University of Arkansas at Little Rock Law Review

Volume 4
Issue 3 *Symposium on Developmental Disabilities and the Law*

Article 8

1981

Property—Future Interest—Partition by Remaindermen Allowed

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NOTES

PROPERTY—FUTURE INTERESTS—PARTITION BY REMAINDERMEN ALLOWED. *Henry v. Kennedy*, 273 Ark. 383, 619 S.W.2d 632 (1981).

J.C. Kennedy died owning 560 acres in Desha County, Arkansas. He devised a life estate to his widow with a remainder, in equal shares, to his nephews Wilburn Kennedy and Cecil Kennedy. Wilburn Kennedy conveyed his undivided one-half remainder interest to E.R. Henry, Jr. and Sterling L. Henry. The Henrys petitioned for partition under the Arkansas partition statute,[1] as owners of one-half of the remainder interest, against Cecil Kennedy. Because the property was not susceptible to partition in kind, the chancery court ordered a sale of the property, subject to the widow's life estate. On appeal, the Arkansas Court of Appeals reversed, holding that remaindermen have no right to bring a partition action against other remaindermen when they have no present possessory interest in the property.[2] On certiorari, the Arkansas Supreme Court reversed, holding that citizens of Arkansas who have a remainder interest in property may compel partition of their future interests regardless of whether they have any present possessory interest. *Henry v. Kennedy*, 273 Ark. 383, 619 S.W.2d 632 (1981).

The right to partition[3] originated very early in English law.[4]

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1. ARK. STAT. ANN. § 34-1801 (1962) provides:

> Any persons having any interest in and desiring a division of land held in joint tenancy, in common, as assigned or unassigned dower, as assigned or unassigned curtesy, or in coparceny, absolutely or subject to the life estate of another, or otherwise, or under an estate by the entirety where said owners shall have been divorced either prior or subsequent to the passage of this Act, except where the property involved shall be a homestead and occupied by either of said divorced persons, shall file in the circuit or chancery court a written petition in which a description of the property, the names of those having an interest in it, and the amount of such interest shall be briefly stated in ordinary language, with a prayer for the division, and for a sale thereof if it shall appear that partition cannot be made without great prejudice to the owners, and thereupon all persons interested in the property who have not united in the petition shall be summoned to appear.

2. Kennedy v. Henry, 270 Ark. 275, 604 S.W.2d 585 (Ct. App. 1980).

3. BLACK'S LAW DICTIONARY 1008 (5th ed. 1979) defines "partition" as "[t]he dividing of lands held by joint tenants, coparceners, or tenants in common, into distinct portions, so that they may hold them in severalty."

4. *E.g.*, Patel v. Premabhai, [1954] A.C. 35; 2A R. POWELL, THE LAW OF REAL PROPERTY ¶ 289 (1977).

Because co-owners were forced to share the possession of land, the original purpose of partition was to alleviate the inconvenience of joint possession.[5] By the end of the thirteenth century, the common-law writ *de partitione facienda* was available to coparceners.[6] The right to compel partition was extended by statute in the mid-1500s to include joint tenants and tenants in common.[7] Persons owning future interests were not afforded the right to partition because they did not have present possession.[8]

The statutory right to partition in Arkansas was originally enacted in 1838,[9] and included essentially the same text as the English

5. *E.g.*, Duke v. Allen, 198 Ky. 368, 248 S.W. 894 (1923); 4 L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1764 (2d ed. 1956).

6. *E.g.*, Miller v. Warmington, 37 Eng. Rep. 452 (1820); 4 L. SIMES & A. SMITH, *supra* note 5, at § 1762; 2A R. POWELL, *supra* note 4, at ¶ 289. Coparceners are persons who become concurrent owners by inheritance from a common ancestor. *Id.*

7. 31 Henry VIII, c. 1 (1539); 32 Henry VIII, c. 32 (1540). 4 L. SIMES & A. SMITH, *supra* note 5, at § 1762; 2A R. POWELL, *supra* note 4, at ¶ 289. 31 Henry VIII, c. 1 (1539), as quoted in Shaw v. August, 266 Mich. 634, 254 N.W. 231 (1934), provided:

> That all joint tenants and tenants in common, that now be, or hereafter shall be, of any estate or estates of inheritance in their own rights, or in the right of their wives, of any manors lands tenements or heriditaments within this Realm of England, Wales, or the Marches of the same, shall and may be coacted and compelled, by Virtue of this present act, to make partition between them of all such manors lands tenements and heriditaments as they now hold, or hereafter shall hold as joint tenants or tenants in common, by Writ De participatione facienda, in that case to be devised in the King our Sovereign Lord's Court of Chancery, in like manner and form as coparceners by the common laws of this realm have been and are compellable to do, and the same Writ to be pursued at the Common Law.

8. *E.g.*, Moore v. Shannon, 17 D.C. (6 Mackey) 157 (1887); Brown v. Brown, 8 N.H. 93 (1835); Nichols v. Nichols, 28 Vt. 228 (1856); A. FREEMAN, COTENANCY AND PARTITION §§ 440, 446 (2d ed. 1886); 4 L. SIMES & A. SMITH, *supra* note 5, at § 1764. Since the purpose of partition was to avoid the inconvenience of joint possession, the nonpossessory future interests did not come within the purview of the common-law rule. *Id.*

An exception is made to the common-law rule in one situation: partition is allowed when a "future interest would be possessory but for the existence of a present estate for years or at will." *Id. See, e.g.*, Woodworth v. Campbell, 5 Paige Ch. 518 (N.Y. 1835); Rawson v. Brown, 104 Ohio St. 537, 136 N.E. 209 (1922).

Although actual or constructive possession was required for partition at common law, a remainderman has neither. The remainderman's estate vests in possession *in futuro*, and his only means of partition must be statutory. C. KNAPP, A TREATISE ON THE LAW OF PARTITION OF REAL AND PERSONAL PROPERTY 92 (1887).

9. Revised Statutes, ch. 107 § 1 (1838) provided:

> Where any lands, tenements, or hereditaments shall be held in joint tenancy, tenancy in common, or co-parcenary, whether such right or title be derived by purchase, devise or descent, or whether any, all, or part, of such claimants, be of full age, or minors, it shall be lawful for any one or more of the persons interested by themselves, if of full age, or by their guardian, if minors, to present to the circuit court of the county where such lands or tenements lie, (or, where the lands lie in

statutes.[10] In 1882 the Arkansas Supreme Court linked the common-law and statutory requirements for partition, stating that an action "lies only for those who are in possession as joint tenants, tenants in common, or coparceners."[11] In 1940, the requisites of possession and cotenancy became synonymous in a significant Arkansas decision, *Krickerberg v. Hoff*.[12] In that case, Hoff owned property in fee simple, subject to a life estate in an undivided one-

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different counties, to the circuit court of either or all such counties) their petition praying for a division and partition of such premises, according to the respective rights of the parties interested therein, and for a sale thereof, if it shall appear that partition cannot be made without great prejudice to the owners.

This provision was later combined with ARK. CIVIL CODE § 538 (1869) which stated:

Any person desiring a division of land, held in joint tenancy, in common or in coparcenary, or an allotment of dower, by the Probate Court, shall file in said court, or in the clerk's office thereof, in vacation, a written petition, in which a description of the property, the names of those having an interest in it, and the amount of such interest, shall be briefly stated in ordinary language, with a prayer for the division or allotment, and thereupon all persons interested in the property, who have not united in the petition, shall be summoned to appear and answer the petition on the first day of the next term of the court.

The combination of these provisions produced the partition law of Arkansas in POPE'S DIGEST § 10509:

Any person desiring a division of land held in joint tenancy, in common or in coparceny shall file in the circuit court a written petition in which a description of the property, the names of those having an interest in it, and the amount of such interest shall be briefly stated in ordinary language, with a prayer for the division, and for a sale thereof if it shall appear that partition can not be made without great prejudice to the owners, and thereupon all persons interested in the property who have not united in the petition shall be summoned to appear and answer the petition on the first day of the next term of the court.

The current version of Arkansas' partition statute is codified at ARK. STAT. ANN. § 34-1801 (1962), set out at note 1 *supra*.

Professor Powell has categorized the partition statutes of the 50 states and the District of Columbia. According to Powell, there are 19 other states in which the partition statutes have generally allowed joint tenants and tenants in common of future interests to compel partition: Alaska, Arizona, California, Delaware, Hawaii, Illinois, Maryland, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, New York, North Carolina, Oregon, Pennsylvania, South Carolina, Tennessee, and Wisconsin. Five states extend the right to partition to such owners only in a partial and incomplete manner. They are Alabama, Connecticut, Indiana, Maine, and New Jersey.

The remaining 25 states and the District of Columbia have partition statutes which definitely or most likely restrict partition to persons with present possessory interests: Colorado, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Montana, Nevada, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. For a more detailed analysis, see 2A R. POWELL, *supra* note 4, at ¶ 290.

10. *See* note 7 *supra*. In an early New Jersey case, the court held that the English partition statutes were not intended to apply to remaindermen. Only those entitled to present possession were allowed this right. Stevens v. Enders, 13 N.J.L. 271, 275 (1833).

11. London v. Overby, 40 Ark. 155, 156 (1882).

12. 201 Ark. 63, 143 S.W.2d 560 (1940).

half interest held by Krickerberg. Hoff sought partition, which the court permitted. When the court applied its test of present possession in order to determine whether a cotenancy existed, it found that Hoff owned a present undivided one-half interest in the property and that he could compel partition under the statute.[13]

The Arkansas partition statute was amended in 1941.[14] The amendment, which inserted the language at issue in *Henry v. Kennedy*, added the words "having any interest in" and "absolutely or subject to the life estate of another or otherwise." Although the amendment purported to extend partition rights to persons not entitled to partition under the *Krickerberg* decision, subsequent cases were decided according to common-law precedent.[15] The court continued to equate cotenancy with possession, and engaged in common-law decision-making instead of relying on the statute's plain meaning.[16]

In *Monroe v. Monroe*[17] a life tenant in exclusive possession attempted to compel partition against a remainderman who did not have a present interest in the property. The life estate was held by one person exclusively; there was no cotenancy between the life tenant and the remainderman, and the court did not allow partition.[18]

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13. *Id.* at 65-67, 143 S.W.2d at 561-62. In Kennedy v. Henry, 270 Ark. 275, 604 S.W.2d 585 (Ct. App. 1980), the court of appeals emphasized the statutory requirement of a cotenancy. The court relied heavily on the *Krickerberg* test of present possession, and stated that because remaindermen do not have present possession, they cannot be cotenants. Thus, it held that remaindermen cannot compel partition under the statute. *Id.* at 276, 604 S.W.2d at 585.

14. 1941 Ark. Acts 92, § 1. The statute was again amended in 1947 to permit a tenant of an estate by the entirety to compel partition. 1947 Ark. Acts 161, § 1. *See generally* Rodgers v. Rodgers, 271 Ark. 762, 611 S.W.2d 175 (1981) (effect of foreign divorce decree on title to land in Arkansas); Brown v. Brown, 233 Ark. 422, 345 S.W.2d 27 (1961) (partition not allowed because divorce occurred before amendment).

In 1957 the statute was amended a third time to allow one who has an interest in assigned or unassigned dower or curtesy to compel partition. 1957 Ark. Acts 324, § 1. *See generally* Gibson v. Gibson, 264 Ark. 418, 572 S.W.2d 146 (1978) (holder of dower interest may seek partition); Smith v. Smith, 235 Ark. 932, 362 S.W.2d 719 (1962) (same).

15. *E.g.*, Luster v. Arnold, 249 Ark. 152, 458 S.W.2d 414 (1970); McGee v. Hatcher, 217 Ark. 402, 230 S.W.2d 41 (1950); Goodlett v. Goodlett, 209 Ark. 297, 190 S.W.2d 14 (1945). Partition was allowed in each case because the remainderman seeking partition was a cotenant with the life estate holder. The remainderman had a present interest in the property.

16. In McGee v. Hatcher, 217 Ark. 402, 405, 230 S.W.2d 41, 43 (1950), the court placed emphasis upon the *Krickerberg* test in determining whether the remainderman could compel partition. Present possession was still stressed as essential to a remainderman's right to partition; the court avoided the plain meaning of the amendment, which eliminated the requirement of present possession.

17. 226 Ark. 805, 294 S.W.2d 338 (1956).

18. *Id.* at 807, 294 S.W.2d at 339.

The *Monroe* court stated that the 1941 amendment was passed "to allow the partition of property by *remaindermen*, subject to the life estate of another. . . ."[19] Yet, in a footnote, the court emphasized the requirement of possession, stating, "In the case of *McGee v. Hatcher*, . . . we reiterated that the right of *present possession* between parties is essential to maintain partition."[20]

The *Monroe* decision was reaffirmed in *Bowman v. Phillips*[21] in which a sole life tenant sought partition against the remainderman. The action was not allowed because there was no cotenancy of the life estate. As a first indication of allowing remaindermen to partition their respective future interests, the court suggested that the life tenant, when he is also a remainderman, might compel partition of the remainder interests, and give up the value of his life estate.[22]

Until *Henry*, the emphasis of the court had been upon the existence of a cotenancy between the parties to the partition action. In its interpretation of the statute, the court of appeals in *Henry* followed the common-law precedent, stressing such factors as cotenancy and present possession.[23] The court also placed significance upon the statutory language "held in" and applied the *Krickerberg* test in deciding that present possession is essential when one "holds" an interest in land.[24]

In reversing the court of appeals, the Arkansas Supreme Court held that the partition statute does not limit partition actions to those owning possessory interests.[25] Although the court recognized that the statute is contrary to the general rule at common law, it stated that the General Assembly had expressly acknowledged the right of remaindermen to compel partition by inserting into the stat-

19. *Id.* at 808, 294 S.W.2d at 340 (court's emphasis).

20. *Id.* at 808, n.4, 294 S.W.2d at 340 (court's emphasis). Although these statements appear to be contradictory, the court of appeals attempted to reconcile them in Kennedy v. Henry, 270 Ark. 275, 277, 604 S.W.2d 585, 586 (Ct. App. 1980). That court stated that the *Monroe* decision construed the statute to allow partition by remaindermen, subject to the life estate of another, "*if* the remaindermen are also contenants to the holder of the life estate." *Id.* at 281, 604 S.W.2d at 589 (court's emphasis).

21. 260 Ark. 496, 542 S.W.2d 740 (1976).

22. *Id.* at 498, 542 S.W.2d at 741-42.

23. Kennedy v. Henry, 270 Ark. 275, 604 S.W.2d 585 (Ct. App. 1980).

24. *Id.* at 277-78, 604 S.W.2d at 586-87. In the early case of Smith v. Gaines, 39 N.J. Eq. 545 (1885), the words "held in," in a technical sense, were construed to mean the ownership of an estate of present possession. *Id.* at 547. The *Smith* decision was later discussed in a Nebraska case which was factually similar to *Henry*. Baskins v. Krepcik, 153 Neb. 36, 43 N.W.2d 624 (1950). The court allowed partition by the remainderman because the Nebraska partition statute did not contain the language "held in."

25. Henry v. Kennedy, 273 Ark. 383, 386, 619 S.W.2d 632, 634 (1981).

ute such language as "any persons having any interest in" and "subject to the life estate of another."[26] The court also placed significance upon the emergency clauses of the amendments to the statute, in which the legislature emphasized the importance of broadening the scope of Arkansas' partition statute.[27] The court cited the *Monroe* case as specifically holding that partition by remaindermen is permitted, subject to the life estate of another.[28] In further support of its decision, the supreme court relied upon the Restatement of Property[29] for guidance. The court's reliance upon the Restatement prerequisites demonstrates that the remaindermen in the *Henry* case met the test successfully.[30]

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26. *Id.* at 387, 619 S.W.2d at 634.

27. *Id.* The emergency clause of Act 92 provides in pertinent part:

> It is hereby found and declared by the General Assembly that the present statute relative to partition of real property in Arkansas, having been enacted many years ago, is inadequate and not broad enough to provide this form of relief in numerous cases in the State of Arkansas, and which are working an unjust hardship upon citizens owning property jointly, in common or in coparceny, absolutely or subject to the life estate of another or otherwise, and that such condition is hindering the alienation of real property and prejudicing the property rights of many citizens.

1941 Ark. Acts 92, § 3.

28. The court remarked that the court of appeals had used the *Monroe* case to support its decision, *see* text at note 17 *supra*; the supreme court then suggested that the *Monroe* decision must be read in reference to the unique issue in that case. The court cited Bowman v. Phillips, 260 Ark. 496, 542 S.W.2d 740 (1976), as its reaffirmation of the principle set forth in *Monroe*. Henry v. Kennedy, 273 Ark. 383, 387-88, 619 S.W.2d 632, 635 (1981).

29. RESTATEMENT OF PROPERTY § 175 (1936) provides:

> (1) When a future interest in land is owned in a joint tenancy or in a tenancy in common, then a concurrent owner in such future interest has power to compel partition thereof when the requirements of all the Clauses of Subsection (2) are satisfied.
>
> (2) The prerequisites for the existence of the power stated in Subsection (1) are the following:
>
> (a) the state wherein the affected land is located has a statute which, in specific words, confers the power to compel partition on a joint tenant or tenant in common in a "reversion or remainder," or in a "vested remainder or reversion," or in "an interest or estate in land," or which employs other language of like import; and
>
> (b) the joint tenant or tenant in common, in exercising such power, complies with all requirements specified by such statute as to matters other than the prerequisite variety of future interest; and
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> (c) the creator of the concurrently owned future interest has not manifested effectively an intent that no such power to compel partition be present . . . ; and
>
> (d) the future interest of such joint tenant or tenant in common is a future estate in fee simple absolute not subject to a condition precedent.

30. Henry v. Kennedy, 273 Ark. 383, 388, 619 S.W.2d 632, 635 (1981). It is important to note that subsection 2(d) of RESTATEMENT § 175 requires the future interest to be vested and not subject to a condition precedent. The court remarked that the remaindermen in *Henry*

The holding of the court, allowing remaindermen with nonpossessory interests to compel partition, appears at first to be contrary to the historical progression of Arkansas partition law. Before the 1941 amendment, the statutory and common-law principles were consistent in requiring present possession. After the amendment, the court continued to decide partition cases on the basis of common-law principles. Until the *Henry* case, however, the facts of these cases never warranted a plain meaning interpretation of the statute's new language nor did they warrant an abandonment of the case law precedent. Under either theory, the cases would have been decided the same way. Although the fact situations in *Monroe* and *Bowman* were distinguishable from previous cases, the court was still able to rely upon the theory of cotenancy and present possession in order to dispose of these cases. However, the suggestion made by the court in *Bowman* indicated that it might allow partition by a remainderman against other remaindermen.[31]

The issue in the *Henry* case was one of first impression. There was no direct point of law upon which to decide the case; thus, the court of appeals chose one line of reasoning and the supreme court chose another. The court of appeals based its decision upon the common-law precedent, the technical sense of the statutory language, and the well-settled historical background of partition law. It is significant that the reasoning of the court of appeals points directly to the requirement of present possession. The technical sense of the terms "cotenancy" and "held in" seems to strengthen the court's analysis, and yet the supreme court rejected that analysis and construed the statute based on its plain meaning. The legislature did not restrict partition to those with possessory interests, and it demonstrated a clear intent to broaden the scope of Arkansas partition law. The broad interpretation of the statute permits those who own future interests in land to enjoy the fruits of their interests before the expiration of the life term. For example, if the life tenant is young, it would be very likely that a middle-aged remainderman would never receive the benefits of his future interest. If partition is allowed, the remainderman may receive his portion of the sale of

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had vested remainders and that other jurisdictions which allow partition by remaindermen also require the future interest to be indefeasibly vested. This statement indicates that persons having contingent remainders do not come within the scope of the *Henry* decision or the Arkansas partition statute.

31. *See* text at note 21 *supra*.

the future interests, subject to the life estate,[32] and enjoy his future interest during his lifetime.

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32. It is apparent that any partition of future interests would remain subject to the present life estate. Although the future interests in the property could be partitioned, the life tenant would still be entitled to his estate, and the purchaser of the future interest would be allowed to take possession upon the termination of the life estate.