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'All Good Things Must Come to An End': Terminating Co-Ownership Under the 'Old' Partition and Sale Rules

Dr Heather Conway*

Whether co-ownership is solicited by willing purchasers or inflicted on unsuspecting beneficiaries under a will or intestacy, some mechanism to escape the ties of perpetual contention between co-owners must be allowed in any system of law which seeks efficient resource exploitation.¹

Despite its benefits, co-ownership of land creates problems where relations between the parties have soured, or one person simply wants to extricate themselves from this arrangement. The remedies of compulsory partition and sale allow one joint tenant or tenant in common to terminate co-ownership against the wishes of the others, by seeking a court order to this effect. Throughout parts of the common law world, this has been based on nineteenth century English legislation- namely the Partition Act 1868, the key elements of which remain in force in Western Australia, South Australia, Tasmania and the Australian Capital Territory. This article provides an up-to-date analysis of the law on compulsory partition and sale as derived from the 1868 Act and analogous provisions, drawing not only on Australian cases, but on frequently overlooked decisions from courts in both parts of Ireland and in parts of Canada, as well as 'old' English judgments on the 1868 Act.

Introduction

The phrase 'all good things must come to an end' is often used to denote the fact that enjoyable associations (and, in particular, those which began with seemingly great promise or potential) cannot last indefinitely. In the land law context, it is perhaps most applicable in co-ownership situations- two or more individuals acquire property together for personal, family, business or financial reasons, but circumstances change or relationships sour over time.² For example, co-owners may be unable to agree on a suitable means of exploiting their land, or one individual may be deriving more benefit from it than the others.³ Alternatively, a co-owner who no longer wishes to be burdened with the responsibilities of land ownership or who simply wants to realise his investment may be keen to sell the property. Problems may also arise in the event of a personal disagreement between co-owners or the breakdown of a relationship which originally caused them to purchase property as co-owners, such as the end of a joint business venture or

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¹ SAAA Cooper, "Partition of Land in the Commonwealth Caribbean" (2010) 39 Comm L World Rev 283 at 304.

² Co-ownership is one of the most important areas of modern land law, largely due to socio-economic developments from the latter half of the twentieth century onwards. Factors such as the societal ideal of home ownership and an increasingly diverse array of intimate relationships based on equality, within which shared property arrangements are the norm, have ensured that most couples- whether spouses or cohabiting couples- will be co-owners of a family home. The huge intergenerational transfer of wealth which occurs within families on death often results in co-ownership- especially as the 'baby-boom generation' grows older having accumulated significant assets to pass onto their children who become co-owners under a parent's will or through intestacy laws. Domestic and intra-familial transactions aside, co-ownership is also important in the commercial context: partnership property, as well as development land and investment properties may all be purchased by two or more individuals, again often for financial reasons in terms of both the initial capital and subsequent outlay.

³ It is a fundamental aspect of co-ownership that the inherent unity of possession dictates that each joint tenant or tenant in common is entitled to use and occupy the entire property, subject to a similar right on the part of all the other co-owners- 2 *Bl Comm* 181.

failure of a marriage or cohabiting relationship. In these circumstances, relations between the parties may have deteriorated to the extent that shared enjoyment of the property is no longer possible, and one individual may wish to end co-ownership with all its legal rights and responsibilities.

The remedies of compulsory partition or sale allow one joint tenant or tenant in common to terminate co-ownership against the wishes of his fellow co-owners, by seeking a court order to this effect.⁴ Partition results in the property being physically divided into lots, while sale in lieu thereof involves a sale of the land and division of the proceeds between the former co-owners.⁵ Every legal system which recognises co-ownership as a form of shared landholding provides some mechanism for releasing the parties from that relationship by means of compulsory partition or sale. Throughout many parts of the common law world, this has tended to be based on nineteenth century English legislation- namely, the Partition Act 1868⁶ which first allowed courts to substitute the more convenient and practical remedy of sale for that of physical partition of co-owned land.⁷ The key elements of the 1868 Act still form the basis of the law relating to compulsory partition or sale in parts of Australia today, and virtually identical provisions to ss 3-5 of the 1868 Act (which prescribe the circumstances in which the court can terminate co-ownership) can be found in Western Australia⁸, South Australia⁹, Tasmania¹⁰ and the Australian Capital Territory.¹¹ For those advising or adjudicating on co-ownership contests of this nature, the task has been made more difficult by a diminishing pool of case law following the introduction of substantively new or different powers of compulsory partition and sale in other parts of Australia¹², as well as an over-reliance on 'old' English case law decided prior to 1925 when the Partition Act 1868 was repealed in that jurisdiction.¹³

⁴ Of course, there is nothing to stop the parties from ending co-ownership voluntarily (and without judicial intervention) by agreeing to divide the property or to sell it and split the proceeds between them. However, this is dependent on consensus at all stages of the process, which may not be forthcoming where relations between the co-owners are strained or not all of them wish to bring co-ownership to an end.

⁵ In the majority of cases, sale is a more useful and workable remedy, especially where division of the property in question is inconvenient, impractical or impossible.

⁶ The 1868 Act was supplemented by the Partition Act 1876 which dealt with certain procedural aspects of partition actions and will not be considered here.

⁷ Prior to 1868, the only available remedy was that of partition. However, a co-owner was entitled to an order as of right (there was no discretion to refuse relief) with the 1868 Act introducing sale as an alternative- see Part VI below.

⁸ Property Law Act 1969 (WA), s 126.

⁹ Law of Property Act 1936 (SA), ss 69-71.

¹⁰ Partition Act 1869 (Tas), ss 3-5.

¹¹ Civil Law (Property) Act 2006 (ACT), s 244.

¹² See text to n 15 below.

¹³ Law of Property Act 1925, s 207 and Sch 7. This occurred as part of the comprehensive 1925 property law reforms in England and Wales which imposed a system of statutory trusts on co-owned land and introduced fundamentally different powers for resolving co-ownership disputes.

This article provides an up-to-date analysis of the law on compulsory partition or sale as derived from the 1868 Act and analogous provisions.¹⁴ In doing so, it does not confine itself to case law from the aforementioned Australian states and territories or those in which similar legislation existed in the past¹⁵; comparative reference is also made to the English decisions mentioned above, and more importantly to a large (and frequently overlooked) volume of cases from other jurisdictions in which the key provisions of the 1868 Act either remain in force or governed disputes between co-owners until fairly recently.¹⁶ In drawing all these together, the article gives a comprehensive account of the circumstances in which an order for compulsory partition or sale is likely to be made today, and the factors which will influence the outcome in co-ownership contests based on statutory derivatives of the 1868 Act.

II. The Key Statutory Provisions

As noted above, the key provisions of the Partition Act 1868 are ss 3-5 which define the circumstances in which courts can order partition or sale of co-owned land at the request of one joint tenant or tenant in common. These three provisions differ fundamentally in their scope and application, with distinct rules regarding the size of interest in the property which is needed to bring an action and the factors which the court must consider in reaching its decision. Each individual section will be used as the main reference point in the discussion which follows, and will provide a basis for analysing its Australian equivalents. Any linguistic variations across the various statutes will be highlighted, though these tend to be minor points and of little practical relevance.

III. Section 3 of the Partition Act 1868 and Analogous Provisions: Sale at the Request of a Co-Owner with Less Than a Half Interest, If ‘More Beneficial Than Partition’

Section 3 of the Partition Act 1868 and its legislative counterparts contemplate a request for sale by co-owners with less than a half share of the jointly owned property, despite the fact that there is no such inherent restriction in the provisions themselves. For example, s 3 uses the phrase “on

¹⁴ For a more in-depth analysis of this and other issues associated with compulsory partition and sale of jointly property see H Conway, *Co-Ownership of Land: Partition Actions and Remedies* (Bloomsbury Professional: 2nd edn, 2012).

¹⁵ While similar provisions used to exist in Victoria and the Northern Territory, both jurisdictions now have substantially different legislative frameworks for terminating co-ownership under the Property Law Act 1958 (Vict) (as amended), Pt IV and the Law of Property Act 2010 (NT), Pt 5, Div 2. As regards New South Wales and Queensland, termination of co-ownership has been governed by fundamentally different provisions for a much longer period of time- see the Conveyancing Act 1919 (NSW), Pt IV (as amended by the Conveyancing (Amendment) Act 1930 (NSW)) and the Property Law Act 1974 (Qd), Pt 4, Div 2.

¹⁶ For example, the Partition Act 1868 is still in force in Northern Ireland and also applied in the Republic of Ireland until 2009 when it was replaced by a new statutory regime under the Land and Conveyancing Law Reform Act 2009. Substantially similar legislation to ss 3-5 of the Partition Act 1868 is still in force in parts of Canada (see for example, the Partition of Property Act 1996 (BC), ss 6-8 and the Real Property Act 1974 (PEI), s 39) while the 1868 Act itself still applies in Saskatchewan and the Northwest Territories. In New Zealand, ss 140-142 of the Property Law Act 1952 (NZ) were virtually identical to ss 3-5 of the original 1868 Act; however, substantively new powers have now been introduced by the Property Law Act 2007 (NZ), ss 339-343.

the request of any of the parties interested”, as do s 3 of the Partition Act 1869 (Tas) and s 69(2) of the Law of Property Act 1936 (SA), while broadly similar wording can be found in s 126(2) of the Property Law Act 1969 (WA)¹⁷ and s 244(1)(a) of the Civil Law (Property) Act 2006 (ACT).¹⁸ However, these provisions only apply where the co-owner seeking sale is entitled to less than a half share in the property¹⁹, given that there is a distinct statutory provision for those who have a half share or more.²⁰

There are several important points to bear in mind here. Firstly, the court’s power of sale under s 3 and the like is discretionary²¹ given the use of the permissive “may” in the legislation.²² Secondly, in deciding whether to order sale the court is guided by specific statutory factors, and must be satisfied that sale of the property and division of the proceeds would be “more beneficial than partition”²³ for one or more of the following reasons:

- (a) the nature of the property;
- (b) the number of parties interested (or presumptively interested) therein;
- (c) the absence or disability of any of those parties; or
- (d) any other circumstance.²⁴

Thus in *Drinkwater v Ratcliffe*²⁵ where buildings surrounded by 30 acres of land were divisible into 36 shares, the court ordered sale due to the nature of the property and the number of parties.²⁶ A more recent (and much more complex) example can be found in *Nevin v Beneficiaries of the Peppermint Beach Estate Trust*²⁷ in which Roberts-Smith J ordered a sale of co-owned property divisible into 2,745 shares held by approximately 862 co-owners, some of whom were absent and

¹⁷ Section 126(2) uses the phrase “on the request of any party interested.”

¹⁸ Section 244(1)(a) uses the phrase “on the application of an interested person.”

¹⁹ *Grunert v Grunert* (1960) 32 WWR 509 and see the comments of Joyce J in *Hoggard v Hoggard* (22 November 1996, unreported) British Columbia Supreme Court, in relation to the corresponding provision in the then Partition of Property Act 1979 (BC). Alternatively, where an action for compulsory sale is brought by two or more co-owners, their collective interests in the property must be less than one-half.

²⁰ The position where co-owners seeking sale have a half interest or more in the joint property is governed by s 4 of the Partition Act 1868 and its statutory equivalents. Meanwhile, s 5 of the 1868 Act and its derivatives apply where the plaintiff’s interest affects less than half of the property but he cannot show any reason for preferring sale to partition as required by s 3 or the like. See respectively Parts IV and V below.

²¹ See the comments of Lord Hatherley LC in *Pemberton v Barnes* (1871) 6 Ch App 685 at 693, and see also *Re Langdale’s Estate* (1871) 6 ILTR 12 and *Grunert v Grunert* (1960) 32 WWR 509. However, it appears that the court’s discretion only extends to refusing an order for sale. Older cases held that the court was obliged to order partition as an alternative (see for example, *Dicks v Batten* [1870] WN 173 and *Dyer v Painter* (1885) 33 WR 806) and this is still the basic position today- see Part VI below.

²² Section 3 of the 1868 Act states that the court “may, if it thinks fit” direct a sale of the property, as do s 3 of the Partition Act 1869 (Tas), s 126(2) of the Property Law Act 1969 (WA) and s 69(2) of the Law of Property Act 1936 (SA). Meanwhile, s 244(1)(a) of the Civil Law (Property) Act 2006 (ACT) simply states that the court “may” order sale.

²³ This exact wording can be found in s 3 of the 1868 Act, as well as s 3 of the Partition Act 1869 (Tas) and s 244(1)(a) of the Civil Law (Property) Act 2006 (ACT), while s 69(2) of the Law of Property Act 1936 (SA) refers to sale being “more beneficial...than a division.” In contrast, s 126(2) of the Property Law Act 1969 (WA) simply requires that sale “would be for the benefit of the parties interested”; although this might suggest that no comparisons need be drawn with partition, it is likely that this provision would be interpreted in such a way given that it is derived from s 3 of the Partition Act 1868.

²⁴ The same basic wording can be found in each of the provisions being considered here.

²⁵ (1875) LR 20 Eq 528.

²⁶ See further *Pennington v Dalbiac* (1870) 18 WR 684, *Groves v Carbert* (1873) 29 LT 129, *Higgs v Dorkis* (1872) LR 13 Eq 280 and *Thompson v Richardson* (1872) IR 6 Eq 596.

²⁷ [2002] WASC 300 considering an application for sale under s 126(2) of the Property Law Act 1969 (WA).

could not be located. Finally, the onus of proof is on the party seeking sale²⁸, who must put forward specific reasons why this would be more beneficial than partition as contemplated by the legislation.²⁹

Case law suggests that sale should be more beneficial than partition for *all* of the persons interested in the property³⁰ and that courts should look at the issue objectively.³¹ More importantly, perhaps, the word “beneficial” as used here means advantageous in a pecuniary sense- the court should usually look towards the financial result³², though other considerations may be relevant as well.³³ For example, if the costs associated with dividing land are greater than those incurred by selling it because of the number of co-owners, then sale would be more beneficial than partition.³⁴ Likewise, the court may order sale where the price offered for the property would be greater than its current rental income³⁵, or where a sale of the entire property would fetch a higher price than separate sales of the divided shares following partition.³⁶ An order for sale is also likely where a deterioration in property value is expected if the order is refused³⁷, while the fact that one of the parties is absent from the area and is therefore unable to enjoy the land or his share if it were partitioned may also be relevant.³⁸ Animosity between the joint owners which would make mutual co-operation difficult if the land were divided may also be a factor which favours sale under s 3 of the 1868 Act and its statutory equivalents.³⁹ Turning to specific types of property, the court should consider each party’s commercial interests when dealing with

²⁸ See *Allen v Allen* (1873) 21 WR 842, *Drinkwater v Ratcliffe* (1875) LR 20 Eq 528 and *Prendergast v Mongan* [1913] 1 IR 321. Similar views were expressed in *Perman v Maloney* [1939] VLR 376 and in *Nevin v Beneficiaries of the Peppermint Beach Estate Trust* [2002] WASC 300.

²⁹ See *Evans v Evans* (1883) 31 WR 495.

³⁰ See *Corpn of Huddersfield v Jacomb* [1874] WN 80, *Allen v Allen* (1873) 21 WR 842 and *Gilbert v Smith* (1879) 11 Ch D 78. See further *Jabs Construction Ltd v Callahan* [1992] 1 WWR 748 and *BM v AM* [2003] IEHC 170, the court in the latter case stressing that all the parties interested in the property must be considered and not just the applicant.

³¹ *Pannizutti v Trask* (1987) 10 NSWLR 531 at 540 per Kirby P, and cited with approval by Templeman J in *Mitchell v Cullington* [1997] ANZ ConvR 342.

³² *Drinkwater v Ratcliffe* (1875) LR 20 Eq 528 at 533 per Jessel MR. See further the comments of Kearney J in *Hayward v Skinner* [1981] NSWLR 590 at 593 and those of Huddart J in *Jabs Construction Ltd v Callahan* [1992] 1 WWR 748 at 753.

³³ A number of cases have suggested that, while ‘beneficial’ primarily means in an economic sense, it could also encompass emotional and other factors- see *Mitchell v Cullington* [1997] ANZ Conv R 342, *Re Darby* [1999] 2 QdR 350 and *Nevin v Beneficiaries of the Peppermint Beach Estate Trust* [2002] WASC 300, all referring to comments to this effect made by Kirby P in *Pannizutti v Trask* (1987) 10 NSWLR 531 at 540 (who in turn was referring to the judgment of Lord Hatherley LC in *Pemberton v Barnes* (1871) 6 Ch App 685 at 693). For a more restrictive approach, see *Cryer v Ossher* (5 December 1997, unreported) Supreme Court of New South Wales.

³⁴ See *In the Matter of Softwood Plantations Party Ltd* (17 October 1995, unreported) Supreme Court of the Northern Territory of Australia. Here, the disputed property was owned by persons entitled to varying sixty-third shares and the evidence before the court suggested that partition would cost over Aus\$315,000 while sale expenses would only amount to Aus\$7,800.

³⁵ *Drinkwater v Ratcliffe* (1875) LR 20 Eq 528 at 533 per Jessel MR.

³⁶ *Pemberton v Barnes* (1871) 6 Ch App 685 at 695 per Lord Hatherley LC. See further *Sheahan v Cooper* (1 December 1998, unreported) Federal Court of Australia. In *Moss v Zorn* [1991] NWTR 141 the court was influenced by the fact that the parties would have difficulty selling their individual interests in the property, with or without partition.

³⁷ *Zachariuk v Chepsiuk* [2005] BCSC 919 (occupying co-owner seeking to realise her inheritance and unable to afford the joint home or its current upkeep by her own means; consequent deterioration in value to the property likely to impact on the remaining beneficiaries’ interests under the will if sale refused).

³⁸ *Moss v Zorn* [1991] NWTR 141.

³⁹ *Smith v DeSanti* [2005] BCSC 750 (property comprising four homes situated on three lots, and parties unlikely to co-operate with each other if partition ordered given the level of acrimony between them).

land or premises used for entrepreneurial activities.⁴⁰ However, the fact that sale will detrimentally affect a business conducted on the property by one of the co-owners may not deter the court from making such an order.⁴¹ In a domestic context, questions of sentiment that arise, for example, on the proposed sale of family property are generally irrelevant in determining whether sale would be more beneficial than partition.⁴²

Of course, it should be borne in mind that sale is only one option here- though one which is extremely likely if the statutory requirements are met. In the nineteenth century English case of *Gilbert v Smith*⁴³ Jessel MR remarked:

The meaning of the Legislature was that 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.⁴⁴

It stands to reason that the court may refuse to make an order for sale if it believes that partition is more appropriate on the facts of a particular case.⁴⁵ The decision of the Supreme Court of South Australia in *Francis v Francis*⁴⁶ is an excellent illustration of a request for sale being denied under s 69(2) of the Law of Property Act 1936 (SA), following a dispute between parents and their adult daughter. The parents owned around 65 hectares of farm property (which included their home) and transferred part of this to their daughter to allow her to build a transportable home there following the breakdown of the daughter's marriage.⁴⁷ Relations between the parties having soured, the daughter (who was now a co-owner of the land with her parents) sought an order for sale of the entire farm property and division of the proceeds. However, the court refused on the basis that there would be a significant increase in value to all parties if the land were partitioned instead of being sold.⁴⁸ The daughter's interest in the property was confined to one hectare, and this portion could be partitioned off from the rest. In addition, Bleby J cited as "compelling" the fact

⁴⁰ *Jabs Construction Ltd v Callahan* [1992] 1 WWR 748 at 754-755 per Huddart J.

⁴¹ *Scates v Scates* [1962] VR 398.

⁴² *Drinkwater v Ratcliffe* (1875) LR 20 Eq 528 at 533 per Jessel MR, though one might question whether such a strict approach would still be taken today- especially where the property in question is a home.

⁴³ (1879) 11 Ch D 78 at 81.

⁴⁴ Cited with approval by Meredith CJ in *Ontario Power Co v Whattler* (1904) 7 OLR 198 and by Baxter CJ in *Lehman v Hunter* (1939) 13 MPR 553. In *Dyer v Painter* (1885) 33 WR 806 Cotton LJ (commenting on *Gilbert v Smith*) stated that, in an action under the Partition Act 1868, s 3 "when you cannot see how a partition can reasonably be made, a sale should be directed."

⁴⁵ *Dicks v Batten* [1870] WN 173. See further *Allen v Allen* (1873) 21 WR 842, *Ontario Power Co v Whattler* (1904) 7 OLR 198 and *Prendergast v Mongan* [1913] 1 IR 321. The fact that there is evidence to suggest that it would be a good time to sell the property is irrelevant if the court decides to order partition- *Dyer v Painter* (1885) 33 WR 806.

⁴⁶ [2009] SASC 363.

⁴⁷ There was some disagreement as regards the extent of the daughter's interest in the property. While the parents had originally transferred one half of the legal title in the farm to their daughter, this was solely for the purposes of facilitating a bank loan to the daughter for the purchase of the transportable home and associated construction costs. The parties all agreed that this transfer did not represent their true intentions at the time, with the daughter arguing that it was intended that she would have a one-third beneficial interest in the property while the parents argued that the intent was only for the daughter to have a beneficial interest in one hectare of the land. Finding in favour of the parents, Bleby J ruled that the daughter held the remainder of the 50% interest (minus the one hectare allocation) on resulting trust for her parents.

⁴⁸ The respective lots, if partitioned, were valued at Aus\$110,000 for the daughter's portion and Aus\$502,000 for the parents' portion (which included their home). In contrast, the whole of the land, if sold, was valued at Aus\$574,000.

that to order sale would mean ejecting the parents from the home in which they had resided for over 20 years.⁴⁹

As a general point, s 3 and its corresponding provisions state that the court 'may' order sale if it would be more beneficial than partition. Returning to the idea that this power is discretionary,⁵⁰ a situation could conceivably arise in which the court refuses to order sale, even though it is of the opinion that selling the land and dividing the proceeds would be more beneficial than partition.⁵¹ However, this is unlikely to occur in practice. The traditional view in partition actions is that the court must order partition if it refuses sale.⁵² Therefore, if sale is more beneficial, the court is likely to order make an order to this effect- especially where partition is impossible or impracticable.

IV. Section 4 of the Partition Act 1868 and Analogous Provisions: Sale at the Request of a Co-Owner with a Half Interest or More, in the Absence of 'Good Reason to the Contrary'

Different considerations apply where the co-owner seeking sale is entitled to a half interest or more in the property in question. Section 4 of the Partition Act 1868 contemplates a request being made by the owner of "one moiety or upwards", as do s 4 of the Partition Act 1869 (Tas) and s 70 of the Law of Property Act 1936 (SA), while both s 126(1) of the Property Law Act 1969 (WA) and s 244(1)(b) of the Civil Law (Property) Act 2006 (ACT) use the more instantly recognisable terminology of "a half share" or upwards.⁵³

Linguistics aside, one might assume that this particular eligibility test is satisfied by the plaintiff having a half interest or more in the property itself. However, it was suggested in the Northern Ireland case of *Northern Bank Ltd v Adams*⁵⁴ that the test was whether such persons were entitled to half or more of the realisable monetary value of the property. In this case, the plaintiff Bank had a mortgage affecting a husband's half share of a matrimonial home and applied for sale under s 4 of the Partition Act 1868 following the husband's default. Observing that the house was worth £80,000 while the sum owing to the Bank was approximately £10,000, Master Ellison rejected the Bank's argument that it came within s 4 because its mortgage affected a half share of the estate. Instead, the Bank's action fell under s 3 of the 1868 Act because the realisable value of its mortgage was less than half the value of the entire property. Although the plaintiff in

⁴⁹ [2009] SASC 363 at [75]. However, Bleby J pointed out that partition would not affect the mortgage which had been taken out entirely for the daughter's benefit; the parents could apply for a partial discharge of the mortgage from their share following partition, while the value of the daughter's divided portion would still provide sufficient security for the outstanding mortgage debt.

⁵⁰ See text to n 22 above.

⁵¹ See the comments of Lowe J in *Carpenter v Sheehan* [1947] VLR 127 at 128 and those of Wright J in *Bay v Bay* (1984) 38 Sask 101 at 103.

⁵² Since partition and sale are strict alternatives under the legislation- see Part VI below.

⁵³ According to the respective statutory provisions, where an individual co-owner seeks sale the court must be satisfied that he is entitled to at least a half interest in the land. Where a request for sale is made by two or more co-owners, the collective sum of their interests must be equivalent to or exceed a half interest in the property.

⁵⁴ (1 February 1996, unreported) High Court (NI).

Northern Bank Ltd v Adams was a mortgagee of one co-owner's interest, the same reasoning (if correct) would apply to all s 4 applications so that a plaintiff would have to show that his undivided interest, if sold, would fetch a sum equivalent to or greater than half the amount that would be raised by selling the entirety.⁵⁵ However, the decision in *Adams* must be wrong on this point. There are no other examples of courts adopting this approach in proceedings under s 4 or its statutory equivalents⁵⁶ - hardly surprising, since the legislation itself specifically refers to persons having a half interest or more "in the property" to which the action relates.⁵⁷

Assuming that this basic requirement is satisfied, the question then arises as to when an order for sale is likely to be made and in what circumstances. A useful starting point is to contrast s 4 of the 1868 Act and analogous provisions with s 3 of the 1868 Act and its derivatives. The wording used is much stronger - instead of the permissive "may" which appears in the latter⁵⁸, s 4 and the like use the imperative "shall" or "must" order sale which suggests a much stronger presumption in its favour. In addition, there is no need to put forward a specific case for ordering sale or to show any particular reason why such a request should be granted. Unlike s 3 of the 1868 Act and its statutory counterparts, the court does not have to consider the nature of the property, the number of parties interested therein, the absence or disability of any of those persons, or any other relevant circumstance.⁵⁹ The only factor for the court to consider is whether the co-owners who oppose sale have established "good reason to the contrary" (in other words, good reason against sale⁶⁰) as required by s 4 and its equivalent provisions.⁶¹ The onus of proof is on the dissenting co-owners, who must convince the court that the property should not be sold.⁶²

⁵⁵ If correct, this would also mean that ss 3 and 5 of the Partition Act 1868 and their legislative counterparts would only apply where sale of the plaintiff's undivided interest was worth less than half of the sale value of the entire property.

⁵⁶ On the contrary, case law clearly indicates that the plaintiff must have a half interest or more in the property itself - see *Pemberton v Barnes* (1871) 6 Ch App 685, *Roughton v Gibson* (1877) 46 LJ Ch 366 and *Pitt v Jones* (1880) 5 App Cas 651. For more recent suggestions, see *Fleming v Hargreaves* [1976] 1 NZLR 123, *Tansell v Tansell* (1977) 35 FLR 272, *Glendinning v Thiessen* (1994) 95 BCLR (2d) 21 and *Grunert v Grunert* (1960) 32 WWR 509, as well as the various cases cited throughout the discussion below on s 4 of the 1868 Act and its derivatives.

⁵⁷ Section s 126(2) of the Property Law Act 1969 (WA) uses the term "in the land" to which the action relates. However, the meaning is exactly the same.

⁵⁸ See text to n 22 above.

⁵⁹ See the comments of Jessel MR in *Drinkwater v Ratcliffe* (1875) LR 20 Eq 528 at 530-531.

⁶⁰ See the comments of Jessel MR in *Porter v Lopes* (1877) 7 Ch D 358 at 363.

⁶¹ Section s 244(1)(b) of the Civil Law (Property) Act 2006 (ACT) uses the term "good reason not to." Once again, the meaning is exactly the same.

⁶² See *Porter v Lopes* (1877) 7 Ch D 358, *Pemberton v Barnes* (1871) 6 Ch App 685, *Drinkwater v Ratcliffe* (1875) LR 20 Eq 528, *Allen v Allen* (1873) 21 WR 842, *Lys v Lys* (1868) LR 7 Eq 126 and *Fleming v Crouch* [1884] WN 111. Discussing the corresponding section of the then Partition Act 1911 (Qd) Jeffriess J in *Joyce v Joyce* [1963] Qd R 139 at 154 remarked: "The onus of showing good reason to the contrary is upon the defendant, and if he fails to do so, I must in terms of the section direct a sale. It is not for me to inquire into the reasons why the plaintiff desires a sale." See further *Martin-Smith v Woodhead* [1990] WAR 62, *Dew v Riddler* (1900) 19 NZLR 28, *Pillar v Odlin* [1951] NZLR 220, *Re Moore* [1952] NZLR 273, *Zakoski v Zakoski* (11 June 1984, unreported), Saskatchewan Queen's Bench, *BM v AM* [2003] IEHC 170 and *Tryphena Properties Ltd v Harnett* [2007] NZHC 370. Suggestions in *Bradwell v Scott* [2000] BCCA 576 that the language of s 4 (or in this case, its statutory equivalent under s 6 of the Partition of Property Act 1996 (BC)) is neutral in terms of onus must be regarded as incorrect.

The legislation contemplates some sort of discretion to refuse sale.⁶³ However, the issue of whether ‘good reason to the contrary’ should be given a wide or restrictive interpretation was the subject of judicial debate following the enactment of the Partition Act 1868, with Malins VC in the first instance decision in *Pemberton v Barnes*⁶⁴ advocating a broad discretion:

[Counsel for the plaintiff] says [s 4 of the 1868 Act] is imperative, and no doubt it would have been but for the words “the Court shall, *unless it sees good reason to the contrary*, direct a sale.” This leaves it entirely to the discretion of the Court; and the Court, in exercising that discretion, must have regard to all the surrounding circumstances; but above all, it must look ... to the nature of the property and the interests of the parties.

These comments were endorsed by Cotton LJ in *Porter v Porter*⁶⁵ who argued that s 4 “does not make it imperative on the Court to direct a sale.” In contrast, most early decisions on the 1868 Act took the view that use of the word ‘shall’ created a strong presumption in favour of such an order. For example, in *Pemberton v Barnes*⁶⁶ Lord Hatherley LC stated that the court is usually “bound” to order sale, while Hall VC in *Rowe v Gray*⁶⁷ referred to the plaintiff’s “right to have sale” in the absence of ‘good reason to the contrary.’⁶⁸ It is obvious from these and more recent cases that the court’s discretion under s 4 and its statutory derivatives is limited.⁶⁹ In short, ‘good reason to the contrary’ is a high hurdle for the opposing parties to overcome; if they fail to establish this, the court is obliged to order sale.

This interpretation is supported by the fact that, while there are numerous decisions on what *does not* constitute ‘good reason to the contrary’, there are relatively few cases stating what *does*. For example, it is well-established that co-owners who oppose sale must submit some positive and substantive reason for the court to refuse such an order; mere dissent or opposition to sale is not enough⁷⁰, unless there are other mitigating factors.⁷¹ Likewise, the court is not usually concerned with questions of sentiment, and may order sale of family property which has passed down through generations.⁷² In the domestic co-ownership context, one joint tenant or tenant in common may not be able to prevent sale on the basis that he wants to remain in the area but is

⁶³ Once again, the prevailing view in the nineteenth century was that the court had to order partition if it refused sale (see for example *Saxton v Bartley* (1879) 48 LJ Ch 519), and it appears that this is still the practice today- see Part VI below.

⁶⁴ Reported at (1871) 6 Ch App 685 at 690.

⁶⁵ (1888) 37 Ch D 420 at 426.

⁶⁶ (1871) 6 Ch App 685 at 693.

⁶⁷ (1877) 5 Ch D 263 at 264.

⁶⁸ See further the comments of Lynch J in *Re Langdale’s Estate* (1871) 6 ILTR 12 at 13, as well as *Parker v Trigg* [1874] WN 27 and *Porter v Lopes* (1877) 7 Ch D 358.

⁶⁹ See for example, *De Campo Holdings v Cianciullo* [1977] WAR 56 decided under the corresponding provision of the Property Law Act 1969 (WA) and see the comments of Kirby P in *Pannizutti v Trask* (1987) 10 NSWLR 531 at 539 in relation to the corresponding provision of the Partition Act 1878 (NSW). In *Glendinning v Thiessen* (1994) 95 BCLR (2d) 21 at 23 the court referred to the “very narrow discretion” to refuse sale under the corresponding provision of the then Partition of Property Act 1979 (BC). Similar views were expressed by Holmes J in *Richardson v McGuiness* (12 December 1996, unreported) British Columbia Supreme Court, and see *Dobell v Oman* (6 March 1998, unreported) British Columbia Supreme Court as well as *Dunford v Sale* [2007] BCSC 1422.

⁷⁰ See the comments of Lynch J in *Re Langdale’s Estate* (1871) 6 ILTR 12 at 13 and those of Lord Hatherley LC in *Pemberton v Barnes* (1871) 6 Ch App 685 at 694.

⁷¹ *Re Langdale’s Estate* (1871) 6 ILTR 12.

⁷² *Pemberton v Barnes* (1871) 6 Ch App 685 and *Porter v Lopes* (1877) 7 Ch D 358.

unlikely to acquire a reasonably priced equivalent property⁷³, or that sale will result in the loss of their home.⁷⁴ The fact that the property in question is the house in which children of the family were brought up may not constitute 'good reason to the contrary'⁷⁵, and a request for sale of a family home may also be granted despite potential disruption to a child's education.⁷⁶ In the commercial sphere, an order for sale is likely where joint property is used wholly or principally for such purposes, and irrespective of any hardship caused by one of the parties having to relocate their business.⁷⁷ Considering a request for sale of commercial property under s 4 of the 1868 Act, Lord Selbourne LC in *Wilkinson v Joberns*⁷⁸ remarked:

I can imagine no description of real property to which the policy of that Act would be more applicable than this, of which the value is essentially commercial.⁷⁹

While accepting that occupancy for business purposes by one co-owner is insufficient reason for refusing sale under virtually identical legislation to s 4⁸⁰, Hutchison J in the New Zealand case of *Re Moore*⁸¹ suggested that there might be circumstances in which the court should consider a connection between one co-owner's occupation of the property and his position as co-owner. However, this factor alone is unlikely to amount to 'good reason to the contrary.' As discussed below, partition of the property should be a feasible alternative⁸², and there is authority to suggest that commercial property will not be partitioned simply because it is possible to do so in a manner which accommodates the defendant's business needs⁸³ or where the proposed division would be economically disadvantageous for the plaintiff.⁸⁴

Irrespective of whether property is used for business or residential purposes, 'good reason to the contrary' is not established by the fact that sale by auction will probably not realise the true value

⁷³ *Richardson v McGuiness* (12 December 1996, unreported) British Columbia Supreme Court.

⁷⁴ For example, in *Peck v Peck* [1965] SASR 293 where a wife opposed her husband's request for sale of a jointly owned matrimonial home on the basis that he had deserted her and sale would deprive the wife of her home, the court held that this was insufficient reason for refusing to order sale. However, contrast this with the decision in *BM v AM* [2003] IEHC 170, discussed text to n 115-117 below.

⁷⁵ See *Smith v Smith (No 2)* [1962] Qd R 132 considering the corresponding provision of the then Partition Act 1911 (Qd). In *Cattoni v Cattoni* (12 March 1980, unreported) Alberta Queen's Bench, Kerans J made an order for sale of matrimonial property under s 4 of the Partition Act 1868 on the basis that it was being used as revenue property (for rental in units) and the wife no longer needed it as her home.

⁷⁶ *Bourke v Bourke* [1983] 2 NZFLR 55, though one might query whether such a factor might persuade the court to postpone the order.

⁷⁷ See for example, *Re Franchi and Franchi* (21 August 1980, unreported) Ontario District Court, in which the court made an order for sale under the then Partition Act 1970 (Ont) despite the fact that the opposing co-owners occupied both a home and business premises on part of the property. In *Gillespie v Brett* (20 November 1979, unreported) Alberta Queen's Bench, Cormack J made an order for sale of commercial property under the Partition Act 1868, s 4 where the parties could no longer agree on the management of the premises and the appropriate rent to charge tenants.

⁷⁸ (1873) LR 16 Eq 14 at 17 and see further the judgment of Bacon VC in *Roughton v Gibson* (1877) 46 LJ Ch 366.

⁷⁹ Similar views were expressed by Kennedy J in *Martin-Smith v Woodhead* [1990] WAR 62 and by Stable J in *Smith v Smith (No 2)* [1962] Qd R 132. See however, *Schnytzer v Wielunski* [1978] VR 418 discussed at text to n 118-120 below.

⁸⁰ Namely the then Property Law Act 1908 (NZ), s 105(1).

⁸¹ [1952] NZLR 273.

⁸² See text to n 100-106 below.

⁸³ *Re Moore* [1952] NZLR 273 (defendant was 74 years of age and unlikely to spend many more years in the business so that the proposed partition would be of more benefit to his son and to the other business partner).

⁸⁴ *Polden v Rowling* [1958] NZLR 31 (partition refused on this basis, even though an order for sale of commercial property would result in a serious reduction of income for the defendant).

of the property⁸⁵, or by the fact that a dissenting co-owner offers to purchase the share of the party seeking sale.⁸⁶ The fact that the plaintiff simply wants to capitalise on his investment by selling is irrelevant⁸⁷, and where previous attempts have been made to sell his share in the property, the other co-owners cannot argue that the plaintiff should have kept it on the market for longer to create more interest from potential buyers.⁸⁸ Suggestions to the effect that it is the wrong time to sell the property and that postponing sale would generate more money are usually irrelevant⁸⁹, as is the fact that the disputed property is currently operating at a loss⁹⁰ or might fetch more at sale if renovation works were carried out.⁹¹ In addition, a co-owner cannot prevent sale on the basis that it would not produce sufficient money to discharge debts or incumbrances on the property⁹² or that sale will produce a possible monetary loss.⁹³ While the court may take a proven loss of revenue into account⁹⁴, a mere possibility that the money generated by sale would be less than the income derived from the land itself is immaterial.⁹⁵ Complaints that sale will expose the dissenting co-owners to significant tax liabilities also tend to have little impact⁹⁶, while the fact that the actions of a neighbouring landowner might render the disputed land less marketable does not constitute 'good reason to the contrary.'⁹⁷ The fact that the defendant has expended money on the property which increases its sale value is relevant in any subsequent

⁸⁵ *Lys v Lys* (1868) LR 7 Eq 126.

⁸⁶ Numerous cases on the equivalent provision of the Partition of Property Act 1996 (BC) have held that an undertaking to purchase does not constitute 'good reason to the contrary'- see *Ching v Ching* [2005] BCSC 1368; *Rendle v Stanhope Dairy Farm Ltd* [2003] BCSC 1984, *Machin v Rathbone* [2006] BCSC 252, *Pelikan v Quarry* [2006] BCSC 269 and *Trimble v Crow* [2006] BCSC 831. For an Australian perspective, see the comments of Menhennitt J in *Schnytzer v Wielunski* [1978] VR 418 at 421 in relation to the corresponding provision of the then Property Law Act 1928 (Vict) citing *Perman v Maloney* [1939] VLR 376 and *Anderson v Anderson* [1957] VR 317. However, Menhennitt J suggested that an undertaking to purchase might be taken into account along with other relevant factors in establishing good reason for refusing sale.

⁸⁷ *Richardson v McGuinness* (12 December 1996, unreported) British Columbia Supreme Court.

⁸⁸ *Richardson v McGuinness* (12 December 1996, unreported) British Columbia Supreme Court, where the petitioners had placed the property on the market for several months at less than its market value but had failed to find a buyer.

⁸⁹ *Canadian Imperial Bank of Commerce v Mulholland Construction* (28 January 1998, unreported) Ontario Court (General Division), in which Wilkins J regarded expert evidence to this effect as "conjecture and speculation" and cautioned against the court "entering into any realm of financial prophecy": Lexis transcript, p 4.

⁹⁰ *Canadian Imperial Bank of Commerce v Mulholland Construction* (28 January 1998, unreported) Ontario Court (General Division), citing *Sheridan Platinum Group Inc v Madeleine Mines Ltd* (29 June 1994, unreported) Ontario Court (General Division).

⁹¹ *Leader v Azevedo* [2007] NZHC 1076 (defendant's argument that the house in question required renovations which he was in a position to carry out as a competent tradesman did not constitute 'good reason to the contrary').

⁹² *First National Building Society v Ring* [1992] IR 375. The fact that the opposing co-owner has acted as guarantor on mortgages affecting the entire property does not constitute 'good reason to the contrary'- see *Gillespie v Brett* (20 November 1979, unreported) Alberta Queens Bench (although the court directed that the property should not be sold for less than the amount due on both mortgages in order to protect the respondent from subsequent action by the mortgagees).

⁹³ See *Barnes and Park Place Holdings Ltd v Henshaw* (1980) 5 WWR 755.

⁹⁴ See *Langmead v Cockerton* (1877) 25 WR 315.

⁹⁵ See for example, *Rowe v Gray* (1877) 5 Ch D 263 and *Re Langdale's Estate* (1871) 6 ILTR 12. See further *Re Whitwell's Estate* (1887) 19 LR Ir 45. In *Worotniak v Korobejko* (11 August 1988, unreported) Saskatchewan Queen's Bench, Grotsky J made an order for sale of rental property under the Partition Act 1868, s 4 despite the opposing co-owner's attempts to restrain sale by means of an interlocutory injunction.

⁹⁶ *Gartree Investments Ltd v Cartree Enterprises Ltd and Elgtree Holdings Ltd* (5 June 2000, unreported) Ontario Superior Court of Justice.

⁹⁷ For example, the court cannot refuse to order sale where the land in question enjoys a view over the surrounding countryside and future building work on adjoining land might spoil this view. Rejecting a similar argument in *Porter v Lopes* (1877) 7 Ch D 358, Jessel MR stated that a purchaser of property with a view over surrounding countryside should contemplate the possibility of that view being disturbed by lawful actions carried out on a neighbouring property.

accounting adjustment between the co-owners⁹⁸; it does not, however, affect the substantive relief claimed.⁹⁹ In short, financial considerations will not usually negate the strong preference for sale under s 4 and its corresponding provisions.

Judicial opinions have differed over whether the possibility of making a viable partition of the property by itself constitutes 'good reason to the contrary.' In the old Irish case of *Re Langdale's Estate*¹⁰⁰ Lynch J argued that the only material factor "would be to show affirmatively that it was not a matter of difficulty to...partition", while Malins VC at first instance in *Pemberton v Barnes*¹⁰¹ indicated that he would not order sale under s 4 if the property could be divided instead. However, the better view appears to be that feasibility of partition alone does not amount to 'good reason to the contrary.' According to Jessel MR in *Porter v Lopes*¹⁰²:

When there is some objection to a sale, and, in addition to that, the property can be readily partitioned, of course that does come in aid of what might otherwise not be a sufficient objection to a sale standing alone.¹⁰³

Unlike s 3 and its legislative counterparts, s 4 and those provisions which are derived from it do not require any evaluation of the relative merits of sale versus partition.¹⁰⁴ Feasibility of partition is one merely aspect of 'good reason to the contrary'¹⁰⁵; the opposing co-owners must put forward some other exceptional circumstance for refusing sale.¹⁰⁶ Instances of the courts finding that 'good reason to the contrary' exists where partition is impractical are difficult to find, while the recent decision of the Supreme Court of Western Australia in *Orrman v Orrman (No 2)*¹⁰⁷ also suggests that sale will be ordered where division of the land is unsuitable and none of the co-owners actually wants this as an alternative.¹⁰⁸ Practicalities aside, it appears that partition must also be feasible in a legal sense. In the Irish case of *Sheehy v Talbot*¹⁰⁹ where the plaintiff sought sale of a dwelling house which she occupied with her former partner, the court granted the request under s 4 of the 1868 Act despite the defendant's arguments that the property was already partitioned in a *de facto* sense because the parties had continued to reside there and

⁹⁸ For an overview and analysis of the equitable accounting rules, see Conway, n 14 above, ch 11 .

⁹⁹ *Martin-Smith v Woodhead* [1990] WAR 62.

¹⁰⁰ (1871) 6 ILTR 12 at 13.

¹⁰¹ Reported at (1871) 6 Ch App 685.

¹⁰² (1877) 7 Ch D 358 at 364.

¹⁰³ Similar views were expressed by Hall VC in *Rowe v Gray* (1877) 5 Ch D 263. In *Re Moore* [1952] NZLR 273 at 275 Hutchison J stated that "the fact that property can be readily partitioned comes in aid of the opposition to a sale," and see *Polden v Rowling* [1958] NZLR 31.

¹⁰⁴ Commenting on ss 3 and 4 of the Partition Act 1868, Lord Hatherly LC in *Pemberton v Barnes* (1871) 6 Ch App 685 at 695 remarked: "The difficulty of partition is dealt with in sect 3, and there is not in sect 4 a single word about the size of the estate or the difficulty of partition; it simply speaks of a case where the parties interested desire a sale and it provides that they should have the preponderating voice."

¹⁰⁵ Following on from the traditional view that if the court refuses to order sale, it should order partition instead- see Part VI below.

¹⁰⁶ "In relation to what would constitute good reason to the contrary, the old authorities probably do not go beyond the suggestion that it might be sufficient to show (1) that there are serious disadvantages to a sale *and* (2) that there is no difficulty in achieving a physical partition": Mee, 'Partition and Sale of the Family Home' (1993) 15 DULJ 78 at 84.

¹⁰⁷ [2008] WASC 17, discussing s 126(1) of the Property Law Act 1969 (WA).

¹⁰⁸ See also *Mandau v Giesbrecht* [2001] BCSC 719 (sale ordered under the equivalent of s 4 given the likelihood of a protracted, expensive and potentially contentious subdivision process which would probably not succeed).

¹⁰⁹ [2008] IEHC 207.

were living separate lives under the same roof. In reaching its conclusion, the court drew attention to the fact that physical division of the property would not be viable (as well as being very expensive), and was unlikely to be granted the requisite planning permission needed to convert the property into two self-contained dwellings.¹¹⁰

Relatively few factors have been identified as amounting to ‘good reason to the contrary’ for the purposes of s 4 and its equivalents. In the nineteenth century case of *Porter v Lopes*¹¹¹ Jessel MR suggested the following:

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 ... There are cases where the nature of the property was such that you could not well sell it. There are various properties of such a nature; thus, where the property is so attached to some other property, or [has] such a mere dependence on another property as to be almost valueless except in connection with that property, though of very great value in connection with it ...

Instances of sale being refused in these circumstances are difficult to find, though isolated examples do exist. As regards a temporary depreciation in value, McWilliam J in the Irish case of *CH v DGO'D*¹¹² was of the opinion that this would not constitute ‘good reason to the contrary.’¹¹³ However, if the disputed property was family land and the conduct of a family member was intended to deter outsiders from bidding at the sale thus causing a depreciation in value, then this might suffice.¹¹⁴ Meanwhile, in the more recent Irish case of *BM v AM*¹¹⁵ the court refused to order sale of a family home occupied by the husband (the request for sale having been made by his estranged wife who was now living elsewhere) on the basis that the husband would effectively be left without a home. It appears that three factors combined to produce this result: (i) the then state of the property market when house prices were high in Dublin¹¹⁶; (ii) the husband’s age and the difficulties which he would face in trying to obtain a mortgage loan to purchase another property (even allowing for his share of the proceeds of sale from the jointly owned home); and (iii) the fact that the disputed property was a former family home, along with the fact that his estranged wife also had a house in England where she was now residing.¹¹⁷

¹¹⁰ In Ireland, ss 3(1) and 3(3) of the Planning and Development Act 2000 (Ir) prohibit the conversion of a single dwelling house into two or more dwellings without planning permission.

¹¹¹ (1877) 7 Ch D 358 at 363-364.

¹¹² (1978) 114 ILTR 9.

¹¹³ See further *Pemberton v Barnes* (1871) 6 Ch App 685 and *Adler v Ferguson* [1962] VR 129 where similar views were expressed in relation to the corresponding section of the then Property Law Act 1958 (Vict).

¹¹⁴ (1978) 114 ILTR 9 at 14.

¹¹⁵ [2003] IEHC 170.

¹¹⁶ The case was decided before the current economic downturn which has reduced property prices in Dublin (and throughout most of Ireland and the UK) significantly.

¹¹⁷ Although the court did not consider whether partition was a viable alternative here, the final outcome is probably correct given that the court could have exercised a discretion to refuse partition (despite having declined to order sale) on the basis that such an order would need third party consent in the form of planning permission for subdivision of a dwelling, and would therefore be futile- see Part VI below. More generally, contrast the decision in *BM v AM* with that in *Trinity College v Kenny* [2010] IEHC 20 in which the court made an order for sale under s 4 of the 1868 Act of a home occupied by a couple in their late seventies. Although the couple had lived in the property for 15 years, the court drew

On the other rare occasions in which courts have refused sale under s 4 and analogous provisions, the reason for doing so appears to have been based on the specific circumstances of the case which favoured partition instead. For example, in *Schnytzer v Wielunski*¹¹⁸ the parties were tenants in common in equal shares of adjoining shop properties. The defendants opposed the plaintiffs' request for sale under the corresponding provision of the then Property Law Act 1958 (Vict), on the basis that they operated a delicatessen business from one of these properties and would suffer financial loss in the event of the court ordering sale. Menhennitt J stated that the commercial interests of the parties should be weighed against each other in determining whether 'good reason to the contrary' existed on the facts of the case.¹¹⁹ More importantly perhaps, several factors favoured partition here. Both properties were of similar size and had been occupied separately by the parties for a number of years prior to the partition action. The properties were also subject to a registered plan of subdivision confirming this arrangement, which would be the same as the partition ordered by the court.¹²⁰

In the nineteenth century English case of *Saxton v Bartley*¹²¹ the plaintiff's motives in seeking sale and the feasibility of partition were regarded as 'good reason to the contrary.' The plaintiff and Bartley were tenants in common of leasehold property; following Bartley's death, his widow was entitled to the rent from the property for her life. Refusing a request for sale under s 4 of the Partition Act 1868, Bacon VC held that the plaintiff was motivated by ill-feeling towards the deceased and his family.¹²² The plaintiff would not benefit substantially from sale, yet such an order would severely diminish the income received by the deceased's widow and partition could be carried out with little difficulty. Thus the court may refuse to order sale if the plaintiff is acting vexatiously or spitefully.¹²³ However, the fact that one co-owner desires a higher price for his share than the other is willing to pay in a negotiated sale and then brings proceedings for compulsory sale is not vexatious; in these circumstances, the plaintiff is merely "relying upon his

attention to the fact that their five adult children had all left home and sale would still leave the couple with sufficient resources to purchase another property.

¹¹⁸ [1978] VR 418.

¹¹⁹ While there is a strong presumption in favour of sale where the property in question is commercial property (see for example, *Wilkinson v Joberns* (1873) 16 LR Eq 14 and the other cases noted at text to n 77-84 above), according to Menhennitt J there is no general principle that the commercial interests of the parties cannot be taken into account in determining whether 'good reason to the contrary' exists: [1978] VR 418 at 424-426.

¹²⁰ See also *Sahlin v The Nature Trust of British Columbia* [2010] BCSC 318 (and affirmed on appeal at [2011] BCCA 157) in which the court held that 'good reason to the contrary' had been established for a number of reasons, including the ease of partition, financial circumstances of the parties and the fact that sale could take the property out of the control of responsible owners while placing it in the hands of a purchaser who shared none of their ecological sensitivities about the land. However, the comments of Rice J at first instance to the effect that denying the petitioner's request for partition would be to "force a sale of the petitioner's property, a step not to be lightly considered inasmuch as it bears resemblance to an expropriation" ([2010] BCSC 318 at [46]) are open to serious question.

¹²¹ (1879) 48 LJ Ch 519.

¹²² Bacon VC referred to *Pemberton v Barnes* (1871) 6 Ch App 685 at 693 in which Lord Hatherley LC suggested that the court might refuse to order sale under the Partition Act 1868, s 4 where it is "manifestly asked for through vindictive feeling, or is on any ground unreasonable."

¹²³ See further *Polden v Rowling* [1958] NZLR 31, *Smith v Smith (No 2)* [1962] Qd R 132 and *Schnytzer v Wielunski* [1978] VR 418. Similar views were expressed by Verchere J in *McGreer v Green and the Westminster Mortgage Corp* (1960) 22 DLR (2d) 775.

legal rights.”¹²⁴ Likewise, there is nothing inherently malicious in the fact that one co-owner simply wants to realise his share of the property.¹²⁵

In short, the co-owners who oppose sale under s 4 must usually satisfy the court that there are exceptional circumstances for refusing sale and there is no difficulty in partitioning the property (in practical terms, the opposing co-owners should put forward a scheme of partition to support this).¹²⁶ The traditional view has been that the court’s discretion to refuse sale under s 4 is limited, and that it must usually order partition if sale is denied.

V. Section 5 of the Partition Act 1868 and Analogous Provisions: Sale at the Request of a Co-Owner with Less Than a Half Interest, in the Absence of an Undertaking to Purchase

Section 5 of the Partition Act 1869 (Tas), s 71 of the Law of Property Act 1936 (SA), s 126(3) of the Property Law Act 1969 (WA) and s 244(1)(c) of the Civil Law (Property) Act 2006 (ACT) are all based on s 5 of the Partition Act 1868. While comparatively few partition actions tend to be brought under these provisions, it was the interpretation of s 5 of the 1868 Act which caused most problems when this statute was passed.

Early case law on s 5 shows that opinions differed as to whether it qualified or restricted ss 3 and 4 of the 1868 Act. Taking the view that it did, Lord Hatherley LC in *Pemberton v Barnes*¹²⁷ stated:

If we ... look to the 5th section, we shall see how any injustice is guarded against by an enactment which, I think, applies to the 3rd and 4th sections ... The Court may think that a sale under the 3rd or 4th section is rather hard upon the parties who are very anxious not to have a sale; and if they come forward and undertake to buy the share of the party who requests a sale, the Court can give them liberty to do so.

Thus, a request for sale under s 3 or s 4 would be refused where the defendants offered to buy the plaintiff’s share in accordance with s 5, and the plaintiff would have to sell his share to them.¹²⁸ In contrast, Jessel MR in *Drinkwater v Ratcliffe*¹²⁹ held that s 5 did not qualify ss 3 and 4, but conferred an independent jurisdiction to order sale where the plaintiff had less than a half interest in the property (those with half or more would simply proceed under s 4) but was unable

¹²⁴ *Joyce v Joyce* [1963] Qd R 139 at 154 per Jeffriess J.

¹²⁵ *Re Franchi and Franchi* (21 August 1980, unreported) Ontario District Court.

¹²⁶ For example, in *Reimer v Robbins* (1982) 24 Man R (2d) 311 the court refused to order partition because there was no evidence before it as to the value of the land, access or planning restrictions which would provide a basis for the court to make a just and fair division.

¹²⁷ (1871) 6 Ch App 685 at 693.

¹²⁸ Similar views were expressed by Webb J in *Trustees, Executors and Agency Company Ltd v Finn* (1891) 17 VLR 609 at 611. Considering the effect of identical provisions in the then Partition Act 1890 (Vict), ss 3-5, Webb J held that s 5 restricted ss 3 and 4, and that in enacting s 5 the legislature “made a very wise provision to prevent one of the parties where a sale is ordered, going to the sale and running up the property where the other party desires to acquire it.”

¹²⁹ (1875) LR 20 Eq 528.

to proceed under s 3 because there was no reason for preferring sale to partition.¹³⁰ Sale could then be ordered under s 5, unless the opposing co-owners offered to purchase the plaintiff's share. Discussing *Pemberton v Barnes*¹³¹, Jessel MR described Lord Hatherley's interpretation of s 5 as a proviso to the effect that "no sale shall be directed under the 3rd or 4th sections ..., if any other party interested shall undertake to buy the share of the parties asking for sale"; in his opinion, this was contrary to the plain meaning of s 5.¹³²

The matter was effectively resolved by the House of Lords in *Pitt v Jones*¹³³ in which Lords Blackburn and Watson held that s 5 of the 1868 Act did not qualify either s 3 or s 4.¹³⁴ Having reviewed the various authorities, Lord Blackburn stated:

[Lord Hatherley in *Pemberton v Barnes*] did express an opinion that the 5th section was applicable to proceedings under the 3rd and 4th sections, and was intended to give the Court a discretionary power to prevent a sale under these sections if the opposing party was willing to bind himself to take the Applicant's share at a valuation...I think if this had been intended it would have been properly expressed in the form of a proviso on the 3rd and 4th sections, and not by a fresh substantive enactment.¹³⁵

Echoing these views, Lord Watson described s 5 as a "new and substantive enactment" that enabled a co-owner to procure a sale unless the others gave an undertaking to purchase his interest.¹³⁶ Subsequent case law has confirmed this interpretation of s 5 and the like as a separate provision that does not restrict ss 3 and 4 or their equivalents.¹³⁷

Other issues have also arisen, beyond those surrounding potential scope and remit. Strictly speaking, a request for sale under s 5 and its corresponding provisions could be made by a co-owner with a half interest or more in the property, though this is unlikely given that there is a

¹³⁰ Section 3 (and analogous provisions) require that sale is "more beneficial than partition"- see Part III above.

¹³¹ (1871) 6 Ch App 685.

¹³² (1875) LR 20 Eq 528 at 531-532. Similar views were expressed by the respective courts in *Roughton v Gibson* (1877) 48 LJ Ch 366 and *Gilbert v Smith* (1879) 11 Ch D 78. See also *Williams v Games* (1875) 10 Ch App 204.

¹³³ (1880) 5 App Cas 651.

¹³⁴ Again, Lord Hatherley was of the opinion that s 5 restricted ss 3 and 4: (1880) 5 App Cas 651 at 655.

¹³⁵ (1880) 5 App Cas 651 at 659-660.

¹³⁶ (1880) 5 App Cas 651 at 662-663 (affirming the decisions in *Williams v Games* (1875) 10 Ch App 204 and *Drinkwater v Ratcliffe* (1875) LR 20 Eq 528).

¹³⁷ Similar views were expressed by Kay J in *Evans v Evans* (1883) 31 WR 495 and by North J in *Richardson v Feary* (1888) 39 Ch D 45, and more recently in relation to the corresponding provisions of the then Partition of Property Act 1979 (BC) and its successor the Partition of Property Act 1996 (BC)- see *Glendinning v Thiessen* (1994) 95 BCLR (2d) 21, *Barnes v Kostiuik* (9 March 1999, unreported) British Columbia Supreme Court, *Ching v Ching* [2005] BCSC 1368 and *Pelikan v Quarry* [2006] BCSC 269. See further *Perman v Maloney* [1939] VLR 376 in which O'Bryan AJ held that the Property Law Act 1928 (Vict), ss 222-224 (corresponding to the Partition Act 1868, ss 3-5) were independent of each other. O'Bryan AJ observed that in *Trustees, Executors and Agency Co Ltd v Finn* (1891) 17 VLR 609 the court had only been referred to *Pemberton v Barnes* (1871) 6 Ch App 685 despite the fact that this case had been overruled by *Pitt v Jones* (1880) 5 App Cas 651. Similar views were expressed on the Property Law Act 1928 (Vict), ss 222-224 in *Anderson v Anderson* [1957] VR 317 and on its successor, the then Property Law Act 1958 (Vict), ss 222-224 in *Scates v Scates* [1962] VR 398. In *Gray v Dawson* (1912) 31 NZLR 1001 counsel for the plaintiffs sought to distinguish *Pitt v Jones* on the basis that, unlike ss 3-5 of the Partition Act 1868, the corresponding provisions in s 105 of the Property Law Act 1908 (NZ) were merely contained in separate subsections and thus qualified each other. Rejecting this argument, Cooper J observed that *Pitt v Jones* was not based upon the premise that ss 3-5 were separate provisions but on the ground that the three sections were to be construed together.

specific provision for dealing with such applications.¹³⁸ Instead, a request for sale is more likely to be made by a co-owner who is entitled to less than a half interest in the property¹³⁹, yet who cannot proceed under s 3 and the like because they cannot show any reason why sale would be more beneficial than partition.¹⁴⁰ It has been suggested that a co-owner seeking sale under s 5 or its equivalents should nevertheless put forward *some* reason for the court to make such an order, with North J in *Richardson v Feary*¹⁴¹ refusing a request for sale on this basis.¹⁴² This is problematic. A co-owner is only likely to rely on s 5 or analogous provisions because he is precluded from bringing an action under s 3 and its equivalents. However, the distinction appears to be that, under s 5 some reason must be shown for preferring sale to partition, yet it is not necessary to show that sale would be more beneficial than partition as contemplated by the specific conditions set out in s 3 and associated case law.¹⁴³ Thus a co-owner who desires sale may have to rely on s 5 or its derivatives if he cannot prove, for example, that sale would be more beneficial in an economic sense for all the parties interested in the property.

A recent illustration can be found in the Irish case of *C v S*¹⁴⁴ in which an estranged couple were co-owners of a home and the 'wife', who was entitled to a one-ninth beneficial interest in the property, requested sale under s 5 of the Partition Act 1868.¹⁴⁵ Herbert J was of the opinion that the applicant had to show some particular reason for wanting a sale, and that this had to be "reasonable, rational and *bona fide*."¹⁴⁶ In refusing her request, the judge drew attention to the fact that the applicant had left the property some 13 years earlier and subsequently established a new life for herself, as well as a new relationship and new residence; in contrast, her 'husband' had remained in the home and brought up the couple's two children there, one of whom (the daughter) was still residing in the property along with her own child. Herbert J concluded:

A sale would leave all three homeless. Given the evidence of his age, health, limited education and skills and poor prospects of any form of continuous employment in the future, I am satisfied that...[the husband] would experience considerable if not insurmountable difficulties in re-housing himself from his own resources, if this property were to be sold, and it is probable that...[the husband], his daughter and her child would become dependant [*sic.*] upon the public housing programme....There was no evidence before the court that...[the wife] was suffering from any form of financial stringency or was

¹³⁸ Namely s 4 of the Partition Act 1868 and its equivalents- see Part IV above.

¹³⁹ Even though there is no such stipulation in the legislation itself. For example, s 5 of the 1868 Act refers to an application by "any party interested in the property", as do s 5 of the Partition Act 1869 (Tas) and s 71 of the Law of Property Act 1936 (SA), while virtually identical wording can be found in s 126(3) of the Property Law Act 1969 (WA) and s 244(1)(c) of the Civil Law (Property) Act 2006 (ACT) contemplates an application by an "interested person."

¹⁴⁰ See *Drinkwater v Ratcliffe* (1875) LR 20 Eq 528, as well as *Ching v Ching* [2005] BCSC 1368.

¹⁴¹ (1888) 39 Ch D 45 at 49 ("the party who applies under...s 5 for a sale must shew some reason for it").

¹⁴² See however *Drinkwater v Ratcliffe* (1875) LR 20 Eq 528 at 531 in which Jessel MR stated that any party may apply for sale under s 5 "with or without any reason whatever."

¹⁴³ 21 *Halsbury's Laws of England* (1st edn, 1912), p 845 citing *Richardson v Feary* (1888) 39 Ch D 45 and *Allen v Allen* (1873) 42 LJ Ch 839.

¹⁴⁴ [2008] IEHC 463.

¹⁴⁵ Although referred to as 'husband' and 'wife' here for convenience, a previous court had found that the parties' marriage was null and void- hence the proceedings for partition or sale of the property under the Partition Act 1868 instead of relying on specific matrimonial legislation.

¹⁴⁶ [2008] IEHC 463 at p 13 transcript.

in urgent need of housing. I am satisfied that there was no evidence before the Court which would lead me to conclude that her motive in seeking this sale is vindictive, but I am satisfied that it is wholly mercenary.¹⁴⁷

At this point, it should be noted that the court's power of sale under s 5 and its statutory equivalents is discretionary¹⁴⁸; the legislation clearly states that the court "may" order sale, and it is not obliged to do so in the absence of an undertaking to purchase from the opposing co-owners.¹⁴⁹

Of course, the position changes where such an offer is made. An order for sale may be granted under s 5 and its statutory derivatives unless one or more opposing co-owners give an undertaking to purchase the plaintiff's share in the property.¹⁵⁰ However, the plaintiff is not obliged to accept this offer¹⁵¹; simply put, the court cannot force one co-owner to sell their interest to the others.¹⁵² As the New Zealand High Court explained in *Dale v McCullough*¹⁵³:

A party who requests the sale of the whole property under [the equivalent of s 5] cannot be compelled to part with his share on valuation if he does not wish to do so for the court has no jurisdiction to direct a valuation against the wishes of such party even though the other co-owners who hold the majority interest in the property are willing and undertake to purchase at such valuation.¹⁵⁴

If the plaintiff refuses to accept the undertaking to purchase the court cannot make an order for sale, leaving partition as an alternative remedy.¹⁵⁵ Where the co-owner accepts, the court may order a valuation of his share and make any necessary directions. However, the undertaking to purchase must be based on a court-directed valuation; for example, in the South Australia case of

¹⁴⁷ [2008] IEHC 463 at p 14 transcript .

¹⁴⁸ See the comments of Lord Blackburn in *Pitt v Jones* (1880) 5 App Cas 651 at 659 and those of North J in *Richardson v Feary* (1888) 39 Ch D 45 at 47-48.

¹⁴⁹ See *Richardson v Feary* (1888) 39 Ch D 45. However, if the court refuses to order sale the plaintiff should usually be granted partition in the alternative- see Part VI below.

¹⁵⁰ Commenting on the then legislative equivalent of s 5 in New Zealand, Chilwell J in *Cook v Hitchens* (1982) 1 NZPCR 438 at 448 stated that: "It has limited application. It applies to a person who requests a sale of the land and who says, in effect, there need be no sale if my opponent will buy my share."

¹⁵¹ See *Perman v Maloney* [1939] VLR 376 and *Norgard v Norgard* (30 May 1996, unreported) Supreme Court of Western Australia. Similar views were expressed in *Lougheed Enterprises Ltd v Armbuster* (1992) 26 RPR (2d) 83 and *Jabs Construction Ltd v Callahan* [1992] 1 WWR 748, as well as *C v S* [2008] IEHC. In *Dibattista v Menecola* (1990) 14 RPR (2d) 157 at 163 Brooke JA observed that the relevant sections of the then Partition Act 1980 (Ont) were "not intended to be a means by which one tenant in common can acquire the interests of the other." He continued: "If that was the intention of the Legislature, the section would say so, and the right of first refusal could or would be fairly accorded to one or to the other." See however *Cattoni v Cattoni* (12 March 1980, unreported) Alberta Queen's Bench.

¹⁵² *Mitchell v Cullington* [1997] ANZ Conv R 342.

¹⁵³ [1998] ANZ Conv R 67 at 69.

¹⁵⁴ For a comprehensive review of the relevant authorities on this aspect of s 5 and its equivalent measures, see the judgment of Em Heenan J in *Giacci v Giacci Holdings* [2010] WASC 349.

¹⁵⁵ See the comments of Lord Blackburn in *Pitt v Jones* (1880) 5 App Cas 651 at 659 and see *Williams v Games* (1875) 10 Ch App 204. Again, this is based on the view the partition and sale are usually strict alternatives under the legislation- see Part VI below.

*Giacci v Giacci Holdings*¹⁵⁶ the defendants' offer to purchase the plaintiff's share based on contested valuations which the former had produced did not suffice.¹⁵⁷

In short, s 5 and its statutory derivatives are effectively 'default' provisions; a co-owner is only likely to rely on them if he does not have an interest in half or more of the property and therefore cannot proceed under s 4 and the like, but cannot show any specific reason for preferring sale to partition under s 3 and its equivalents. The court may order sale unless the opposing parties undertake to purchase the plaintiff's share; if he declines this offer, the only remedy will be partition.¹⁵⁸

VI. Partition or Sale As Alternative Remedies: The Extent of the Court's Discretion?

A co-owner contemplating compulsory partition or sale of joint property may seek advice on the likelihood of succeeding if compromise cannot be reached and the matter goes before the courts. Given the historical development of these remedies, there appears to be a very strong prospect of being granted *either* partition *or* sale.

Prior to 1868 in England and Wales, the Court of Chancery (which had, by this time, assumed exclusive jurisdiction in partition actions between co-owners) regarded partition as a matter of right given that a similar entitlement had previously existed at common law.¹⁵⁹ Thus one joint tenant or tenant in common could force a division of the property no matter how small his interest, and irrespective of the fact that this would reduce the value of the property or impose a scheme of division which would render the property useless or inhabitable.¹⁶⁰ The Partition Act 1868 allowed the Court of Chancery to substitute the more convenient remedy of sale for physical division, and an order for sale was at the discretion of the court under ss 3-5 of the 1868 Act.¹⁶¹ However, since partition was granted as of right prior to 1868 and the Partition Act simply contemplated

¹⁵⁶ [2010] WASC 349.

¹⁵⁷ According to Em Heenan J, sale could only be authorised by way of "a valuation to be directed by the court which would usually be subject to directions designed to ensure the best prospects of ascertaining the full contemporary market value"- [2010] WASC 349 at [44].

¹⁵⁸ See *Schnytzer v Wielunski* [1978] VR 418 and *Martin-Smith v Woodhead* [1990] WAR 62.

¹⁵⁹ As a result of legislation passed in the sixteenth century- namely An Act Concerning Joint Tenants and Tenants in Common 1539 and An Act Concerning Joint Tenants for Term of Life or Years 1540 which granted joint tenants and tenants in common the right to compel partition at common law. The equitable jurisdiction to partition emerged shortly afterwards and was well-established by the late seventeenth century, Lord Nottingham LC in *Manaton v Squire* (1677) 2 Free 26 remarking that he "did no more question the jurisdiction of the Chancellor in these cases, than he did whether a gift to a man and his heirs were a fee simple."

¹⁶⁰ See the comments of Plumer VC in *Baring v Nash* (1813) 1 Ves & B 551 at 554, as well as the decisions in *Nevis v Levene* (1744) 3 Atk 82 and *Warner v Baynes* (1750) Amb 589. One of the most frequently cited authorities is *Turner v Morgan* (1803) 8 Ves 143 in which Lord Eldon LC ordered partition of a single dwelling house, despite the fact that it resulted in the plaintiff having all the fireplaces and chimneys, all the conveniences and the only staircase in the property.

¹⁶¹ Sections 3 and 5 of the Partition Act 1868 (and their equivalents) provide that the court 'may, if it thinks fit' order sale, while s 4 (and its equivalents) state that the court 'shall' order sale 'unless it sees good reason to the contrary.'

sale as an *alternative* remedy, the automatic consequence of refusing sale was an order for partition.¹⁶²

Courts in other jurisdictions have interpreted the equivalent provisions of ss 3-5 in the same manner, and there is a significant body of case law to this effect in Australia based on the specific provisions discussed throughout this article or those derivatives of the 1868 Act which formerly governed the partition and sale of co-owned land. For example, in *Bray v Bray*¹⁶³ Knox CJ expressed the following view on the then Partition Act 1900 (NSW):

So far as I can see, the object of the Act was to provide an alternative remedy to partition...[W]hat the Court has to consider is which is the better course for all parties between two alternatives, namely, is it better that there should be a partition or that there should be a sale ...

Endorsing these comments, Menhennitt J in *Schnytzer v Wielunski*¹⁶⁴ stated that “the only alternative to sale is partition”, while Bright J in *Peck v Peck*¹⁶⁵ asserted that there is “an absolute right to partition, however inconvenient, unless as a strict alternative sale is ordered.”¹⁶⁶ Likewise, Brennan J in *Nullagine Investments Ltd v Western Australian Club*¹⁶⁷ referred to a co-owner’s right “to either an order for partition or an order for sale.”¹⁶⁸

It could be argued that the court has a limited discretion to refuse partition in a small number of situations where the consent of a third party is required to make the order- for example, where partition of the property in question requires zoning approval or subdivision consent¹⁶⁹, or where several persons are co-owners of leasehold property and the tenancy agreement requires the

¹⁶² See for example, *Dicks v Batten* [1870] WN 173 and *Dyer v Painter* (1885) 33 WR 806 (decree for partition where sale refused under the Partition Act 1868, s 3), as well as *Richardson v Feary* (1888) 39 Ch D 45 (partition ordered instead of sale under the Partition Act 1868, s 5). As regards the Partition Act 1868, s 4 see *Saxton v Bartley* (1879) 48 LJ Ch 519 and *Re Whitwell's Estate* (1887) 19 LR Ir 45.

¹⁶³ (1926) 38 CLR 542 at 545.

¹⁶⁴ [1978] VR 418 at 422.

¹⁶⁵ [1965] SASR 293 at 300.

¹⁶⁶ Bright J described an order for sale as a “statutory graft on the right to partition” ([1965] SASR 293 at 296).

¹⁶⁷ (1993) 177 CLR 635 at 645.

¹⁶⁸ Similar views were expressed by Jones J in *De Campo Holdings v Cianciullo* [1977] WAR 56 at 58 and by Kennedy J in *Martin-Smith v Woodhead* [1990] WAR 62 at 69. See further *Norgard v Norgard* (30 May 1996, unreported) Supreme Court of Western Australia (no discretion to refuse relief entirely when an order for partition or sale is sought under the Property Law Act 1969 (WA)), as well as *Tansell v Tansell* (1977) 35 FLR 272, *Bank of Western Australia Ltd v Studman* [2004] WASC 242 and *Orman v Orman (No 2)* [2008] WASC 17. In New Zealand, partition and sale were also strict alternatives under what was then s 140 of the Property Law Act 1952 (NZ), the provisions of which closely resembled ss 3-5 of the Partition Act 1868- see for example, *Polden v Rowling* [1958] NZLR 31, *Hargreaves v Fleming* [1975] NZLR 209, *Bourke v Bourke* [1983] NZFLR 55, *Revell v Baker* [1984] 3 NZFLR 20 and *McMahon v McMahon* [1996] 3 NZLR 334. Similar views have been expressed in a number of Canadian cases decided under the Partition Act 1868 or its equivalent- see for example, *Grunert v Grunert* (1960) 32 WWR 509, *Bay v Bay* (1984) 38 Sask R 101 and *Moss v Zorn* [1991] NWTR 141, as well as *Wickstrand and Mannix v Cavanaugh and Dillon* [1936] 1 WWR 113, *Adelman v Adelman* [1949] 1 WWR 112 and *Clarke v Clarke* (1974) 48 DLR (3d) 707.

¹⁶⁹ See for example, *Patel v Premabhai* [1954] AC 35 (partition refused in the absence of consent from the Subdivision of Land Board as required by the Fiji Subdivision of Land Ordinance 1937), and *Squire v Rogers* (1979) 39 FLR 106 (partition of land refused to due similar consent requirements under the Darwin Town Area Leases Ordinance 1947); in both cases, sale was ordered instead. For a more recent illustration, see *Harley v Registrar-General of Land* [2010] NZHC 454 as well as the discussion in *Sheehy v Talbot* [2008] IEHC 207.

landlord's authorisation for any subdivision and/or contains a covenant against waste.¹⁷⁰ Here an order for partition would be futile in the sense that, if such consent has not been obtained or is unlikely to be granted (because the third party has, for example, indicated their opposition to a potential division), the third party could effectively defeat the order of the court and render it useless.¹⁷¹ However, this would only be an issue if the court declined to order sale under one of the statutory derivatives of ss 3-5 of the 1868 Act, and the likelihood of sale being granted here must be considerable for two reasons. Firstly, sale tends to be the preferred order in most co-ownership contests, given the practical difficulties which tend to be associated with partition¹⁷² and the costs of implementing any designated scheme.¹⁷³ Secondly, the fact that partition and sale are usually regarded as alternatives combined with the fact that partition would be futile (or simply just not practicable or feasible) would probably tip the balance even more heavily in favour of sale under the legislation.

Conclusion

Compulsory partition and sale are important remedies for co-owners of land today, in the event that what was once a productive and mutually beneficial arrangement becomes disharmonious, or one individual simply wants to be released from co-ownership and all associated responsibilities. The need for such a legal mechanism is obvious. Current statutory provisions in force in Western Australia, South Australia, Tasmania and the Australian Capital Territory, and which are derived from ss 3-5 of the Partition Act 1868, suggest that the latter have stood the proverbial test of time in many ways, and are still an effective means of resolving co-ownership disputes where consensus or compromise is not possible. Of course, ss 3-5 and their statutory equivalents are open to criticism on a number of grounds- for example, the rigidity of the rules set

¹⁷⁰ See *North v Guinan* (1829) Beat 342 in which Hart LC refused to partition leasehold premises on the basis that this would be contrary to a covenant in the lease prohibiting waste. See further *Witchard v Witchard* (1975) 6 ACTR 31 (partition refused for similar reasons).

¹⁷¹ This should be contrasted with what might be termed 'jurisdiction' exceptions, where the court cannot make an order for partition or sale because it lacks the ability to do so. For example, an express or implied agreement between co-owners that division or sale of the property should only occur in a certain manner or be subject to certain conditions may oust the court's jurisdiction. Partnership property is one illustration (see *Redwood v Redwood* (1908) 28 NZLR 260 as well as the comments of Brennan J in *Nullagine Investments Pty Ltd v Western Australian Club* (1993) 177 CLR 635 at 645-646), as is a pre-emptive agreement giving the other co-owners a 'right of first refusal' if one person wants to sell their interest in the land (see *Peck v Cardwell* (1839) 2 Beav 137 and the discussion of the High Court of Australia in *Nullagine Investments Pty Ltd v Western Australian Club* (1993) 177 CLR 635, though note the difference of judicial opinion as to the extent of the restriction imposed in the latter case) or an arrangement whereby co-owners agree not to divide to sell their land for a specific period of time or until a certain event occurs (see *Ben 102 Enterprises Ltd v Ben 105 Enterprises Ltd* [2007] BCSC 1071). Another potential jurisdiction exception is where one co-owner is estopped from compelling partition or sale (see *Lucas v McNaughton* (1990) 14 Fam LR 347), and assuming that the constituent elements of the doctrine are established (unlike *Tory v Tory* [2007] NSWSC 1078 - no unequivocal representation proven on the facts of the case).

¹⁷² In other words, ensuring that each co-owner receives a share of the land which is commensurate in value to his interest in the property, deciding which co-owner is allocated specific buildings or fixtures on the land, and allowing for discrepancies in the quality (and consequent value) of different parts of the land as well as fluctuations in terrain- to name but a few problems.

¹⁷³ As well as drafting the final agreement and carrying out all necessary conveyances or transfers between the co-owners to divide the land in legal terms (as well as creating any necessary easements or access routes between the portions post-partition), there are the preceding surveys and valuations which must be carried out to ensure a basic level of parity in the division.

out in each specific provision and the limited discretion available to courts in having to order either partition or sale, alongside the fact that what is essentially a nineteenth century legal framework is not equipped to deal with the realities of modern co-ownership in all its various guises. Yet, the provisions based on ss 3-5 of the 1868 Act have their advantages as well. Courts must usually focus on matters relating to the land itself and the practicalities of sale or division, as opposed to personal disputes or quarrels which might be driving the proceedings. Such an ostensibly objective approach may have its benefits. More importantly perhaps, these 'old' rules provide a clear and predictable framework for advising co-owners on the prospect of success where one party is seeking to end the relationship and what order the court is likely to make.