sale instead of a partition, the Court may, 'if it thinks fit', direct a sale, unless the other parties interested undertake to purchase the share of the party requesting a sale. . . .
>
> I think that section 5 is not synonymous with section 4, but the party who applies under section 5 for a sale must shew some reason for it. I think the court has a discretion whether it will direct a sale, and no reason has been shewn to induce me to do so in this case.

The wording of the 3rd section is the same as the 5th, "the court may, if it thinks fit,". In the case of *In re Dyer; Dyer* v. *Paynter*[105] there was an appeal from a refusal of Bacon, V.C. to order a sale in a partition action, the application being made under section 3. Lord Justice Cotton stated:[106]

> That section [3] does not make it imperative for the court to direct a sale in the circumstances, but it says that the court, 'may, if it thinks fit,' direct a sale, having regard to . . .

His Lordship referred to *Gilbert* v. *Smith*[107] where Jessel M.R. said that the meaning of the legislature was that when the court can not see how a partition can reasonably be made, then a sale should be directed, and concluded that those were not the facts in this case. Lindley and Fry L.J.J. agreed with these facts in dismissing the appeal. Lord Justice Fry stated:[108]

> It [s. 3] states circumstances giving the court jurisdiction to direct a sale, but there is no compulsion.

Cotton L.J. on the same page states:

> I also think that, even when the circumstances which give rise to the jurisdiction exist, the Judge has a discretion.

With regard to section 4, the scope of the court's discretion, to order

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[102] (1888), 39 Ch. D.45.

[103] *Supra*, n. 99.

[104] *Supra*, n. 102 at 47 to 49

[105] (1885), 54 L.J. (Eq.) 1133.

[106] *Id* at 1133.

[107] (1879), 11 Ch. D. 78.

[108] *Supra*, n. 105 at 1134.

sale in lieu of partition is unclear. In the *Drinkwater* case, Sir George Jessel M.R. stated:[109]

> The parties interested to the extent of one moiety are entitled to sale *as of right*, unless there is some good reason to the contrary shewn;[110]

In *Pemberton* v. *Barnes* Lord Hatherley L.C. stated:[111]

> The scope of the enactment appears to me to be this: there being, as I have said, reasons which may induce some of the part owners to wish for a partition, and others to wish for a sale and a division of the proceeds, the Legislature says that if the votes are equally divided, one half of the persons interested in the property desiring a sale and the other half a partition, then the half requiring the sale shall have the preponderating voice, and the Court shall be bound to give them a sale wholly irrespective of the 3rd section. But still there is a certain discretion left to the Court, so that the Court can refuse a sale where it is manifestly asked for through vindictive feeling, or is on any other grounds unreasonable.

and later: "The court would not allow a sale where it was asked merely for purposes of vexation . . ."

In the House of Lords case, *Pitt* v. *Jones*, a case dealing with section 5 of the Act, Lord Watson commented on section 4:[112]

> Section 4 is an imperative enactment to the effect that if parties interested to the extent of one moiety or upwards request a sale, the Court shall order a sale, 'unless it sees good reason to the contrary'. This section will obviously apply to a large class of cases in which the Court is not satisfied that the preponderance of benefits is in favour of a sale, and which cannot, therefore, be brought within the provision of section 3.[113]

In *Saxton* v. *Bartley*[114] Bacon V.C. found it necessary to interpret section 4. In that case counsel for the plaintiff argued he had a positive right to have a sale and relied on certain statements of Jessel M.R. in *Porter* v. *Lopes*:[115]

> In this case the plaintiff had one moiety, and the principal defendant, who has the other moiety, asks for sale. Therefore he has an absolute right to a sale unless the Court sees good reason to the contrary. Contrary to what? As I read it, it is contrary to a sale. It can mean nothing else. The Court must see some good reason why there should not be a sale. I do not say there may not be some other reason from the peculiar nature of the property, but it must be a good reason against the sale.

Bacon V.C.[116] considered the point, he referred to the section and the phrase, "unless the court shall see good reason to the contrary", and said:

> But it is said that the Master of the Rolls' decision in *Porter* v. *Lopes* means that that is to be limited as meaning 'contrary to the fact of sale'. I do not think that what the Master of the Rolls meant is so to be limited, nor do I find that he expressed any disapprobation with the case of *Pemberton* v. *Barnes*, and the other cases which have been decided; and I therefore still consider that there is a discretion in the court to order the sale. I think it is the exercise of its discretion, which these words, 'Unless the court shall see,' confer upon the court, and that they require the court to exercise it.

In this case the Vice Chancellor decreed a partition and not a sale. He found as fact that:

1. There would be no difficulty in effecting a partition,

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[109] *Supra*, n. 97 at 531.

[110] Halsbury makes no reference to any discretion in section 4 as is done specifically for sections 3 and 5.

[111] (1871), 6 Ch. App. 685 at 693.

[112] *Supra*, n. 99 at 661.

[113] Note *Davenport* v. *King* (1883), 49 L.T. 92 where Bacon V.C. held that mortgagees are persons interested within the meaning of section 3 and 4 of the Act.

[114] (1879), 48 L.J. (Eq.) 519.

[115] (1877), 7 Ch. D. 358 at 363.

[116] *Supra*, n. 114 at 521.

2. That the effect of a sale would be to diminish the income received by the widow by one half, and
3. That the action would probably not have been brought but for ill feeling existing between the parties.

On the latter point the Vice Chancellor referred to the decision of Lord Hatherley in *Pemberton* v. *Barnes,* mentioned earlier in this paper. How influenced the court was by this finding can only be determined by looking at the cases which follow.

Section 4 clearly puts the onus on the party opposing the sale to show why it ought not to be directed.[117] A good reason against sale is not necessarily a pecuniary loss while it seems that monetary results are the primary consideration in determining what is beneficial to the parties under section 3.[118]

In *Porter* v. *Lopes*[119] Jessel M.R. stated:

> Property may be of a peculiar description so as not to be actually saleable, or, at the time the sale is asked for, may be temporarily very much depreciated in value.

However, in the New Zealand case *Wachsmann* v. *Burrowes*, Denniston J. stated:[120]

> The plaintiffs have a right to a sale, and can not be asked to wait for the chance of a better time for selling—even if, as is asserted, the present is a time of comparatively low prices.

Likewise in *Rowe* v. *Gray*[121] it was held that the infant defendant did not show a good reason contrary to sale although his income would be reduced by one-half if the property were sold and he had to live off the interest of his share of the sale proceeds.

In the *Rowe* case the property to be partitioned was 10 leasehold houses a property which could easily be divided.

It seems this is a consideration but not sufficient in itself.[122] A stronger statement is made in the Irish case, *In the Matter of the Estate of Charles Langdale and Others, Owners and Petitioners;* and *In The Matter of the Estate of Frances Maria Hayes, Mary Anne Hayes, Mary Anne Madden and Bridget Crean, owners and the Partition Act, 1868.*[123]

This case shows that matters of sentiment and convenience are clearly not a sufficient reason to the contrary. In *Wilkinson* v. *Joberns*[124] the fact that the owner of a moiety opposing sale, was also a yearly tenant of the whole property, and also residing on the property and using it for commercial purposes was held to be insufficient.[125]

B. Paucity of Canadian Authorities and the Use of the Rules of Court

There are few Canadian cases on the interpretation of sections 3, 4 and 5 of the Partition Act, 1868.

In the Saskatchewan case, *Grunert* v. *Grunert* Brownridge J. stated:[126]

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[117] *Lys* v. *Lys* (1868), L.R. 7 Eq. 126.

[118] See *Drinkwater* v. *Ratcliffe, supra* n. 97.

[119] (1877), 7 Ch. D. 361 at 363.

[120] (1912), 31 N.Z.L.R. 833.

[121] (1876), 5 Ch. D. 263.

[122] See *Saxton* v. *Bartley, supra* n. 114 and *Porter* v. *Lopes, supra* n. 115.

[123] (1871), 5 IR. Eq. 572.

[124] (1873), L.R. 16 Eq. 14.

[125] See *Roughton* v. *Gibson* (1877), 46 L.J. (Eq.) 366 to the same effect. There Bacon V.C. said that he could bid at the sale and buy the property so no one would turn him out.

[126] (1960), 32 W.W.R. (NS) 509 at 511 & 512.

> That she has the right to insist upon a sale of the [description of property in which wife had a one half interest] seems clear in view of the provisions of section 4 of the Partition Act . . .

And later His Lordship states:

> But since she owns less than 'one moiety' (one half) interest in [description of property in which wife had a one third interest] she can not compel the sale of this half section. However, the court could direct a sale under section 3 of the Partition Act or under section 44(19) of The Queen's Bench Act R.S.S. 1953 ch. 67. (Now section 45(19) of The Queen's Bench Act R.S.S. 1965 c. 73.)

In *Re Partition Act,* 1868, *Anglo Western Oil & Gas Ltd. et al.* v. *Blanchet and Manning*[127] the report of the case is very limited but a sale rather than a partition of crown petroleum and gas leases was ordered when it was found, as fact, that a partition would render the lands unworkable.

In the Alberta case *Clark (Clarke)* v. *Clarke*[128] Mr. Justice Allen, in the Court of Appeal without quoting authorities states simply, after quoting sections 3, 4 and 5:

> . . . the court has some discretion with regard to the granting of the remedy of sale in lieu of partition.

In *Wagner* v. *Wagner*[129] before Mr. Justice Kirby of the Alberta Supreme Court the plaintiff brought concurrent actions for divorce and partition. His Lordship granted the divorce and awarded a lump sum by way of alimony which was charged against the husband's equity in the matrimonial home. With regard to partition, His Lordship having found that the lump sum awarded for alimony exceeded the husband's equity in the property relied on R. 495 and 496 of the Rules of Court as follows:[130]

> I construe R. 495 and 496 as permitting, in these circumstances, a direction for the sale of the property to the wife, to be effected by cancellation of the existing certificate of title and its replacement by a certificate of title in the name of the wife, . . .

It is submitted that the rules of Court of Alberta and of Saskatchewan cannot confer a right of partition or sale on any party.

The most recent Ontario case on sale or partition is *Cook* v. *Johnston.*[131] The issue in that case was whether a recreation island some 150 x 600 feet ought to be partitioned or sold. Section 3(1) of the Partition Act[132] provides, in part, "if such sale is considered by the court to be more advantageous to the parties interested". In this case Grant J. held in favour of partition, the considerations being:

1. The island was large enough for two families.
2. There are few such islands available.
3. If one were to be successful at the sale the other would be deprived of a summer home he had enjoyed for 30 years.

His Lordship referred to *Lalor* v. *Lalor*[133] where Proudfoot J. stated:

> I do not think any party has a right to insist on a sale; and it will not necessarily be ordered, unless the court thinks it more advantageous for the parties interested.

In the earlier case of *Ontario Power Company* v. *Whattler*[134] Meredith

[127] (1963), 42 W.W.R. (NS) 640 (Alta.).
[128] [1974] 5 W.W.R. 274.
[129] (1970), 73 W.W.R. 474.
[130] *Id.* at 477.
[131] [1970] 2 O.R. 1.
[132] R.S.O. 1960, c. 237, now R.S.O. 1970, c. 338.
[133] (1883), 9 P.R. 455.
[134] (1904), 7 O.L.R. 198.

C.J.O. traced the history of the Ontario Legislation up to R.S.O. 1897, ch. 123 where it was provided that proceedings are to be taken to partition unless it appears:

> That partition can not be made without prejudice to the owners of, or parties interested in, the estate, . . .

His Lordship then stated:[135]

> The law of this Province, as I understand it, is practically the same as by section 3 of the Partition Act of 1868 the English law was made, and, referring to the power of the court under that section, Jessel, M.R., said: 'The meaning of the Legislature was, when you see that the property is of such a character that it cannot be reasonably partitioned, then you are to take it as more beneficial to sell it and divide the money amongst the parties.'[136]

In the *Whattler* case there was no difficulty in making a partition and the only reason the defendants pressed for a sale was in hopes that the plaintiffs would bid up the price to acquire it.

In *Re Dennie et al. Applying for Partition*[137] the application was made under 2 Will 4 c. 35 where in the sixth clause it said:

> the estate can not be divided according to the demand of the WRIT, without prejudice to or spoiling the whole.

Robinson C.J. agreed that a sale should be had, there were 18 claimants of six or seven lots valued in the whole at £1,100.

In *Blasdell* v. *Baldwin et al.* Blake V.C. stated:[136]

> It is true that, at times, the court will decree partition of a part and sale of the balance, but this is not done except in cases where this uncommon mode of dealing with the property is clearly beneficial to all.

Here there was no problem in partitioning the land, the issue was whether it was possible to divide the water power in the river.

V. PARTIES BIDDING AT SALE

Section 6 of the Partition Act, 1868 provides as follows:

> On any sale under this Act the Court may, if it thinks fit, allow any of the Parties interested in the Property to bid at the Sale, on such Terms as to Nonpayment of Deposit, or as to setting off of accounting for the Purchase Money or any Part thereof instead of paying the same, or as to any other Matters, as to the Court seem reasonable.

With regard to the Partition Act, 1868, s. 6, the commentary and cases referred to in 21 Halsbury's Law of England, 1st ed. at page 864 are a sufficient discussion of the section. I have read all of the cases referred to and can add no useful comments. If one recalls the comments of Lord Hatherley L.C. in *Pemberton* v. *Barnes*[139] as to the objects of the Partition Act, 1868 it seems appropriate that all parties be allowed to bid.

VI. ALIQUOT SHARES AND OWELTY OF PARTITION

In the *Town of Morganton* v. *Avery*[140] Mr. Justice Brown of the North Carolina Supreme Court stated:

> The power to adjudge owelty has been from time immemorial a power exercised by the

[135] *Id.* at 199.
[136] *Gilbert* v. *Smith* (1879), 11 Ch. D. 78 at p. 81.
[137] (1852), 10 U.C.Q.B. 104.
[138] (1873), 3 O.A.R. 6 at 18.
[139] (1871), L.R. 6 Ch. App. 685.
[140] (1920), 103 S.E. 138 at 139.

> courts to adjust the equities arising out of the relation of the parties to the property to be divided. It was not a creature of the statute, but the lien was declared on the more valuable dividend of the property partitioned by the courts of equity to avoid the injustice of taking from one and giving to another without 'an equivalent or a sufficient security for it'.

In Coke upon Littleton[141] an example of owelty of partition is given.

> Also, if two meses descend to two parceners, and the one mease is worth twenty shillings per annum, and the other but ten shillings per annum, in this case partition may be made between them in this manner; to wit, the one parcener to have the one mease, and the other parcener the other mease; and she which hath the mease worth 20 shillings per annum and her heires shall pay a yeerely rent of five shillings issuing out of the same mease to the other parcener and to her heires for ever, because each of them should have equality of value.

Halsbury's Laws of England[142] points out that the expression "owelty of partition" is now obsolete and the expression now used is compensation for equality of partition.

In the case of *Porter* v. *Lopes*[143] the plaintiff sought to partition an estate which consisted of a manor house and 185 acres. The plaintiff wanted the partition to be made so that the manor house and part of the land contiguous thereto would be allotted to him; he offering to pay what should be necessary for equality of partition. Jessel M.R. stated:[144]

> The property cannot be partitioned in the way he suggests. It can be divided in the way he suggests, but the result of dividing it will be that, inasmuch as the mansion-house and the fifty-eight acres of land are worth considerably more than the remainder of the property, a sum must be paid for equality of partition . . . Now, that is a modified sale; it is a sale of part. You have, therefore, a property which avowedly cannot be easily partitioned, because that is not partition pure and simple, but is partition plus sale.

The Master of the Rolls directed a sale under section 4 of the Partition Act.

It must be noted that in the earlier case of *Roebuck* v. *Chadebet*[145] plaintiff sought a decree for a partition of part of the property and for a sale of the rest under the Partition Act, 1868. Counsel for the plaintiff, Mr. Wickens, argued that two bills might have been filed, one praying for a partition and the other for a sale and that the court would have had jurisdiction to make decrees according to the prayers of the two bills. Lord Romilly M.R. said he thought it could be done and made the decree as asked.

In *Rowe* v. *Gray*[146] the infant defendant objected to sale of the property, 10 leasehold properties, as requested by the plaintiff who was entitled to one moiety of the property. Hall V.C. stated:[147]

> If a partition were directed instead of a sale, it is reasonably clear that it could not be effected without some payment being made for equality of partition; and where the money to make that payment is to come from in the case of an infant, I do not know, nor do I see why the Plaintiff should be required to find such money. The case, then, is one to which the 4th section of the Act of 1868 is applicable; . . .

In the very early case, *Earl of Claredon and Mr. Bligh and his Wife versus Hornby*[148] two thirds of the estate, consisting of a great house and

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[141] Co. Litt. [169a] s. 251.

[142] *21 Halsbury's Laws of England* 811 (1st ed.).

[143] (1877), 7 Ch. D. 358.

[144] *Id.* at 366.

[145] (1869), L.R. 8 Eq. 127.

[146] (1877), 5 Ch. D. 263.

[147] *Id.* at 265.

[148] (1718), 1 P. Wms. 446; 24 E.R. 465.

garden belonged to Lady Bligh and one third to the defendant. The defendant Hornby insisted on having one third of the house and gardens. Lord Chancellor Parker refused to depreciate the value of the manor house by such a division and decreed that the defendant should have his one third out of a liberal allowance of the rest of the estate. The Lord Chancellor stated:[149]

> If there were three houses of different value to be divided among three, it would not be right to divide every house, for that would be to spoil every house; but some recompence is to be made, either by a sum of money, or rent for oweltry of partition, to those that have the houses of less value. It is true, if there were one house, or mill, or advowson to be divided, then this entire thing must be divided in manner as the other side contended; *secus* when there are other lands, which may make up the defendant's share.

The following is found in Halsbury's Laws of England:[150]

> A strict partition must involve a division of the property into portions which are aliquot parts of the whole. In some cases, however, the partition may be made to suit the convenience of the property and of the co-owners by a division into unequal parts, not necessarily aliquot parts of the whole, those owners who take a larger share than their due making compensation in money or other property to those who take less than their due. This compensation is called money or compensation for equality of partition.

In *Peers* v. *Needham*[151] the Master of the Rolls, [Sir John Romilly] stated:

> . . . nor is it necessary that an aliquot share of each species of property be allotted to each of the parties, nor, as in this instance, where it is household property that one third of each of the two houses beallotted to each tenant in common.

In *Hobson* v. *Sherwood*[152] one out of the five tenants in common wanted partition. Lord Langdale M.R. said:[153]

> The next question is, whether all the shares are to be divided, when all the other parties desire their shares to be kept together. At present I do not see any serious objection to allotting one-fifth to the plaintiff only; but I am not aware that it has ever been done before . . .[154]

In *Richardson* v. *Feary*[155] Cozens-Hardy, counsel for the defendants, argued that as between the owners of the six eighths, a partition ought not to be made as they do not desire it. His Lordship North J. inquired of counsel what right they have to cut off a corner of the property and give it to the plaintiff. His Lordship stated:[156]

> I see no difficulty in allotting seven parts to the owners of seven undivided eights as tenants in common. If all the persons interested in one eighth agree with all those who are interested in another eighth that they will do so, they can remain tenants in common of those two eights.

An interesting New Brunswick case is *Jacob Brill Huestis* v. *Wm. M. Huestis et al.*[157] a decision of Sir Douglas Hazen C.J. The headnote reads:

> A farm was purchased by three brothers and the deed taken in their names and in the names of two other brothers. The price was $1,300.00, of which amount $350.00 was paid in cash, and the balance secured by a mortgage. One of the brothers who had paid no part of the purchase price brought an action for partition, and the Court found that

[149] *Id.* at 447.

[150] *21 Halsbury's Laws of England* 811 (1st ed.).

[151] (1854), Beav. 316 at 320; 52 E.R. 371.

[152] (1841), 4 Beav. 184; 49 E.R. 309.

[153] *Id.* at 186.

[154] This case referred to as good law in *Devereux* v. *Kearns et al.* (1886), 11 P.R. 452.

[155] (1888), 39 Ch. D. 45.

[156] *Id.* at 49.

[157] (1928), 54 N.B.R. 1.

there had been a gift to him of an interest in the farm, that the farm had been improved since it was purchased, although the plaintiff had not assisted in this work, and ordered that the defendants pay the plaintiff $450.00 within thirty days for his interest in the property, and on failure to do so, the property be sold subject to a lien for $950.00, the amount of the mortgage which had been paid by one of the brothers and the amount realized paid into Court subject to further directions. The Court found that the plaintiff had no interest in another lot which was in the names of two of his brothers and a sister. As each party had succeeded in part, no costs were allowed.

No authorities are referred to.

VII. ACCOUNTING (OCCUPATION RENT, WASTE, REPAIRS AND IMPROVEMENTS)

A. Common Law

At law the court confined its relief merely to a partition but in equity if there were proper cause; an account of the rents and profit would be directed, *Lorimer* v. *Lorimer*.[158]

The primary considerations in an accounting between co-owners are occupation rent, improvements, repairs and waste.

The law's position with regard to occupation rent is set out succinctly by Vice Chancellor Kindersley in *Griffies* v. *Griffies* where he states:[159]

> As each party is entitled to enter upon the whole property, there can be no claim by one tenant in common against another for occupation rent.

This statement of the law has been affirmed and further explained by Mr. Justice Salmond in *McCormick* v. *McCormick*. He stated:[160]

> Considerations of justice and convenience have led to the recognition of the general principle that one co-owner cannot by failing to exercise his right of use and occupation establish a claim for compensation against another co-owner for the lawful exercise of his own equal right.

In the *McCormick* case Salmond J. also summarized the only cases in which one co-owner could recover compensation from another who has had the sole use of the property. These situations are four in number and are as follows:[161]

1. When one co-owner has actually excluded the other and wrongfully prevented him from having the use of the common property. In such a case the excluded owner can sue in ejectment and for mesne profits.
2. When one co-owner has received more than his share of the rents or other revenues of the common property. In such a case he is liable under the statute of 4 Anne, c. 16, s. 27, to account to his co-owner for the excess so received above his own share. In *Henderson* v. *Eason*, however, it was decided that this statutory provision applies only to rents or other revenues actually received by a co-owner from some tenant or other third party, and does not apply to the profits which a co-owner may make by his own use and occupation of the common property.
3. When one co-owner occupies and uses the common property under some agreement with the other whereby the occupying owner becomes the bailiff or agent of the other so that he must account to him for his share of the profits.
4. When one co-owner occupies the common property as the tenant of the other's share, and owes rent to him accordingly. In such a case he is answerable to the other, not only for the continuance of the agreed tenancy, but also during any period during which he holds over after the determination or expiry of that tenancy.

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[158] (1820), 5 Mad. 363; 56 E.R. 934.

[159] (1863), 8 L.T.R. 758.

[160] [1921] N.Z.L.R. 384 at 385.

[161] *Id.* at 385.

B. The Statute of Anne

The Statute of Anne,[162] is the law in Alberta and provides as follows:

> [And be it enacted by the Authority aforesaid That from and after the said First Day of Trinity Term Actions of Account shall and may be brought and maintained against the Executors and Administrators of every Guardian Bailiff and Receiver and also by one Joynt Tenant and Tenant in Common his Executors and Administrators against the other as Bailiff for receiving more than comes to his just Share or Proportion and against the Executor and Administrator of such Joynt Tenant or Tenant in common and the Auditors appointed by the Court where such Action shall be depending shall be and are hereby impowered to administer an Oath and examine the Parties touching the Matters in Question and for their Pains and Trouble in auditing and taking such Account have such Allowance as the Court shall adjudge to be reasonable to be paid by the Party on whose Side the Balance of the Account shll appear to be,]

The judgment of Baron Parke in *Edward Henderson, Executor Etc., of Edward Eason, Deceased,* against *Robert Eason*,[163] has become the definitive statement on the interpretation of the Statute of Anne. Essentially, the section applies where one tenant in common receives money or some other benefit from a third person, to which the co-tenants are entitled simply by reason of their being co-tenants. Under the Statute the co-owner becomes a bailiff by virtue of receiving more than his just share. He is not responsible however, as a bailiff at common law, for what he might have made without his wilful default. In the case of *Osachuk* v. *Osachuk*[164] the Manitoba Court of Appeal considered s. 77 of the Queen's Bench Act, R.S.M. 1970, c. C-280 which to all intents and purposes adopts the Statute of Anne in respect of actions of account between co-tenants. In that case one of the co-owners who occupied the lower floor of the premises failed to rent out the upper floor and no rents were received. The other co-owner in a partition action claimed for one-half the value of the rents, which but for the wilful neglect or default of the respondent, might have been received from the rental of the upstairs suite. The Court held that there was no liability to account for what might have been received.

C. The Fact That Partition is in Equity

In many cases the courts of equity, in partition suits, were in fact able to impose terms whereby the tenant in possession was required to make an allowance to his co-owner for his possession.

In the case of *Teasdale* v. *Sanderson*[165] one of several tenants in common instituted proceedings for partition and claimed also an account of the rents and profits received by those who had been in exclusive possession of certain parts of the estate. One of the defendants claimed a set-off for the improvements he had made on a part of the property not occupied by him. Sir John Romilly M.R. stated:[166]

> I think that these accounts must be reciprocal, and, unless the defendant is charged with an occupation rent, he is not entitled to any account of substantial repairs and lasting improvements on any part of the property.

Mr. Justice North in *Re Jones, Farrington* v. *Forrester* explained this statement of the Master of the Rolls:[167]

> That seems to me to shew that he was not to be allowed to have the equitable assistance of the court to get any part of his expenditure repaid, unless he was willing to be

[162] 4 Anne, c. 16, s. 27.

[163] (1851), 17 Q.B. 701; 117 E.R. 1451.

[164] (1971), 18 D.L.R. (3d) 413.

[165] (1864), 33 Beav. 534; 55 E.R. 476.

[166] *Id.* at 534.

[167] [1893] 2 Ch. 461 at 478.

> charged with what he could not by the rules of law, as distinguished from equity, be made liable for. It was merely a case of imposing terms: a man who comes into equity must do equity; but I do not read it as being a decision that you could only have an allowance for repairs where there has been an occupation rent.

The whole issue of an accounting for improvements and repairs ties in nicely with claims for occupation rent. As illustrated earlier[168] there are strict limits on the situation where a co-owner may make a claim for occupation rent. If the co-tenant fails to bring himself within the class he is entitled to no allowance from his co-tenant for the latter's occupation of the premises. The occupant on the other hand, had no remedy at law for expenditures made for repairs or improvements and his only relief was in a partition suit in equity, where he must of course do equity. The judgment of Lord Justice Cotton in *Leigh and Another* v. *Dickson*[169] is instructive on this point.

> . . . 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 improvments 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.

An allowance was made for expenditures incurred in improving the land in the very early case of *Swan* v. *Swan*.[170]

The formula for calculating the allowance to be made for repairs and improvements is explained fully by Mr. Justice North in *Re Jones, Farrington* v. *Forrester*.[171] In that case one of the tenants had made improvements costing £900. North stated:[172]

> [The owners of the moiety] . . . are entitled to an inquiry to what extent the present value of the property has been increased by the expenditure made in 1870. It may turn out that the present value of the increase is £1,200, and in that case the charge can not be for more than £900. It may be that the present value of the increase is less than that—e.g., only £600—and in that case only £600 can be allowed out of the proceeds of sale, and the difference would have to be borne by the owners of the charge.

A recent example of this accounting formula at work is the Ontario case of *Grant* v. *Grant*[173] where a defendant was granted no allowance for an oil burner he had installed in that it had not increased the value of the premises at the sale.

With regard to a claim for improvements and repairs it is important to note the distinction between a co-tenant in actual occupation of the premises and one in receipt of the whole rents and profits. In the former case the rule is, as explained earlier, no claim unless he wishes to submit to occupation rent. In the latter case the courts have always allowed his

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[168] *McCormick* v. *McCormick supra* n. 160.

[169] (1884), L.R. 15 Q.B. 60 at 67.

[170] (1820), 8 Price 518; 146 E.R. 1281.

[171] [1893] 2 Ch. 461.

[172] *Id.* at 479.

[173] [1952] O.W.N. 641.

claim for repairs and lasting improvements because he must account for rents and profits actually received.[174]

Three additional cases will round out the discussion of when allowances are made for improvements.

In *Lasby et al.* v. *Crewson et al.*[175] a tenant in common in remainder, went into possession under agreement with the life tenant and made substantial improvements. After acquiring possession as a tenant in common he sought partition and an accounting for his improvements made. It was held that his improvements were the improvements of the life tenant and thus enured to the general benefit of the estate.

In *Re Young, Brickwood* v. *Young*[176] the court ruled that no allowance could be made unless the court of equity was dealing with the whole fund and therefore in a position to enforce counter equities against the claimant. In that case the claimant had already been paid his one-quarter interest in the sale proceeds. The case also is helpful in considering the rights of a co-tenant who claims for improvements effected by his predecessor. He can, of course, stand no higher and thus has no entitlement unless he is willing to bring in the sale price which necessarily included the value of improvements.

In *Newall* v. *Johnston*[177] the defendant had sole occupation under a lease from his co-tenant. One of the terms of the lease required the defendant to comply with all fire regulations, one of which regulations called for fire escapes to be installed. On a subsequent claim for lasting improvement made, he was denied recovery because of the lease, it would have been otherwise if there had been no such lease.

D. The Presumption of Advancement

Claims for an accounting in recent Canadian cases deal exclusively with issues between husband and wife. The matrimonial relationship gives rise to the presumption of advancement and the issues in the cases are whether or not certain payments by the husband are to be considered gifts to the wife.

At the outset, it must be recalled that suits for partition are within the equitable jurisdiction of the courts and the facts therefore must be closely scrutinized. The English case of *Dunbar* v. *Dunbar*[178] for example, has continually been distinguished on the facts by Canadian Courts.[179]

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[174] See In *Re Curry* v. *Curry* (1898), 25 O.A.R. 267.

[175] (1892), 21 O.R. 255.

[176] (1905), 21 N.S.W.W.N. 257.

[177] (1904), 23 N.Z.L.R. 406.

[178] [1909] 2 Ch. 639.

[179] In that case, plaintiff and defendant were married in 1896 and in 1897 defendant husband purchased a home in their joint names for £654, paying £354 in cash and mortgaging the balance. The mortgage was executed by both husband and wife. In 1898 the parties separated, in 1905 the defendant paid off the mortgage and took a reconveyance in both their names and finally in 1908 the plaintiff obtained a decree absolute whereby the marriage was declared to have been null and void. In her subsequent suit for partition Mr. Justice Warrington held that the doctrine of advancement applied to the purchase of 1897. The issue then became whether the wife was to share in the £300 mortgage payment. The defendant argued: 1. the wife only acquired an interest in the equity of redemption under the presumption of advancement and; 2. he was entitled to keep the debt on foot in that they were both liable on the mortgage. His Lordship held at page 646: "In my opinion the true inference to be drawn from the facts is that it was he, as he says, who bought the house, that it is immaterial that a part of the purchase money was raised by mortgage, and that in form the wife made herself liable to the mortgagee for that £300. The real substance of it was that it was as much a purchase by him as if he had so many sovereigns in his pocket. The repayment of the mortgage money and taking the reconveyance were nothing more than providing the rest of the purchase-money, though it was done at a subsequent date." The *Dunbar* case has been distinguished on the facts by Canadian courts who are loathe to make a finding of gift in similar situations. In *Spatafora* v. *Spatafora*, [1956] O.W.N. 628 Cushing, Master stated at page 632: "I hold that in the absence of an agreement, or circumstances manifesting a different intention on the part of the husband, where an equity of redemption is purchased in these circumstances and the wife acquires a beneficial interest as joint tenant with her husband by reason of a presumption arising of gift by way of advancement, she acquires a half-interest

In *Mastron* v. *Cotton*[180] the husband purchased a house which was placed in joint tenancy with his wife. They lived in the house together for four months following which husband left and wife remained the sole occupant. The parties were divorced five years later and husband then brought proceedings for partition. The Ontario Court of Appeal held that the wife had intended no gift to her husband and she was allowed to claim for all payments made on the purchase money or on principal monies secured by the mortgage irrespective of whether such payments were made before or after divorce and also all payments on account of interest, taxes and repairs during her period of occupation if she elected to submit to an allowance for use and occupation.

In *Szuba* v. *Szuba*[181] the wife left the matrimonial home while it was under construction and brought a partition action. Marriott, Master, disallowed the husband's claim for an accounting of payments he made after the separation in respect of improvements made prior thereto and also for personal obligations he incurred to purchase materials prior to the separation and which were still unpaid at the time of the suit. The Master relied on *Dunbar* v. *Dunbar*[182] for the proposition that the gift was made at the time the property was acquired rather than when the improvement was paid for.

In the British Columbia case of *Harron* v. *MacBean*[183] husband and wife were joint tenants of a house under construction. Following the separation of the spouses, the husband, desiring to complete the house, requested a quit claim deed from his wife who refused. He subsequently completed the house, his wife joining in a mortgage to raise funds. Mr. Justice McInnes in the wife's suit for partition allowed the husband's claim for an allowance for monies spent in completing the house. His Lordship stated:[184]

> In the circumstances here it is evident that it was the intention of the defendant that he and his wife would own the property equally between them and I find that that intention continued certainly until he went to his wife after the separation in January, 1950, and asked for the quit claim deed. That action on his part does not in my view destroy or revoke the gift he made to her and her one-half interest continues except that as from the date of the separation the husband will be entitled to be allowed the costs of any work he did or monies he expended in completing the property.

There are certain statements of MacFarlane J. made in *Andrews* v. *Andrews*[185] that ought to be mentioned. In that case one of the issues was as to the mortgage payments made by the husband while his wife and children were in occupation for the period between separation and an order for support. His Lordship referred to the *Szuba* and *Dunbar* cases and stated:[186]

> The payments made by the husband . . . were in satisfaction of his legal obligation to maintain and support his wife and children.

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only in the equity of redemption acquired, and on a partition, or sale in lieu thereof, her interest in the lands or the proceeds should be computed as half of the equity in such lands and not as half of the total resale price." . . . See also the recent case of Baker v. Baker, [1976] 3 W.W.R. 492 (B.C.S.C.) which further advances the view that the presumption of advancement does not apply to any payments made by the husband with respect to the property following the separation of the spouses.

[180] [1926] 1 D.L.R. 767.

[181] [1951] O.W.N. 61.

[182] *Supra*, n. 178.

[183] (1957), 22 W.W.R. 68.

[184] *Id.* at 70.

[185] (1970), 7 D.L.R. (3d) 744.

[186] *Id.* at 748.

His Lordship[187] made an obiter comment about occupation rent when he stated:

> . . . and even if it had been made [a claim for occupation rent] would not have been successful because such occupation was necessary for the proper maintenance and support of the plaintiff and the children of the marriage.

E. Waste

Tenants in common have a right to exercise acts of ownership over the whole property and this has led to many cases involving waste. In *Hole* v. *Thomas*[188] the plaintiff sought to restrain the defendant from cutting trees on the property held in common. Lord Chancellor Eldon stated:[189]

> A case of malicious destruction may be a ground: but a great part of the subject of this motion is pure equitable waste. I have no objection to grant an injunction against cutting saplings and any timber trees or underwood at unreasonable times, . . . for that is destruction.[190]

The policy of the law is explained by Willes J. in *Jacobs* v. *Seward*:[191]

> It appears that all the defendant did was to take, in the ordinary course, the profits of the land; but for that no action of wrong can be brought; for if such an action could be maintained, the result would be that if two persons were tenants in common of two fields, and each took the whole profit of one, they would each have a right of action against the other for trespass in taking the whole profits of the one field. It is laid down, sometimes on the ground of public policy, and sometimes as *ex necessitate rei*, that the only remedy of a tenant in common who has not had his share of the profits of the common property, is by an action of account.

The action of account would be based on the Statute of Anne[192] discussed earlier with regard to occupation rent. There is, however, some difficulty with the application of that section to acts of waste.

In *Griffies* v. *Griffies*[193] Kindersley V.C. stated:

> As each party is entitled to enter upon the whole property, there can be no claim by one tenant in common against another for an occupation rent. As to cutting down trees, and the other acts of waste alleged in the bill, each tenant in common has a right to exercise acts of ownership over the whole property, and no charge can therefore be sustained in respect of such an act.

The report of the case is very short but elsewhere in his judgment the Vice Chancellor noted that both parties concurred in asking for an account of the rents and profits received by either of them from strangers. This fact was not raised in the judgment of Chancellor Spragge in *Rice* v. *George*.[194] In that case one of the claims in the partition action was in respect of the value of timber cut and sold by one of the parties. The Chancellor quoted the passage from the *Griffies* case and continued:

> But for the case of *Griffies* v. *Griffies* I should have more doubt whether a tenant in common cutting timber would not be liable to a account under the Statute of Anne. Section 27 gives an action of account, *inter alia*, by one joint tenant and tenant in common, 'against the other as bailiff, for receiving more than comes to his just share or proportion.' Conceding that under *Henderson* v. *Eason*, a tenant in common is only chargeable where he actually receives from a third person, I do not, I confess, see very clearly that where he receives payment for timber sold off the land, it is not within the Statute of Anne.

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[187] *Supra*, n. 185 at 749.

[188] (1802), 7 Ves. Jun. 589; 32 E.R. 237.

[189] *Id.* at 590.

[190] See *Martyn* v. *Knowllys*, [1799] T.R. 145; 101 E.R. 1313 to like effect.

[191] (1868), L.R. 4 C.P. 328 at 329.

[192] *Supra*, n. 162.

[193] (1863), 8 L.T. 758.

[194] (1873), 20 Gr. 221 at 223.

Vice Chancellor Blake took the whole matter well in hand in the later case of *Curtis* v. *Coleman*.[195] While the Vice Chancellor did not refer to authorities in his judgment the early cases were all referred to in argument. His judgment was as follows:

> Blake V.C.—I have looked into the authorities cited to me in this case, and am of opinion that where one tenant in common files his bill against his co-tenant, for a partition and an account of the profits of the estate in question, the plaintiff is entitled to such account where it is shewn that the defendant has received a greater share from the estate than that to which he is entitled, by the sale of that which composes the property, whether it be turf, brick-clay, plaster or other such material. Here there is an actual receipt from a third party by one of the co-tenants by a sale of the plaster forming the material of which the land is composed. If one tenant in common is responsible to his co-tenant for his share of the rents received from one who enjoys, without deteriorating the premises, I think it is *a fortiori* that such tenant in common should be made liable, where the amounts received by him are obtained by the eating away of the estate.

VIII. LIMITATION PERIODS

A. Common Law

Unity of possession applies to all co-owners, whether joint tenants, coparceners, or tenants in common. The effect of this unity of possession is that the possession of any co-tenant is the possession of the other or others of them, so as to prevent the Statute of Limitation from affecting such other co-tenants. Likewise, entry by one co-tenant when not adverse to his co-tenant enured to the benefit of all.[196]

B. Real Property Limitations Act

This was the common law position until the Real Property Limitation Act (1833), 3 and 4 Will 4 c. 27 s. 12. That section provides as follows:

> That when any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last mentioned person or persons or any of them.

Mr. Justice Patterson in *Woodroffe* v. *Daniell and Others*[197] commented on the statute as follows:

> Since the passing of that statute, therefore, the possession of the land by one coparcener cannot be considered as the possession of his coparcener; nor, consequently, can the entry of one have the effect of vesting the possession in the other.[198]

A very similar section has been adopted by the Ontario Limitations Act.[199] That section, or a predecessor has been relied on in numerous cases,[200] to prevent the possession of the tenant in common from preserving the rights of his co-tenant.

Section 12 of the Real Property Limitation Act,[201] was continued in force by s. 9 of 37 & 38 Vict. c. 57, an Act for the further limitation of actions and suits relating to Real Property, 1874. This latter Act became

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[195] (1875), 22 Gr. 561.

[196] See also, *Harris* v. *Mudie* (1882), 7 O.A.R. 414.

[197] (1846), 15 M. & W. 769 at 793; 153 E.R. 1061.

[198] See *Corea* v. *Appuhamy and Another*, [1912] A.C. 230.

[199] R.S.O. 1970, c. 246, s. 11.

[200] *Whitehead* v. *Whitehead*, [1946] 2 D.L.R. 737; *Pflug and Pflug* v. *Collins*, [1952] 3 D.L.R. 681.

[201] 3 & 4 Will 4 c.27.

the law in Alberta by virtue of the Limitation of Actions Act.[202] The section ceased to be the law in Alberta in the 1935 revision when the Uniform Act was adopted as R.S.A. 1935, c. 8.

C. Limitation of Actions Act

The Limitation of Actions Act,[203] provides in part as follows:

> 18. No person shall take proceedings to recover land except
>
> (a) within 10 years next after the right to do so first accrued to such person (herein after called the "claimant"), or
>
> (b) if the right to recover first accrued to a predecessor in title, then within 10 years next after the right accrued to such predecessor.
>
> 19. Where in respect of the estate or interest claimed the claimant or a predecessor has
>
> (a) been in possession of the land or in receipt of the profits thereof, and
>
> (b) while entitled thereto
>
> (i) been dispossessed, or
>
> (ii) discontinued such possession or receipt,
>
> the right to take proceedings to recover the land shall be deemed to have first accrued at the time of the dispossession or discontinuance of possession or at the last time at which any such profits were so received.

Section 19 of the Alberta Act is on all fours with the third section of the Imperial Act. It is not within the scope of this paper to pursue the cases dealing with dispossession or discontinuance of possession. Section 3 of the Imperial Act was discussed in *Leigh* v. *Jack*,[204] a decision of the Court of Appeal and *Littledale* v. *Liverpool College*,[205] a case also in the Court of Appeal where Lindley M.R. stated:[206]

> When possession or dispossession has to be inferred from equivocal acts, the intention with which they are done is all-important . . .

In *Handley and Others* v. *Archibald*[207] a partition action, on appeal from the Supreme Court of Nova Scotia, the Supreme Court of Canada considered the Nova Scotia Statute of Limitations which adopted the provisions of the Imperial Statute.[208] The Chief Justice, Sir Henry Strong, stated:[209]

> I assume in the appellant's favour, without meaning to decide it, that the Statute of Limitations is a good defence to an action for partition.

There is now no doubt that the Statute of Limitations is a good defence to an action for partition; even against a spouse.[210] In *Tolosnak* v. *Tolosnak*[211] a decision of the Ontario High Court, the spouses became joint owners in 1939 and in 1943 the husband acquired sole possession when his wife left him because of his cruelty. Following divorce, the wife

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[202] R.S.A. 1922, c. 90, s. 3.

[203] R.S.A. 1970, c. 209.

[204] (1879), 5 Ex. D. 264.

[205] [1900] 1 Ch. 19.

[206] *Id.* at 23.

[207] (1900), 30 S.C.R. 130.

[208] 3 and 4 Will 4 c. 27.

[209] *Supra*, n. 207 at135.

[210] In the recent Alberta case, *In the Matter of the Partition Act*, 1868, *Deal* v. *Deal* (1975), 19 R.F.L. 28, the husband did not reside in the matrimonial home, which was registered in his name and that of his wife, after 1956. In 1968 the wife divorced her husband on the grounds of separation, and in 1973 the husband sought partition or sale of the matrimonial home. The wife raised the Limitation of Actions Act but the court held she had failed to show any adverse possession and the husband succeeded in his claim for partition. It is unclear why the wife had to prove adverse possession in light of the wording of s. 19 of the Act. I have not had an opportunity to pursue the cases which may have interpreted 19(b)ii but query whether that subsection is equivalent in meaning to s. 12 of 3 & 4 Will 4.

[211] (1957), 10 D.L.R. (2d) 186.

commenced a partition action in 1956 and an order of sale was made. In the subsequent case brought by the husband for a declaration that he was sole owner it was held that the issue was *res judicata* in that the wife was found to have an interest in the land by reason of the order for sale in the partition action. It was said:[212]

> . . . no one can compel partition of lands unless he has, or represents someone who has, an interest in the lands.

There was, however, no issue for Mr. Justice David with regard to the husband's claim based on the Statute of Limitations. His Lordship stated:[213]

> Her cause of action ceased in May or June 1953, as the plaintiff has been in possession since 1943 to the exclusion of all others, including the defendant. I am of opinion that the plaintiff should succeed with his action if the judgment for sale that the defendant obtained in the partition proceedings does not estop him, or that the matter is not *res judicata*.

The possession necessary to bar the title of the true owner has been discussed in numerous cases. Generally it is necessary to show an actual possession, an occupation exclusive, continuous, open or visible and notorious, for the limitation period. "It must not be equivocal, occasional or for a special or temporary purpose."[214]

IX. PROCEDURE

Under Rule 410(i) of the Alberta Rules of Court proceedings to compel partition of land may be commenced by originating notice. With the removal of the monetary limitation on the jurisdiction of the District Courts[215] they too, have general jurisdiction in partition matters under section 25(c) of the District Courts Act.[216]

The plaintiff must precisely allege his own interest in the lands, for no partition can be effected unless the parties are interested in ascertainable shares.[217] By reason of the Partition Act, 1868, s. 9 it is not necessary to join as defendants all persons interested in the land, and the defendants named may not object for lack of parties. By the same section the Court may direct inquiries as to the nature of the property, the persons interested therein, and other matters, as it thinks necessary or proper with a view to an order of partition or sale being made on further consideration.[218] The same section further provides that all necessary parties shall be served with notice of the decree or order on the hearing, and after such notice shall be bound by the proceedings.

The thrust of the Imperial Partition legislation pertaining to procedure, is directed at: ascertaining who are the interested parties in the land; providing for persons under disability, such as infants; disposition of the proceeds of sale; and for substituted service of notice of the proceedings. It would appear that these matters are adequately dealt with by the Alberta Rules of Court.[219]

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[212] *Id.* at 191.

[213] *Id.* at 189.

[214] *Sherren* v. *Pearson* (1888), 14 S.C.R. 581 at 585.

[215] S.A. 1971, c. 28, s. 4.

[216] R.S.A. 1970, c. 111 as amended.

[217] *Agar* v. *Fairfax. Agar* v. *Holdsworth* (1811), 17 Ves. Jun. 533; 34 E.R. 206.

[218] *Mildmay* v. *Quicke* (1875) L.R. 20 Eq. 537, Sir George Jessel M.R. said at page 538: ". . . that if all persons interested were parties to the cause a decree for -sale could be made at the hearing; but if they were not all parties, then the 9th section of the Partition Act, 1868, applied, and a sale could only be ordered 'on further consideration'."

[219] See particularly rules 495-498 dealing with the sale of real estate.