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PARTITION AND SALE

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The Institute of Law Research and Reform was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Its office is at 402 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5. Its telephone number is (403) 432-5291.

PARTITION AND SALE

I

INTRODUCTION

This study of the law of partition and alternative methods of termination of co-ownership arose as a consequence of the Institute's work on Matrimonial Property. The matrimonial home is the most common, but not the only, example of property which is the subject of co-ownership in Alberta.

Historically, there are four kinds of concurrent estates in land. These are, joint tenancy, tenancy in common, co-parcenary and tenancy by the entireties. At common law the joint tenancy was distinguished by the four unities; unity of title, time, interest and possession. One other characteristic that distinguished a joint tenancy was the right of survivorship, or jus accrescendi, by which, if one joint tenant dies without having obtained a separate share in his lifetime, his interest is extinguished and accrues to the surviving joint tenant. A tenancy in common is characterized only by the unity of possession and there is no right of survivorship. Co-parcenary, which is now extinct in Alberta, arose when land descended to two or more daughters of a deceased owner. A tenancy by the entireties arises by a conveyance to persons who are husband and wife. In substance, it may conveniently be described as an "unbreakable" joint tenancy.

Alberta and Saskatchewan are the only two provinces in Canada which do not have revised legislation providing for termination of co-ownership. The current law in Alberta is contained in three English statutes which are no longer in force in England, the Law of Property Act, 1925, having replaced co-ownership with a form of statutory trust. The three statutes are:

1. 31 Henry VIII, c. 1, an Act for Joint Tenants and Tenants in Common. This Act provides that co-tenants may be compelled to make partition (Appendix I).

2. 32 Henry VIII, c. 32, Joint Tenants for Life or Years. This Act extends the 1539 Act to co-tenants for life or for a term of years (Appendix II).

3. 31, 32 Vict., c. 40, The Partition Act, 1868. This Act permits the court to order sale instead of partition (Appendix III).

In reference to these statutes we shall call them the 1539, 1540, and 1868 Acts.

1. Purpose of the Remedy

Co-owners often buy or inherit property without making an agreement as to what will happen if they disagree over its use or disposition. It is in their interest that the law provide a means by which one or more of them can bring the relationship to an end. It is also in the public interest that the law provide a means by which the disuse of land, due to disagreement by the owners, can be brought to an end. The Partition Acts were intended to accomplish these objectives.

Partition is one way to terminate concurrent ownership of land. Before the reign of Henry VIII co-owners could agree to partition by private arrangement but only co-parceners had a legal right to demand partition. The preamble to the 1539 Act eloquently states the need for the remedy as between joint tenants and tenants in common.

Partition physically divides the land between the

co-owners. However, a simple physical division is not always possible and in some cases partition has caused great hardship. There is a reported case on partition where a house was divided and the plaintiff got neither chimneys nor stairs. It was because of problems of that kind that the Partition Act, 1868 was introduced. It provides that the court in appropriate circumstances may order a sale of the property rather than a physical division. It should be noted that the Act of 1868 only confers upon the court a power to order sale whereas the right to partition is grounded in the 1539 and 1540 Acts of Henry VIII.

The present law is unsatisfactory for two reasons. First, it is inconvenient to have to refer to English statutes; and second, its form and content can be improved.

Recommendation #1

That the Legislature enact a statute providing for the termination of the co-ownership of land.

2. Form of the Remedy

(1) Existing law

The 1539 and 1540 Acts gave the court power to make a physical division of the land between co-owners who were unable by agreement to make a division of the land or to agree to a sale. As we have said, however, the single remedy of physical partition was sometimes insufficient to allow the court to make a just and proper arrangement between the parties, and the Partition Act, 1868 was passed to make up for the deficiency. Partition remained the primary remedy but sections 3, 4 and 5 of the 1868 Act gave the court power to order sale of the property and gave

guidance to the courts as to when sale might be ordered. We will summarize the three sections. Each applies only in a suit for partition, where, if the Act had not been passed, only a decree for partition might have been made; and the effect of each is to allow the court to direct a sale of the property and a distribution of the proceeds. The effect of the sections is as follows:

Section 3

> If sale would be more beneficial than physical division of the property, the court has a discretion to order it. (The word "beneficial" relates to the nature of the property, the number, absence, or disability of parties, or "any other circumstances.")

Section 4

> If the owner of a half or greater interest asks for sale, the court must give it unless it sees good reason to the contrary.

Section 5

> If a party asks for sale, the court has a discretion to order it unless another party undertakes to buy the interest of the first in which latter event the court may order a valuation of the applicant's share and give necessary or proper directions for its sale to the party who so undertakes.

Section 5 raises some questions of construction. Jessell M.R. in Drinkwater v. Ratcliffe (1875), 20 Eq. 528

said that it applies only if Sections 3 and 4 do not, that is, if the court sees no reason to prefer a sale over physical division, and if the applicant does not have a half interest or more; but remarks in the House of Lords in Pitt v. Jones (1880), 5 App. Cas. 651 appeared to contemplate an application under Section 5 in the case where Section 3 or 4 may be available. Remarks in the latter case suggest that the applicant can withdraw his application under Section 5 at any time before the respondent gives the undertaking to buy, and that he might even decline to accept the undertaking. If the section requires both a willing seller and a willing buyer it adds little to the court's powers, but it was recently applied in Powell v. Powell (1976), 21 R.F.L. 234 (B.C.S.C.) where the court ordered the applicant wife to sell her interest in the matrimonial home to the respondent husband. It is not necessary for the purposes of this report to give definitive answers to the questions raised by the section.

The courts have on occasion granted the physical partition of a part of the land and sale of the remainder. Such an order has been made only where it is clearly beneficial to all the parties.

(2) Proposals for Change

We will now discuss the remedies which a co-owner should have.

The earliest form of remedy, the physical partition of the property between the owners, is satisfactory if the property can without loss in total value be divided into parts of approximately equal value and we think that it should continue to be available. In many cases however, the nature of the property, for example a dwelling house on

a city lot, may make partition undesirable or even illegal and physical partition should therefore not be the only remedy. Sale under supervision of the court is the other remedy which is now available. In a proper case it allows the co-owners to obtain the value of their interests and it should continue to be available.

In addition to the power to grant physical partition and the power to grant sale in the usual way, should the court be able to order one party to sell to another? As we have said, section 5 of the 1868 Act gave the court power to direct such a sale, though it may be that the power depends on the concurrence of the seller and the buyer.

We refer here to a recent line of Alberta decisions in each of which the court has compelled one co-owner to sell to another: Wagner v. Wagner (1970), 73 W.W.R. 474 (Alta. S.C.); Williams v. Williams, S.C. 89441, Edmonton, July 5, 1976 (Alta S.C.), reversed on other grounds, Appeal No. 10929, November 5, 1976; Smith v. Smith, [1976] 6 W.W.R. 510 (Alta. S.C.); and Lobello v. Lobello S.C. 125297, Calgary, October 27, 1976. In each case the court in divorce proceedings ordered a husband to pay a lump sum to his wife and in proceedings under the Partition Act to transfer his interest in the matrimonial home to his wife in settlement of the lump sum. These cases are all of first instance and their basis in the 1868 Act may be open to question, but they do suggest that there are cases in which it is appropriate to require one co-owner to sell to the other. We think that those cases are not restricted to the matrimonial home but include cases in which the property has come into co-ownership by inheritance or as a business matter; in special circumstances the interest of one co-owner may be prejudiced by a sale under judicial process while the interest of the other will not be

prejudiced if he is required to sell his share to the first at a proper valuation. Such a remedy should be available.

We now turn to another question: should a co-owner be entitled as of right to have the co-ownership terminated? Our answer is that he should. The interest of co-owners, as a class, in being able to bring unsatisfactory relationships to an end, and the public interest in providing a means to bring them to an end, appear to us to outweigh the interest of a co-owner who, in a particular case, may have a reason for wanting the relationship to continue. There are, however, some exceptional cases, one class of which we will now consider, leaving others to be dealt with later in this report.

A case may arise in which physical partition is not practicable and an order for sale to the other co-owner is not appropriate. Of the three remedies we have suggested, an order for sale under judicial process would then be the only one available. However, even that order might act unfairly. The market for a parcel of land may be depressed, or it may not respond to a sale under judicial process. In these circumstances one co-owner may bring proceedings for partition and sale with the intention of buying the other's share cheaply at the sale under judicial process; he is most likely to do so if he is in good financial condition and has a substantial interest in the land and if he knows that the respondent does not have adequate financial resources. Under such circumstances we do not think that the court should have to carry through with sale; it should have power to stay the proceedings.

These remedies may appropriately be granted either by the Supreme Court or by the District Court.

Recommendation #2

(1) That the Partition and Sale Act provide three ways in which the co-ownership may be terminated:

(i) partition

(ii) sale

(iii) sale of the interest of one or more of the co-owners in all or part of the land to one or more of the other co-owners who are willing to purchase the interest, such sale to be under the direction of a court, which shall fix the value of the interest sold and the other terms of the sale.

(2) That the Supreme Court and the District Court have jurisdiction to grant the three remedies.

[Draft Act, s. 2(1)(i), (ii) and (iii)]

Recommendation #3

That except as provided elsewhere in these recommendations a co-owner be entitled as of right to the termination of the co-ownership.

[Draft Act, s. 2(1)]

Recommendation #4

That the court have a discretion as to the remedy or combination of remedies to be granted upon an application for termination of co-ownership.

[Draft Act, s. 2(1)]

Recommendation #5

> *That if the price offered at a sale under order for sale is less than the fair value of the land and the court considers further efforts to effect such a sale unwarranted, the court have power to*
>
> *(1) refuse to approve the sale, and*
>
> *(2) stay the proceedings from time to time.*
>
> [Draft Act, s. 2(3)]

II

THE MATRIMONIAL HOME

The Acts of 1539 and 1540 provide that joint tenants, tenants in common, including holders of estates for lives and years "shall and may" be compelled to make partition. There are English cases which hold that the words "shall and may" are to be construed imperatively. Following the passage of these two Acts and before the passage of the Partition Act, 1868, partition was a matter of right and the court had no discretion to refuse partition or to order sale in lieu thereof. Baring v. Nash (1813), 35 E.R. 214.

We can conveniently begin our discussion of the Alberta cases on partition with Wikstrand & Mannix v. Cavanaugh & Dillon, [1936] 1 W.W.R. 113, which held that partition is a matter of right in the province of Alberta. In that case Mr. Justice Frank Ford stated at pages 114-115:

> 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....The right to partition may, however, be limited, modified or waived by agreement expressed or implied.

It will be noted that in Wikstrand the court was not concerned with a matrimonial home.

There are, however, two recent Alberta cases in which the question has arisen: is there a discretion in the court to refuse either partition or sale where the property is the matrimonial home?

The first case is Clark (Clarke) v. Clarke, [1974] 1 W.W.R. 488, affirmed [1974] 5 W.W.R. 274. At page 278 of his reasons for judgment Mr. Justice Allen, speaking for the court, said:

> 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 section 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.

There is considerable justification for the decision on the ground that the husband had not claimed a partition in his originating notice, a point noted in the decision of Mr. Justice Allen. A similar question had arisen earlier in at least two English cases and in both of those cases the

application was amended to include a claim for partition to eliminate any question of the court's jurisdiction. However, the earlier cases had all concluded that partition was a matter of right no matter how impractical the physical partition might be. The Partition Act, 1868, was passed specifically to provide the courts with the alternative remedy of sale in those cases where physical partition was impractical.

In the case of Re Kornacki and Kornacki (1976), 58 D.L.R. (3d) 159 there was an application for partition or sale of the matrimonial home. Mr. Justice Moir speaking for the Appellate Division declared, without citing authorities, that the courts of Alberta have a discretion to refuse both partition and sale. In this case, unlike Clarke, both remedies were claimed, and the result is unequivocal. So far as the Alberta courts are concerned, notwithstanding Wikstrand, there is in the case of a matrimonial home a discretion to refuse either partition or sale, the purpose being to permit the wife or former wife to remain in the home.

In most of the other common law provinces of Canada the courts have a discretion under the respective statutes of partition to refuse the remedy. However, the recent cases from Manitoba, British Columbia, and Ontario dealing with partition or sale of the matrimonial home makes it clear that there remains a prima facie right to partition or sale. For the application to be rejected the respondent must show that the order applied for would be oppressive or vexatious, and must involve more than mere inconvenience. The principles on which the courts exercise their discretion to allow or refuse partition are similar in all three provinces.

A recent case in the Supreme Court of British Columbia, Fernandes v. Fernandes, [1976] 3 W.W.R. 510, holds that the hardship to the spouse resisting partition or sale should be given more weight than it has been in the past and that the test should be one of relative hardship. In that case the court made an order for sale over the objection of the former wife, but only after having decided to award her a lump sum by way of maintenance.

We recognize that there are some special problems relating to the matrimonial home. It appears to us that those problems arise because there is often a need to keep the home available for the shelter of one spouse, usually a spouse who is caring for young children. In our Matrimonial Property Report we accordingly recommended the enactment of a Matrimonial Home Possession Act (Appendix IV) under which the court would have a discretionary power to grant a spouse possession of a "homestead" as defined in the Dower Act. By the provisions of that proposed Act the possession order would continue in force notwithstanding any partition, sale or disposition of the property not consented to by the spouse who applied for the possession order. We think that that proposal would do much to provide for the special problem of the matrimonial home and urge that the proposed Matrimonial Home Possession Act be enacted. We think, however, that the court should have power to stay proceedings under the proposed Partition and Sale Act if there is an application pending or order outstanding under the proposed Matrimonial Home Possession Act. Physical partition will often be inappropriate for a matrimonial home, and an adverse and overriding right of possession for an indeterminate period is likely to make sale inappropriate as well.

Recommendation #6

> *That where a homestead is the subject matter of an application under the proposed Act the court have the power to make an order staying proceedings pending an application under the Matrimonial Home Possession Act or while an order under that Act remains in force.*
>
> [Draft Act, s. 5]

A second question that has arisen in Alberta in connection with partition and the matrimonial home is whether partition or sale is a disposition under The Dower Act. A number of cases have considered this question.

The first is In re Partition Act 1868, and Rule 474 Robertson v. Robertson (1951), 1 W.W.R. 183, a decision of Mr. Justice Egbert. In that case the issue was raised whether, if the land is a homestead within the meaning of The Dower Act, 1948 (now R.S.A. 1970, c. 114), the right to partition or sale is lost if the applicant fails to acquire the consent of his spouse, the other co-owner. His Lordship held that the right to partition or sale was lost, citing with approval the decision of the Manitoba Court of Appeal in Wimmer v. Wimmer, [1947] 2 W.W.R. 249 where it was held that the property was a "homestead" under the Manitoba Dower Act and that the plaintiff was not entitled to partition without the consent of his wife.

There have been two cases subsequent to the Robertson case dealing with the same issue. These cases are McWilliam v. McWilliam & Prudential Insurance Company of America (1960), 31 W.W.R. 480, affirmed (1961), 34 W.W.R. 476 and Wagner v. Wagner (1970), 73 W.W.R. 474.

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, he held that even if it were a "disposition," he 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: Johnson J.A. stated at page 477:

> It is unnecessary to consider the correctness of that decision, for in this case, unlike the Robertson one, there was before the court an application to dispense with the other spouse's consent to partition. The learned trial judge ordered that the appellant's consent be dispensed with. The Dower Act provides that consent may be dispensed with 'if a married person and his spouse are living apart' (s. 11[1]a), and the evidence was that these parties had not lived together since 1956.

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.

We are not satisfied that The Dower Act was intended to apply to property owned jointly or in common by husband and wife, but there is a widely held view that it does so by virtue of section 26(2) which provides:

> Where a married person and his spouse are joint tenants or tenants in common in land, the execution of a disposition by them constitutes a consent by each of them to the release of their dower rights and no acknowledgement under this Act is required from either of them.

We do not think that our proposed Act should provide a way to avoid the provisions of another statute, The Dower Act, which is part of the law of Alberta. Furthermore, it is not within the scope of this project to examine The Dower Act to see whether it should be reformed or repealed. However, we think that the best approach, pending a re-examination of The Dower Act, is to allow proceedings to be brought for termination of co-ownership of a homestead under the proposed Act, but to provide that in those proceedings the court should have power to award compensation equivalent to that which each spouse would have received if the consent of that spouse had been dispensed with under The Dower Act. Such a provision is unnecessary where the interests are equal.

The following recommendations give effect to that view.

Recommendation #7

> *That the proposed Act declare that an order under the proposed Act is not a disposition under The Dower Act.*
>
> [Draft Act, s. 4(1)]

Recommendation #8

> *That upon co-ownership being terminated under the proposed Act, the land cease to be a homestead.*
>
> [Draft Act, s. 4(2)]

Recommendation #9

> *That where the interests of the spouses in the homestead are unequal, the court have*

power to direct compensation by set-off or otherwise for the rights of each co-owner under The Dower Act.

[Draft Act, s. 4(3)]

Recommendation #10

That the compensation be in the amount that the co-owner would have received upon an application under The Dower Act for an order dispensing with the consent of the co-owner to a disposition of the land.

[Draft Act, s. 4(4)]

III

RIGHT TO PARTITION IN SPECIAL CASES

1. Partnership

Section 24 of The Partnership Act, R.S.A. 1970, c. 271 provides:

> 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.

The Appellate Division of the Supreme Court of Alberta in the recent unreported case of Nugent Sales and Service Limited v. Consolidated Ad Astra Mineral Ltd., and Allied Investors Syndicate Limited, Appeal 10365, December 31, 1975, held that, in the absence of agreement between the partners, real property must be sold in the partnership proceedings and cannot be partitioned or sold in proceedings under the Partition

Acts. We think that partnership property is best dealt with under the law of partnership so that the whole partnership relation can be taken into consideration; in view of the Nugent case, partnership property will be excluded from the proposed Partition and Sale Act without express reference, and we accordingly do not find it necessary to make a specific recommendation to exclude it.

2. Tenancy by the Entireties

Section 6 of The Transfer and Descent of Land Act, R.S.A. 1970, c. 368, contemplates the possibility of creating a tenancy by the entireties. The remedy of partition is not available while such a tenancy continues.

A tenancy by the entireties is an anomaly that has come down from the time when husband and wife were considered as one. Rather than make special provision in the proposed Act for a form of tenancy which does not so far as we know exist in Alberta, and which is not necessary or desirable, we recommend that tenancy by the entireties be abolished.

Recommendation #11

That The Transfer and Descent of Land Act be amended to abolish tenancies by the entireties.

3. Contract between Co-owners

There is authority for the proposition that under the existing law a co-owner can contract out of the right to apply for partition and sale. We think, however, though not unanimously, that there can be cases of manifest hardship in

which one co-owner's statutory right to have the co-ownership terminated should override another co-owner's contractual right to have it continued. In such cases the court should have the power to make an order for partition or sale notwithstanding a contract.

Recommendation #12

> *That if continuance of a co-ownership would cause undue hardship to a co-owner, the court have power to make an order terminating the co-ownership notwithstanding any contract.*
>
> [Draft Act, s. 9]

4. Beneficiaries of a Trust

Our view is that partition should not be available to the beneficiaries of a trust. If they are entitled to terminate the trust they can acquire legal title, and if they are not, the trust property should be dealt with under the law of trusts and not under the law of partition. We have also considered whether trustees holding in trust for common beneficiaries should have the power to partition amongst themselves, and see no reason why they should.

Recommendation #13

> *That equitable estates not be made subject to the proposed Act and that co-owners holding in trust for common beneficiaries have no right to apply for termination of co-ownership as amongst themselves.*
>
> [Draft Act, s. 1(2)]

5. The Planning Act

Section 3b of The Planning Amendment Act 1976 as amended

by S.A. 1976, c. 44, provides that planning approval is required before an order or judgment dividing a parcel or transferring an estate or interest in part of a parcel can be registered under The Land Titles Act. The section appears to be broad enough to cover an order for partition; and, indeed, it has been held that The Planning Act did so even before the amendment: Wensel v. Wensel, [1977] 1 W.W.R. 32 (App. Div.).

The need for planning approval raises mechanical difficulties. A co-owner may be met on a partition application by an argument based on the lack of planning approval. On the other hand, he may not want to apply for planning approval until he knows whether the court will grant partition. To provide flexibility the court should have the power to stay partition proceedings pending planning approval or to make a partition order conditional upon planning approval.

Recommendation #14

> *That where the applicant seeks an order for partition the court have power to*
>
> *(i) stay proceedings until subdivision approval under The Planning Act is obtained; or*
>
> *(ii) make the order for partition conditional upon subdivision approval.*
>
> [Draft Act, s. 8(1)]

IV

WHO MAY DEMAND PARTITION

As noted above, at common law only the very limited

class of co-owners known as co-parceners had a legal right to demand partition. It was not until the Acts 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 for years.

A fundamental requirement of a party seeking partition is that he have an estate in possession--that is, an estate by virtue of which he is entitled to enjoy the present rents or possession of the property. Evans v. Bagshaw (1870), 5 L.R. Ch. App. 340.

From this rule it follows that an applicant who has a simple charge on land, such as a judgment creditor of one co-owner who has registered his judgment in a land titles office, is not, without more, entitled to possession and is therefore not entitled to maintain an action for partition. The judgment creditor may, however, obtain the sale of the judgment debtor's interest in the land and the purchaser of that interest may bring partition proceedings. We do not see any need for change.

1. Lessors and Lessees

By the Act of 1540 the right to partition was extended to lessees. However, while there is authority for the proposition that a lessee may have partition against a co-owner of the land other than his lessor, the partition only binds during the term of his lease. We do not see any justification for a lessee of an undivided share having the right to claim partition or sale against an owner. Further, it may be inconvenient to the owner to have a partition made against him for a term, whether certain or uncertain, and it would not be appropriate to give a lessee the remedy of sale.

2. Mortgagors and Mortgagees

(1) Mortgagors

The right of a co-owner who has mortgaged his share to seek partition against another co-owner is determined primarily by 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 or sale of the land cannot diminish or affect the mortgagee's rights and partition or sale may be had by the owners of the land. Where the mortgage attaches to an undivided share however, the general rule established by the English authorities is that the mortgagor may not seek partition against his co-owner without the mortgagee's consent. The rule has been rationalized on two bases, (1) that it is wrong that the character of the property subject to the mortgage should be altered to the prejudice of the security; and (2) that he who seeks partition must bring the legal estate before the court for the benefit and protection of his co-tenants whom he seeks to bind. The second basis does not apply if, as in the case of an Alberta Land Titles Act mortgage, the legal estate does not pass to the mortgagee, but the authorities would presumably otherwise apply in Alberta. We will make recommendations which will allow a co-owner who has mortgaged his share to apply for termination of the co-ownership and which will protect the mortgage.

(2) Mortgagees

There is some authority that a mortgagee of the whole, or of an undivided share only, has the right to claim partition although this is not entirely free of doubt.

The better rule would seem to be that a mortgagee who has not perfected his title by foreclosure or otherwise is not entitled to an order for sale or partition and we recommend accordingly.

3. Our Proposals

(1) Co-owners of Freehold Estates

Joint tenants and tenants in common of land should have the right to terminate their co-ownership by using the machinery of the proposed Act. The most convenient and precise phrase to describe them is "joint tenants or tenants in commmon legally entitled to a freehold estate in land." That will include joint tenants or tenants in common entitled to an estate for their joint lives or for the life of another person though such tenancies are rare. We think that it should be made clear that co-owners of a reversion can terminate the co-ownership even if all or part of the estate is leased, but we would exclude other future interests. We have already said that co-owners of a beneficial estate should not be able to take proceedings for termination of co-ownership, nor should trustees holding in trust for common beneficiaries.

(2) Co-owners of Leasehold Estates and Profits à Prendre

(a) Right to Termination of Co-ownership

The arguments in support of a provision for termination of co-ownership of a freehold estate support a provision for termination of co-ownership of a leasehold estate as well, particularly if the lease is for a long term. The arguments also apply to a profit à prendre held by co-owners,

the most important example of which in Alberta is the mineral "lease." We recommend accordingly.

(b) Protection of Lessor or Grantor

A lessor, or a grantor of a profit à prendre, may have reserved rights which are inconsistent with termination of the co-ownership of the lease or profit, and we do not think that the co-owners of the lease or profit should have an untrammelled right to terminate. We think that it should be left to the court to decide whether in any particular case termination would unduly prejudice the lessor or grantor.

(c) Protection of Co-owners

If a leasehold estate or profit à prendre is divided between the co-owners, the interests of each are likely to require that steps be taken to ensure that payment of rents and royalties be made and other covenants performed so that the lease or profit is not terminated for default. It is not possible to prescribe in advance the steps which should be taken in a particular case, and we think that the best thing to do is to give the court power to impose whatever terms and conditions are necessary to ensure that the obligations under the lease or profit are performed.

(3) Holders of Encumbrances

It is necessary to consider the position of the holder of an encumbrance or interest affecting land that is co-owned. By "encumbrance" we mean any charge on or claim against land created or effected for any purpose whatever, and appearing on the title or in the general register inclusive of easements, restrictive covenants, profits

à prendre, leases, mortgages, builders' liens, and executions against lands. If the encumbrance affects the shares of all the co-owners the holder should not be involved in the proceedings for termination of the co-ownership; the encumbrance would simply be carried forward after the partition or sale and would not be affected by it. If the encumbrance does not affect all the shares there is a question whether or not it should be carried forward. We think that in the case of physical partition it should be carried forward on the title to the property received by the co-owner or co-owners whose shares were subject to it and that it should be discharged from other shares; that in the case of an order for sale of the land it should be discharged and that the holder should have a claim for its value against the portion of the sale proceeds which will go to those co-owners whose shares were affected by it; and that if the interest affected by it is ordered to be sold to other co-owners it should be discharged from the land and the holder should have a claim against the sale proceeds. While the holder of the encumbrance will obviously be affected by these proposals we think that he will be adequately protected and we think that he should be aware when he acquires the encumbrance or interest that there are disadvantages in not dealing with all co-owners.

(4) Recommendations

Our recommendations as to who should be entitled to apply for termination of co-ownership are therefore as follows:

Recommendation #15

> *That with the exception of co-owners of a future estate or interest in land, and of co-owners holding in trust for common beneficiaries,*

joint tenants and tenants in common legally entitled to one of the following estates or interests in land be entitled to apply under the proposed Act for termination of their co-ownership:

(i) a freehold estate whether or not subject to a lease or tenancy;

(ii) a lease for a year or years;

(iii) a profit à prendre.

[Draft Act, s. 1(2)]

Recommendation #16

That co-owners of a lease or profit à prendre be entitled to termination of ownership only if the lessor or grantor will not be unduly prejudiced.

[Draft Act, s. 6]

Recommendation #17

That where the applicant is a co-owner of a lease or profit à prendre the court may impose all terms and conditions necessary to ensure that the obligations under the lease or profit à prendre are performed.

[Draft Act, s. 2(6)]

Recommendation #18

That a co-owner who has encumbered his estate or interest may apply under the proposed Act for termination of the co-ownership.

[Draft Act, ss. 2(1), 7]

Recommendation #19

That the proposed Act make the following

provisions to deal with the rights of holders of encumbrances:

(1) In this section, "encumbrance" means any charge on or claim against land created or effected for any purpose whatever, and appearing on the title or in the general register inclusive of easements, restrictive covenants, profits à prendre, leases, mortgages, builders' liens, and executions against land.

(2) An order under this Act does not affect an encumbrance against the whole of the estate or interest which is the subject matter of the order.

(3) The following provisions apply in respect of an encumbrance against the estate or interest of one or more but not all of the co-owners:

(i) upon the making of an order for partition under section 2(1)(i) the encumbrance becomes an encumbrance against, and is restricted to, the land allotted to the co-owners whose estates or interests are affected by it;

(ii) upon the making of an order for sale under section 2(1)(ii) the encumbrance shall be discharged and compensation therefor in the amount fixed by the court shall be a charge on the share of the proceeds accruing to the co-owners whose estates or interests are affected by it; and

(iii) upon the making of an order for sale under section 2(1)(iii) the encumbrance shall not be affected unless the estates or interests affected by it are sold in which event the encumbrance shall be discharged and compensation therefor in the amount fixed by the court shall be a charge on the share of the proceeds accruing to the co-owners whose estates or interests are affected by it.

[Draft Act, s. 7]

V
EVEN DIVISION AND COMPENSATION FOR UNEQUAL PORTIONS

The law now allows partition of land into unequal shares and provides for compensation in money or property from one co-owner who receives more than his share to another who receives less. That is good sense and should continue.

Recommendation #20

> *That the court shall have power to order compensation for unequal division.*
>
> [Draft Act, s. 2(4)]

VI
ACCOUNTING

1. General

It is important to emphasize at this point that each co-tenant has an equal right to possession of the entire property subject to co-ownership, and that this sharing of the right of possession frequently creates problems. If there is no agreement between the co-owners, what are their rights and duties with respect to rents and profits, and repairs and improvements? These problems arise both during the existence of the co-ownership, and at its termination. Although this report is not concerned with the substantive rights and duties of co-owners during the continuance of the co-ownership, the applicable law must be discussed because it provides the foundation for the law applicable at termination.

A matter of procedure must also be emphasized. After the right to compulsory partition was created by the Acts of 1539 and 1540, the courts of equity developed a concurrent jurisdiction over partition, and in part because of the availability of the equitable remedy of accounting, this equitable jurisdiction superseded that of law. The legal writ of partition under the old Acts was abolished by the Real Property Limitation Act, 1833, 3 & 4 Will. 4, c. 27, s. 36, and the English partition Acts in force in Alberta apply only to suits in equity. Consequently, when a co-ownership is terminated by a court order for partition or sale, the order may make all just allowances as will do complete equity between the parties. Mastron v. Cotton, [1926] 1 D.L.R. 767 (Ont. App. Div.).

(1) Rents and Profits; Waste

It is not uncommon for one co-owner to exclusively occupy property subject to co-ownership. Must the co-owner in actual possession account to the other co-owners for the value of his use and occupation or for rents and profits received? Even before 1705 the answer was "Yes" in three situations; where the occupying co-tenant had (i) ousted the other co-tenants, (ii) agreed to act as bailiff or agent for the other co-tenants, or (iii) agreed to pay rent to the other co-tenants for the right of exclusive possession. Otherwise the occupying co-tenant, who did no more than exercise rights of possession his co-tenants could equally have enjoyed had they desired, had no duty to account for use and occupation or for rents and profits.

The Statute of Anne, 1705, 4 Anne, c. 16, s. 27 introduced a basic change in the law and provided that one co-owner could bring an action of account against another co-tenant for receiving more of the rents and profits "than comes to his just share or proportion...." The leading

case on the Statute is Henderson v. Eason (1851), 17 Q.B. 701, 117 E.R. 1451. In Henderson the court held that a co-tenant who farmed the property, and thus realized profits as a result of the application of his labour and capital, had no duty to account to his co-tenants voluntarily out of possession. In dicta, the court said that the Statute of Anne only applies where one co-tenant receives money or other payment from a third party which all of the co-tenants are entitled to simply by reason of their being co-tenants. Practically speaking, this means that a co-tenant must only account for payments received in the nature of pure rent. For example, in Spelman v. Spelman, [1944] 2 D.L.R. 74 (B.C. Ct. of App.), a co-tenant was not required to account for profits received from running a rooming house, for his gross receipts were blended payments received in indistinguishable portions for dwelling space, and the labour and capital of the occupying co-tenant.

The doctrine of the Henderson case is, however, subject to a significant exception. In Henderson the farming operation would not result in a permanent reduction in the value of the property. What then if one co-tenant expends his labour and capital to produce a profit by removing mineral deposits or cutting timber on the property? We may assume that the value of the property would be permanently impaired. This question raises two sub-questions; (i) may a co-tenant exploit resources and reduce the value of the land, or does this constitute waste, and (ii) if he may, must he account to his co-tenants for any net profits?

First, do activities which deplete the land constitute waste? Clearly, if a life tenant were to remove minerals this would constitute a permanent injury to the interests of the holders of the reversion or remainder. This would be waste and the life tenant (or a lessee) would be subject to an injunction and liable for damages. The Statute of

Westminster II, 1285, 13 Edw. 1, c. 22, provided that one co-tenant could maintain an action against a co-tenant for waste. But the English courts early held that the concept of waste is quite different when applied to acts of co-tenants. Unlike a life tenant or a lessee, a co-tenant in fee simple may use the property in the same manner as would an owner who did not share title with co-owners, subject only to a duty to act reasonably. A co-owner can cut mature timber which is not of special value as ornamental timber. Martyn v. Knowllys (1799), 8 T.R. 145, 101 E.R. 1313 (K.B.); Hersey v. Murphy (1920), 48 N.B.R. 65 (Ch. Div.). Similarly, a co-tenant can develop and operate mines. Job v. Potton (1875), L.R. 20 Eq. 84. If these acts are not waste, what acts would constitute waste as between co-tenants? The answer is, any conduct which would unreasonably diminish the value of the property. Malicious conduct would be included. In Wilkinson v. Haygarth (1847), 12 Q.B. 837, 116 E.R. 1805, it was held that carrying away turf from the property was destructive waste rather than a reasonable exploitation of resources. Of course, if a co-tenant commits acts of waste, he is liable to his co-tenants for damages.

Second, assuming now that a co-tenant may reasonably exploit the land, even if its value is thereby reduced, must he account to his co-tenants for any profits? The English courts permitted an accounting in Job, supra, and Glyn v. Howell, [1909] 1 Ch. 666. There are a multitude of cases in the United States, and in the overwhelming majority of them the co-tenant was required to account for any profits derived from activities which permanently reduced the value of the land. Authority on the point in Canada is thin, and inconsistent. In Rice v. George (1873), 20 Gr. 221 (Ont. Ch.), the court held that a co-tenant was not required to account for profits realized from the sale of timber. In Curtis v. Coleman (1875), 22

Gr. 561 (Ont. Ch.), the court required a co-tenant to account for profits derived from the sale of plaster from plaster beds on the land. The difference from the basic doctrine of Henderson should be noted. Where the activities of a co-tenant do not result in permanent devaluation of the property, such as farming, and any profits result in part from the co-tenant's investment of labour and capital, the co-tenant need not account at all. But where the reasonable exploitation of resources does result in impairment of the land's value, the co-tenant should be required to account. In determining net profits, the co-tenant is, of course, given credit for the value of his labour and capital.

To the extent that any accounts required by the above rules have not been taken during the existence of the co-tenancy, they may be taken at termination of the co-tenancy subject to normal equitable procedures. We are satisfied with the doctrine of the Henderson case, but believe the law should make it clear that a co-tenant who has not accounted for profits resulting from resource exploitation during the existence of the co-tenancy should be required to do so at its termination.

(2) Repairs and Improvements

We believe the rules of accounting developed under this heading are satisfactory, and will merely summarize them. During the existence of the co-tenancy, a co-tenant cannot directly compel contribution for expenditures made by him for repairs or improvements. What repairs and improvements should be made is a matter of business judgment; if the co-tenants cannot agree, it would be virtually impossible for equity to arbitrate the disputes which would arise by forcing contribution. However, if a co-tenant not in sole

possession of the property is required to account for rents and profits, he can indirectly recover for any repairs which can be off-set as expenses incident to the production of those rents and profits. If the co-tenant is in sole possession, he will usually be subject to a charge for the value of his use and possession of the property as a condition precedent to his right to off-set costs of repairs against rents and profits. These rules, of course, remain applicable to accounting at the termination of a co-tenancy.

At termination of the co-tenancy the co-tenant who has made repairs or improvements has additional remedies. He will usually be granted an allowance for repairs, subject to a charge for the value of his use and occupation if he has enjoyed exclusive possession. And, if he has made improvements, he will normally be granted an allowance measured by the lesser of the amount of his expenditures, or the realizeable value which they have added to the property. A recent example of the application of this formula is Grant v. Grant, [1952] O.W.N. 641, a case in which the Ontario High Court denied any allowance to a co-tenant who had installed a new oil burner because it had not increased the value of the property at all at the time of termination of the co-tenancy by sale.

2. Spouses who are Co-owners

Claims for an accounting in recent Canadian cases have arisen primarily between husband and wife. Because the matrimonial relationship gives rise to a presumption of advancement, a frequent issue is whether or not payments made by the husband are to be considered gifts to the wife. Two cases are illustrative of the problems arising from the presumption of advancement. The first is the English case of Dunbar v. Dunbar, [1909] 2 Ch. 639. There the plaintiff wife and the defendant husband were married in 1896, and in 1897

the husband purchased a home in their joint names for £654, paying £354 in cash and giving a mortgage for the £300 balance. The mortgage was executed by both husband and wife. In 1898 the parties separated, in 1905 the husband paid off the mortgage and took a reconveyance in both their names, and finally in 1908 the wife obtained a decree declaring that the marriage had been void. In the wife's subsequent suit for partition it was held that the doctrine of advancement applied to the purchase in 1897. The issue then became whether the wife was to share in the benefit of the £300 mortgage payment. At page 646 Mr. Justice Warrington said:

> 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. It seems to me, therefore, that the plaintiff is entitled to be declared now joint tenant with the defendant of the house, as she asks, free from incumbrances.

The second case is the British Columbia case of Harron v. MacBean (1957), 22 W.W.R. 68 (S.C.). There a 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. In the wife's suit for partition, Mr. Justice McInnes allowed the husband's claim for an allowance for money spent in completing the house. At page 70 he said:

> 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 cost of any work he did or monies he expended in completing the property.

Although the Dunbar case has been frequently referred to by Canadian courts, see Andrews v. Andrews (1970), 7 D.L.R. (3d) 744 (B.C.S.C.), the prevailing view seems to be 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. Baker v. Baker, [1976] 3 W.W.R. 492 (B.C.S.C.).

3. Recommendations

Although the law relating to accounting between co-owners regulates that relationship both during and at termination of the co-ownership, this report is concerned only with accounting at the latter stage. However, as we believe that the rules which have been developed are generally satisfactory, our basic recommendation is that a court, when making an order under the proposed Act, continue to be empowered to provide for an accounting according to the existing rules of law and equity. To assist the parties and the courts, we think that the proposed Act should restate the basic elements of those rules, with such clarification as seems necessary.

Recommendation #21

(1) That upon making an order under the proposed Act the court have power to provide for an accounting, contribution or adjustment according to law and equity.

[Draft Act, s. 2(4)]

(2) Without limiting the generality of subsection (1) the court may consider:

(i) whether one co-owner has excluded another co-owner from the land;

(ii) whether an occupying co-owner was tenant, bailiff or agent of another co-owner;

(iii) whether a co-owner has received from third parties more than his just share of the rents from the land, or profits from the reasonable removal of its natural resources;

(iv) whether a co-owner has committed waste by an unreasonable use of the land;

(v) whether a co-owner should be compensated for non-capital expenses;

(vi) whether an occupying co-owner claiming non-capital expenses should be required to submit to a fair occupation rent; and

(vii) whether a co-owner has made improvements or capital payments that have increased the realizable value of the land.

[Draft Act, s. 2(5)]

VII

SEVERANCE OR DESTRUCTION OF A JOINT TENANCY

One significant characteristic that distinguishes a joint tenancy from a tenancy in common is the right of survivorship, or the jus accrescendi; if one joint tenant

dies without having obtained a separate share in his lifetime, his interest is extinguished and accrues to the surviving tenant.

At common law each joint owner was at liberty to dispose of his own interest in such a manner as to sever the joint tenancy and create a tenancy in common. The commencement of partition or sale proceedings, however, would not sever the joint tenancy. Sorensen v. Sorensen, Appeal No. 10477, Calgary, February 18, 1977 (Alta. App. Div.). Rather, the proceedings come to fruition with an order providing for the termination of the co-ownership, and we think that it is the order which should sever the joint tenancy. We think that it should have that effect even though the partition or sale has not been carried out or the proceeds of sale distributed.

Recommendation #22

> *That an order under the proposed Act effect a severance of a joint tenancy.*
>
> [Draft Act, s. 3]

VIII
LIMITATION PERIODS

We will deal with the question of limitations as between co-owners in our projected report on Limitation of Actions and will say nothing about it here.

IX
PROCEDURE

The Imperial Partition Legislation contains procedural provisions directed at ascertaining who are the parties

interested in the land; providing for persons under disability, such as infants; providing for disposition of the proceeds of the sale; and providing for substituted service of notice of the proceedings. It appears to us that these matters are adequately dealt with by the Alberta Rules of Court. However the proposed Act should require that the application be by way of originating notice and that the holder of an encumbrance be served. Provision should also be made for the recovery of expenses incurred by a co-owner in contemplation of an action under the proposed Act.

Recommendation #23

> *That the proposed Act require that the application for termination of co-ownership be made by originating notice.*
>
> [Draft Act, s. 2(l)]

Recommendation #24

> *That the holder of an encumbrance which may be affected by an order under the proposed Act:*
>
> *(i) shall be given notice; and*
>
> *(ii) shall be bound by the order.*
>
> [Draft Act, s. 7(4)]

Recommendation #25

> *That in addition to any other powers existing in it to order costs the court may make such order as it thinks just regarding costs and expenses incurred by a co-owner in contemplation of an application.*
>
> [Draft Act, s. 10]

X

REPEAL OF IMPERIAL STATUTES

The proposed Act will take the place of the Statutes of 1539, 1540 and 1868, and they should therefore be repealed insofar as they affect Alberta.

Recommendation #26

> *That the Acts of 1539, 1540 and 1868 no longer apply in Alberta.*
>
> [Draft Act, s. 11]

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BY: _____
CHAIRMAN

_____
DIRECTOR

March, 1977

APPENDIX I

31 Hen. 8 c. 1

CHAPTER I.

An Acte for joynt Ten'nt̄ & Ten'nt̄ in comon.

FORASMUCHE as by the comen lawes of this Realme, diᵛse of the Kingᵉ Subjectᵉ being seised of Mannors landᵉ teñtes & hereditamentᵉ as joynt ten'ntes or as ten'ntes in comen with other, of any estate of enheritaunce, in their owne rightᵉ or in the right of their wyffes, by purchase discent or otherwise, and eᵛy of them so being joynt ten'ntes or ten'ntes in comen hathe like righte title interest and possession in the same Mannors landes teñtes and hereditamentᵉ for their partᵉ or porc̄ons joyntlye or in comen undevydedlye together withe other, and none of them by the lawe doeth or maye knowe their seᵛall partes or porc̄ons in the same, or that that ys his or theirs by hit selfe undevyded, and cannot by the lawes of this Realme otherwise occupye or take the p̄fytt of the same, or make any severans division or partic̄on thereof, without either of their mutuall consentes and assentᵉ; By reason whereof diᵛse and many of them, beinge so joyntly and undevidedly seised of the saide Mannors landᵉ teñtᵉ & hereditamentᵉ, often tymes of their perverse covetous and malicious myndes and willes, ayens all right justice equitie and good conscience by strenghe and power, hath not onlye cutt and fallen downe all the Woodes and trees growinge uppon the same, but also hathe extirped subverted pulled downe and distroyed all the houses [edificyons'] and buyldyngᵉ meadowes pasture c̄omens and the hoole c̄omodities of the same, and hath taken and converted them to their owne uses and behooffᵉ, to the open wronge & disherison & ayens the myndes and willes of other holdinge the same Mannors landes teñtᵉ & hereditamentᵉ joyntlye or in c̄omen withe them, and they have bene alwaies without assured remedy for the same; Be it therefore enacted by the Kinge our most drede Soveraigne Lorde and by thassent of his Lordes sp̄uall and temporall and by the C̄omons in this p̄sent Parliament assembled, That all joyntten'ntᵉ and ten'ntes in c̄omen, that nowe be or hereafter shalbe of enny estate or estates of enheritaunce in their owne rightᵉ or in the righte of their wyffes, of any Manners landes teñtᵉ or hereditamentes within this Realme of Englande Wales or the Mersches of the same, shall and maye be coacted and compelled by vertue of this p̄sent acte, to make ptic̄on betwene them of all suche Mannors landes teñtes and hereditamentᵉ as they nowe holde or hereafter shall holde as joyntten'ntᵉ or ten'ntes in c̄omen, by writt de [ptic̄oe'] faciend, in that case to be devised in the Kinge our Soᵛaigne Lordes Courte of Chauncerie, in like manner and forme as Coperceners by the comen lawes of this Realme have bync and are compellable to doe, and the same writt to be pursued at the c̄omen lawe.

Provided alwaye and be it enacted, that eᵛye of the saide joyntten'ntᵉ or ten'ntes in c̄omen and their heires after suche partic̄on made, shall and may have ayde of the other, or of their heires, to thentent to denigne the warrantye paramounte and to recover for the rate as is used betwene Copceners after ptic̄on made by the order of the comen lawe; any thinge in this acte conteyned to the cont'rie notwithstandinge.

32 Hen. 8 c. 32

CHAPTER XXXII.

Joinctenauntꝯ for lif or yeres.

FORASMUCHE as in the plament begon at Westñ the xxvijth day of Aprill and there contynued till the xxviijth day of June the xxxj yere of the Kinges moeste noble and victoriouse reigne that nowe is, it was amongest other thinges [there³] enacted and established that all joyncte ten'ntis and ten'ntis in cōmon that then were or heraftre shulde be of anny estate or estatis of Inheritaunce, in their owne rightis or in the right of their wifes, of anny mannours landis tenementis or hereditamentis within this Realme of England Wales or Marches of the same, shall and may be coacted and compellid by vertue of the said acte to make partition betwene them of all suche mannours landis teñtis and hereditamentis as they [than hilde⁴] or herafter shulde holde as joynte ten'ntis or ten'ntis in cōmon; as more (¹) at large apperith by the said estatute: And forasmuche as the said estatute dothe not extende to joyncte ten'ntis or ten'ntis in cōmon for terme of life or yeris, nother to joyncte ten'ntis or tenantis in cōmon where one or some of them have but a pticulier estate for terme of life or yeris and thother have estate or estatis of inheritaunce of and in any mannours landis tenementis and heredita'ꝯ; Be it therefore enacted by the Kinge our Souᵛaine Lorde and by thassent of his Lordis sp̄uall and temporall and the Comons in this p̄sent plament assembled and by thauctoritie of the same, That all joynct ten'ntis and tenauntis in cōmen and eᵛy of them, whiche nowe hold or herafter shalholde joynctly or in cōmon for terme of life yere or yeres, or joyncteten'ntis or ten'ntis in cōmon where one or some of them have or shalhave estate or estatis for terme of life or yeris with thother that have or shalhave estate or estatis of inheritaunce or freeholde, in any manours landes teñtis or hereditamentis, shall and may be compellable from hensfurth, by writte of partition to be pursued out of the Kinges Courtis of Chauncery uppon his or their cace or caces, to make severaunce and partition of all suche manours landis tenementis and hereditamentis whiche they holde joynctely or in cōmon for terme of lyf or lifes yere or yeris, where one or sōme of them holde joynctly or in cōmon for terme of life or yeris with other, or that have an estate or estatis of inheritaunce or freeholde.

PROVIDED alway and be it enacted that no suche ptition nor severaunce hereafter to be made by force of this acte be nor shalbe prejudiciall or hurtefull to anny psonne or psonnes their heirs or successours other than suche whiche be parties unto the said partition their Executors or Assigneis.

APPENDIX III

31 and 32 Vict. c. 40

C A P. XL.

An Act to amend the Law relating to Partition. [25th *June* 1868.]

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

1. This Act may be cited as The Partition Act, 1868.

2. In this Act the Term "the Court" means the Court of Chancery in *England*, the Court of Chancery in *Ireland*, the Landed Estates Court in *Ireland*, and the Court of Chancery of the County Palatine of *Lancaster*, within their respective Jurisdictions.

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 therein, 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 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.

6. 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 or 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.

7. Section Thirty of The Trustee Act, 1850, shall extend and apply to Cases where, in Suits for Partition, the Court directs a Sale instead of a Division of the Property.

8. Sections Twenty-three to Twenty-five (both inclusive) of the Act of the Session of the Nineteenth and Twentieth Years of Her Majesty's Reign (Chapter One hundred and twenty), "to facilitate Leases "and Sales of Settled Estates," shall extend and apply to Money to be received on any Sale effected under the Authority of this Act.

9. Any Person who, if this Act had not been passed, might have maintained a Suit for Partition may maintain such Suit against any One or more of the Parties interested, without serving the other or others (if any) of those Parties; and it shall not be competent to any Defendant in the Suit to object for Want of Parties; and at the Hearing of the Cause the Court may direct such Inquiries as to the Nature of the Property, and the Persons interested therein, and other Matters, as it thinks necessary or proper with a view to an Order for Partition or Sale being made on further Consideration; but all Persons who, if this Act had not been passed, would have been necessary Parties to the Suit, shall be served with Notice of the Decree or Order on the Hearing, and after such Notice shall be bound by the Proceedings as if they had been originally Parties to the Suit, and shall be deemed Parties to the Suit; and all such Persons may have Liberty to attend the Proceedings; and any such Person may, within a Time limited by General Orders, apply to the Court to add to the Decree or Order.

10. In a Suit for Partition the Court may make such Order as it thinks just respecting Costs up to the Time of the Hearing.

11. Sections Nine, Ten, and Eleven of The Chancery Amendment Act, 1858, relative to the making of General Orders, shall have Effect as if they were repeated in this Act, and in Terms made applicable to the Purposes thereof.

12. In *England* the County Courts shall have and exercise the like Power and Authority as the Court of Chancery in Suits for Partition (including the Power and Authority conferred by this Act) in any Case where the Property to which the Suit relates does not exceed in Value the Sum of Five hundred Pounds, and the same shall be had and exercised in like Manner and subject to the like Provisions as the Power and Authority conferred by Section One of The County Courts Act, 1865.

APPENDIX IV

Bill No. 3

Matrimonial Home Possession Act

1. In this Act:

(1) "Homestead" has the same meaning as in the Dower Act.

(2) "Spouse" includes a former husband or wife.

2. (1) The court may

(i) grant a spouse the right to live in a homestead owned by either or both spouses or such part thereof as it may deem appropriate with or without

(a) the right of exclusive possession of the homestead, and

(b) the right of exclusive possession and use of household goods and chattels owned by either or both spouses,

(ii) exclude the other spouse from living in the homestead,

(iii) restrain a spouse from entering upon or attending at or near the homestead, and

(iv) vary or discharge an order made under this section.

(2) The court may make an order under subsection (1) pending trial of an action or for an indefinite period or for a fixed period of time.

(3) If the spouses are joint tenants of the homestead the court may by order sever the joint tenancy and the spouses shall upon registration of the order at the Land Titles Office be tenants in common.

(4) In exercising its powers under this section, the court shall have regard to

(i) the availability of other accommodation within the means of the spouses,

(ii) the needs of the children of the marriage, and

(iii) the financial position of the spouses.

(5) The court may make an order under this section ex parte upon being satisfied that there is danger of injury to the applicant spouse or the children of the family.

3. An order under this Act

(1) Takes effect notwithstanding an order under the Matrimonial Property Act or an order for partition or sale of the property,

(2) May be registered at the Land Titles Office against the title to the matrimonial home, and

(3) Upon such registration remains in force notwithstanding any partition, sale or disposition of the property unless the applicant spouse consents to or participates in any such partition, sale or disposition.

4. If the spouse to whom the court grants possession under section 2 becomes entitled to a life estate of the homestead an order under section 2 ceases to have effect.

APPENDIX V

Partition and Sale Act

1. In this Act,

(1) "court" means the Supreme Court or the District Court of Alberta;

[Recommendation #2(2) p.8]

(2) "co-owners" means joint tenants or tenants in common legally entitled to one of the following estates or interests in land:

(i) a freehold estate whether or not subject to a lease or tenancy;

(ii) a lease for a year or years;

(iii) a profit à prendre;

but does not mean co-owners of any future estate or interest in land, or co-owners holding in trust for common beneficiaries.

[Recommendation #13, p. 18;
Recommendation #15, p. 24]

(3) "Homestead" has the same meaning as in The Dower Act.

[Recommendation #6, p. 13;
Recommendation #8, p. 15]

2. (1) Upon application for termination of the co-ownership by one or more co-owners, which application shall be by way of originating notice, the court shall make one or more of the following orders:

[Recommendation #3, p. 8;
Recommendation #4, p. 8;
Recommendation #23, p.37]

(i) A partition order making a physical division of all or part of the land between the co-owners;

[Recommendation #2, p.8]

(ii) An order for sale of all or part of the land and the distribution of the proceeds between the co-owners, such sale and distribution to be under the direction of the court;

[Recommendation #2, p. 8]

and

(iii) An order for sale of the interest of one or more of the co-owners in all or part of the land to one or more of the other co-owners who are willing to purchase the interest, such sale to be under the direction of the court, which shall fix the value of the interest sold and the other terms of the sale.

[Recommendation #2, p. 8]

(2) Subsection (1) is subject to sections 5, 6, 9 and 10.

[Recommendation #3, p. 8]

(3) If the price offered at a sale pursuant to order under section 2(1)(ii) is less than the fair value of the land and the court considers further efforts to effect such a sale unwarranted, the court may

(i) refuse to approve the sale, and

(ii) stay the proceedings from time to time.

[Recommendation #5, p. 9]

(4) Upon making an order under subsection (1) the court may provide for an accounting, contribution or adjustment according to law and equity, and may order compensation for unequal division.

[Recommendation #20, p. 27;
Recommendation #21(1) p. 35]

(5) Without limiting the generality of subsection (4) the court may consider

(i) whether one co-owner has excluded another co-owner from the land;

(ii) whether an occupying co-owner was tenant, bailiff or agent of another co-owner;

(iii) whether a co-owner has received from third parties more than his just share of the rents from the land, or profits from the reasonable removal of its natural resources;

(iv) whether a co-owner has committed waste by an unreasonable use of the land;

(v) whether a co-owner should be compensated for non-capital expenses;

(vi) whether an occupying co-owner claiming non-capital expenses should be required to submit to a fair occupation rent; and

(vii) whether a co-owner has made improvements or capital payments that have increased the realizable value of the land.

[Recommendation #21(2), p. 35]

(6) Where the applicant is a co-owner of a lease or a profit à prendre the court may impose all terms and conditions necessary to ensure that the obligations under the lease or profit à prendre are performed.

[Recommendation #17, p. 25]

3. An order under section 2(1) effects severance of a joint tenancy.

[Recommendation #22, p. 36]

4. (1) An order under this Act is not a disposition under The Dower Act.

[Recommendation #7, p. 15]

(2) Upon co-ownership being terminated under this Act, the land ceases to be a homestead.

[Recommendation #8, p. 15]

(3) In making an order under section 2(1) in respect of a homestead the court may, when the interest of the spouses in the homestead are unequal, direct compensation by set-off or otherwise for the rights which each co-owner has under The Dower Act.

[Recommendation #9, p. 15]

(4) Compensation for a co-owner under subsection (3) shall be in the amount which that co-owner would have received upon an application under The Dower Act for an order dispensing with the consent of the other to a disposition of the land.

[Recommendation #10, p. 16]

5. Where a homestead is the subject matter of an application the court may stay proceedings under this Act pending an application under the Matrimonial Home Possession Act or while an order under that Act remains in force.

[Recommendation #6, p. 13]

6. The court may refuse to make an order under section 2(1) in respect of a lease or profit à prendre if the order would unduly prejudice the lessor or grantor.

[Recommendation #16, p. 25]

7. (1) In this section, "encumbrance" means any charge on or claim against land created or effected for any purpose whatever, and appearing on the title or in the general register inclusive of easements, restrictive covenants, profits à prendre, leases, mortgages, builders' liens, and executions against land.

[Recommendation #19(1), p. 26]

(2) An order under this Act does not affect an encumbrance against the whole of the estate or interest which is the subject matter of the order.

[Recommendation #19(2), p. 26]

(3) The following provisions apply in respect of an encumbrance against the estate or interest of one or more but not all of the co-owners;

(i) upon the making of an order for partition under section 2(1)(i) the encumbrance becomes an encumbrance against, and is restricted to, the land allotted to the co-owners whose estates or interests are affected by it;

(ii) upon the making of an order for sale under section 2(1)(ii) the encumbrance shall be discharged

and compensation therefor in the amount fixed by the court shall be a charge on the share of the proceeds accruing to the co-owners whose estates or interest are affected by it; and

(iii) upon the making of an order for sale under section 2(1)(iii) the encumbrance shall not be affected unless the estates or interests affected by it are sold in which event the encumbrance shall be discharged and compensation therefor in the amount fixed by the court shall be a charge on the share of the proceeds accruing to the co-owners whose estates or interests are affected by it.

[Recommendation #19(3), p. 26]

(4) The owner of an encumbrance which may be affected by an order under this Act

(i) shall be given notice of the application, and

(ii) is bound by the order.

[Recommendation #24, p. 37]

8. (1) Where the applicant seeks an order for partition of land the court on the application of a party or on its own motion may make an order

(i) staying proceedings until subdivision approval under The Planning Act is obtained, or

(ii) for partition conditional upon subdivision approval.

[Recommendation #14, p. 19]

(2) Where subdivision approval is not obtained a party may apply to the court for a further order.

[Recommendation #14, p. 19]

9. Notwithstanding any contract the court may make an order terminating a co-ownership the continuance of which would cause undue hardship to a co-owner.

[Recommendation #12, p. 18]

10. In addition to any other powers existing in it to order costs the court may make such order as it thinks just regarding costs and expenses incurred by a co-owner in contemplation of an application.

[Recommendation #25, p. 37]

11. The Acts of the Parliament of Great Britain, 31 Hen. VIII, c. 1; 32 Hen. VIII, c. 32; 31 and 32 Vict., c. 40 no longer apply in Alberta.

[Recommendation #26, p. 38]

APPENDIX VI

RECOMMENDATION NOT EMBODIED IN PROPOSED PARTITION AND SALE ACT

Recommendation #11

That The Transfer and Descent of Land Act be amended to abolish tenancies by the entireties.

[Report Page 17]