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Acquiring Property Through Forced Partitioning Sales: Abuses and Remedies

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NOTES

ACQUIRING PROPERTY THROUGH FORCED PARTITIONING SALES: ABUSES AND REMEDIES*

Tom Banks worked and lived on a ninety-acre family farm in Alabama since he was a child.[1] He and his two brothers, who assisted him on the farm, each owned a fifteen percent interest in the property. Other more distant relatives owned various fractional interests in the property ranging from 1/10 to 5/1053. Many of these co-owners had disappeared or were unaware of their ownership.

In 1983, Mr. Banks received notice that a co-owner had petitioned a local court to sell the farm and divide the proceeds of the sale among the ascertainable owners. The petitioner, a local real estate agent, recently had purchased a 1/37 interest in the property from a distant relative of Mr. Banks for $500. That agent now was petitioning the court to sever his interest in the property from the remaining interests. The agent argued, however, that because the farm could not be divided conveniently, including into a 1/37 portion, it would have to be sold. Tom Banks testified at the hearing that he wished to continue farming the land, and that he would be willing to buy the agent's interest or divide the property to the latter's advantage and satisfaction. The court concluded, however, that the property had to be sold to the highest bidder. When put up for sale, the sole and highest bidder was the real estate agent because Tom Banks and his brothers did not have the financial resources necessary to purchase the land. As a result, the Bankses lost their farm, receiving in its place a sum of money worth less than either its actual or replacement value.

Although the preceding facts are fictitious, the scenario is a common one in rural areas throughout the southern United States.[2] One organization providing assistance to

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[1] Although the following facts are fictitious, they are similar to those in actual partitioning sale cases throughout the South. Telephone interviews with Henry Sanders, Esq., of Chestnut, Sanders, Sanders, Turner & Williams, P.C. (Aug. 27, 1986), and Michael A. Figures, Esq., of Figures, Ludgood & Figures (Sept. 15, 1986). Mr. Sanders and Mr. Figures have represented many cotenants seeking to protect their property interests from partitioning sale actions throughout Alabama.

[2] Telephone interview with Edward Pennick, Federation of Southern Cooperatives/Land Assistance Fund (formerly the Emergency Land Fund) (Nov. 1, 1985) [hereinafter Pennick Interview]. A private, nonprofit organization founded in 1971, the Emergency Land Fund ("ELF") addressed the problems of black land loss by providing outreach, technical assistance, and legal support to black farmers. In the late 1970's, the ELF contracted with the United States Department of Agriculture to study the impact of heir property on black ownership of land. U.S. COMM'N ON CIVIL RIGHTS, THE DECLINE OF BLACK FARMING IN AMERICA 66 (1982) [hereinafter BLACK FARMING].

such property owners has monitored literally hundreds of similar actions over the past fifteen years.[3] Many of these actions result in litigation, where more often than not those parties seeking to retain their property end up losing it in a court-ordered sale.[4]

The United States Commission on Civil Rights recently reported that from 1920 to 1978, the number of farms operated by blacks in the United States diminished from 925,710 to 57,271, a loss of 93.8%.[5] By comparison, farms operated by whites diminished during this same period from 5,499,707 to 2,398,726, a loss of 56.4%.[6] Moreover, the divergence between these rates of loss has been increasing. Between 1969 and 1978 the rate of loss of black-operated farms was two and one half times that of white-operated farms.[7] This dramatic drop in black ownership of land, termed "the 'largest single equity resource in minority hands' in the South,"[8] is estimated to have been the result of partitioning sales in over half the recent cases.[9]

Anglo-American law always recognized the ability of two or more persons to own undivided interests in the same property simultaneously.[10] In the United States, co-ownership by cotenants generally takes the form of a tenancy in common,[11] a joint tenancy,[12] or a tenancy by the entirety.[13] Courts also recognized the right of cotenants to separate their interests by partition, either voluntarily[14] or by suit.[15] Partitioning is the physical division, or the forced sale and division of the proceeds, of property jointly owned by cotenants.[16] While partitioning by division in kind vests each cotenant with his or her property interest, partitioning sales typically result in the sale of those property interests to a third party.[17] Throughout the southern United States, both cotenants and third parties have used partitioning sale actions to acquire private cotenancy property not otherwise for sale.[18]

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[3] Pennick Interview, *supra* note 2.

[4] BLACK FARMING, *supra* note 2, at 66–67.

[5] *Id.* at 2–3. These same figures for the loss between 1959 and 1969 are 84.1% and 26.3% for black- and white-operated farms respectively. *Id.* at 40. The classification of farm operators includes full owners, part owners, and tenants. *Id.* at 1 n.1. In 1974, 66.9% of the black operators were full owners, 20.6% were part owners, and 12.5% were tenant farmers. *Id.*

[6] *Id.* at 2–3.

[7] *Id.* at 2.

[8] *Id.* at 7–8 (quoting U.S. DEP'T OF COMMERCE, LAND AND MINORITY ENTERPRISE: THE CRISIS AND THE OPPORTUNITY ii–iii, prepared by Dr. Lester M. Salamon for the Office of Minority Business Enterprise (1976)). Although black landholdings increased after the Civil War, blacks were not able to develop the capital necessary to purchase substantial amounts of property until the beginning of the twentieth century. *Id.* at 14–22.

[9] Pennick Interview, *supra* note 2.

[10] 4 G.W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF PROPERTY § 1771 (1979).

[11] Tenants in common own undivided interests which do not terminate at death but pass on through the decedent's estate. BLACK'S LAW DICTIONARY 1314 (5th ed. 1979).

[12] Joint tenants own the same interests jointly by purchase or grant. At death a joint tenant's interest passes on to the remaining cotenants through a process known as survivorship. *Id.* at 1313.

[13] Tenancy by the entirety is essentially a joint tenancy between husband and wife with rights of survivorship. *Id.* at 1313–14.

[14] G.W. THOMPSON, *supra* note 10, § 1820.

[15] *Id.* § 1822.

[16] BLACK'S LAW DICTIONARY 1009–10 (5th ed. 1979).

[17] G.W. THOMPSON, *supra* note 10, § 1820.

[18] Fuller, *Living Off the Land*, BLACK ENTERPRISE, Nov. 1982, at 49, 52.

The prevalence of black farm cotenancies in southern states has resulted in the ownership of many properties by cotenants representing several generations.[19] Land values throughout the South have increased dramatically since the Second World War.[20] These conditions provide a fertile environment for partitioning actions.[21] Typically, an outsider to the cotenancy purchases one cotenant's interest, intending to force the sale of the entire cotenancy.[22] Or, a cotenant, sometimes at the urging of a land speculator, will petition the court for a sale.[23] In either situation, the court may order a sale of the entire estate on the basis that the property is indivisible among the cotenants.[24] The property consequently is put up for sale, where it is purchased more often than not by local white lawyers or relatives of local officials.[25] The economic inability of many black cotenants to purchase all the real estate provides speculators with an easy bidding market.[26] Furthermore, these partitioning sale actions are sometimes instigated by lawyers to collect fees, and by judges who personally benefit by purchasing the properties.[27]

This note traces the historical development of partitioning actions in law and equity and the influence of that development on modern partitioning statutes. It examines the changing use of partitioning sale actions in Alabama during the nineteenth and twentieth centuries. This note then demonstrates that early interpretations of partitioning sale statutes, and equity limitations thereon, are still relevant to partitioning actions today.

While the judiciary traditionally favored the use of partitioning in kind, the routine trend in Alabama and other jurisdictions is for courts to order sales of property. The frequent use of judicial sales violates the purpose and original use of statutes preferring equitable partitioning by divisions in kind. Furthermore, this judicial preference for sales ignores the remedies in equity which courts traditionally used in partitioning actions. The same property interests once favored and protected by the preferred divisions in kind equally are in need of protection today. It is the province and duty of the courts to prevent partitioning sale actions from being used as a tool to acquire property

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[19] BLACK FARMING, *supra* note 2, at 65–66.

[20] Telephone interview with Henry Sanders, Esq., of Chestnut, Sanders, Sanders, Turner & Williams, P.C. (Dec. 27, 1985) [hereinafter Sanders Interview]. *See also* BLACK FARMING, *supra* note 2, at 4 ("The frequent pattern is for land to remain in minority hands only so long as it is economically marginal, and then to be acquired by whites when its value begins to increase.") (quoting U.S. DEP'T OF COMMERCE, LAND AND MINORITY ENTERPRISE: THE CRISIS AND THE OPPORTUNITY ii, prepared by Dr. Lester M. Salamon for the Office of Minority Business Enterprise (1976)).

[21] BLACK FARMING, *supra* note 2, at 66–67. A sample survey found that 27% of the black-owned land in the Southeast consists of heir property. Such estates are owned by an average of eight cotenants, with an average of five residing outside of the Southeast. *Id.* at 66. This survey found that most such owners mistakenly believed that cotenants could not sell their interests without the consent of the others and that those who possessed the estate had greater rights to the property than those who did not. *Id.* at 69.

[22] *Id.* at 66–67.

[23] *Id.* at 67. *See, e.g.*, Watson v. Durr, 379 So. 2d 1243, 1243 (Ala. 1980) (former cotenant petitioner filed suit on behalf of Tri-County Land Company). *See also infra* note 230.

[24] Fuller, *supra* note 18, at 52.

[25] BLACK FARMING, *supra* note 2, at 66–67.

[26] *Id.*

[27] *Id.* at 67–68. One probate judge who entered public service with almost no land ownership now owns approximately 15,000 acres of land in a county that is 80% black. *Id.* at 68 n.78.

otherwise unavailable. This is particularly true where minority interests, such as those of southern black cotenant farmers, are vulnerable to powerful marketplace pressures.

I. The Origin and Use of Partitioning Actions

A. *The Incorporation of English Precedent*

Although partitioning actions in the United States are controlled by statute, these statutes are complemented by a large body of partitioning doctrine extending back to the origins of Anglo-American legal principles. Under Roman law, for example, co-owners of property in what is now Great Britain used full partitioning remedies.[28] These powers included traditional remedies of cotenant payments between each other to equalize unequal divisions (owelty) and allowing a cotenant to remove and vest his or her interest in the property from a cotenancy (allotment).[29] Such actions disappeared in England after the decline of the Roman Empire, however, possibly due to the interests of chief lords in discouraging co-ownership to maintain undivided tenure services.[30] Nonetheless, the need for remedies other than voluntary partitioning to allow cotenants to separate their interests continued as cotenants used and destroyed the interests of the other cotenants to which they were bound.[31] As a result, in 1539, Parliament extended the old compulsory division in kind writ *de partitione faciendâ*[32] to joint tenants and tenants in common.[33]

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[28] W.W. Buckland & Arnold D. McNair, Roman Law and Common Law 123 (2d ed. 1952) [hereinafter Buckland & McNair].

[29] *Id.* at 124.

[30] *Id.* at 106. An exception to this decline in partitioning actions was with consenting cotenants, who always were able to partition voluntarily by division in kind or sale upon agreement. *Id.* There is some evidence that Roman law continued sporadically through local customs and laws after the demise of the Roman Empire. Charles B. Allnatt, A Practical Treatise on the Law of Partition 55 (London 1820).

[31] 31 Hen. 8, ch. 1 (1539). See *infra* note 33 for examples of waste by cotenants.

[32] 31 Hen. 8, ch. 1 (1539). The statute 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 hereditaments 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 manor, lands, tenements and hereditaments, 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.

Id. As noted in the statute, the writ *de partitione faciendâ* was previously available only to coparceners, or co-owners of property created by descent from a common ancestor. A writ was an order demanding an action issued by a court. Black's Law Dictionary 1441 (5th ed. 1979).

[33] 24 Halsbury's Laws of England § 744 (2d ed. 1937) [hereinafter Halsbury's Laws]. 31 Hen. 8, ch. 1 (1539) applied to joint tenants, tenants in common, and their wives; 32 Hen. 8, ch. 32 (1540) applied to those same cotenants who held for years. These statutes were expressly enacted in response to frustrated cotenants who

As early as the sixteenth century, equity jurisdiction in England for compulsory partitioning by division in kind overshadowed partitioning actions by writ.[34] This development was due to the inefficiency of the partitioning writs and the flexibility of equity partitioning doctrine and procedure.[35] The unused writs were eventually abolished,[36] and the courts of equity received full jurisdiction to adjudicate partitioning actions.[37] In addition, in 1868, Parliament for the first time in England granted courts of equity the power to order a sale in lieu of partitioning in kind.[38]

Simple or general rules cannot summarize the complex relationship between American law and the English law out of which it developed.[39] Reactionary attitudes from the American revolution spurned, and in some cases decreed illegal, any reliance on English common or statutory law.[40] Nonetheless, both before and after the revolution, American courts and legislatures inevitably relied upon English legal precedent in the absence of their own.[41] This reliance probably was due to the profusion of English case reporters in the states and the infusion of English law into colonial jurisdictions before their

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> not only [have] cut and fallen down all the woods and trees growing upon the same, but also have extirped, subverted, pulled down and destroyed all the houses, edifaces and buildings, meadows, pastures, commons, and the whole commodities of the same, and have taken and converted them to their own uses and behoofs, to the open wrong and dishersion and against the minds and wills of other[s] holding the same.

31 Hen. 8, ch. 1 (1539).

[34] J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 646 (Boston 1836). *See also* HALSBURY'S LAWS, *supra* note 33, § 744 n.*t*. *But see* A.C. FREEMAN, COTENANCY AND PARTITION § 423 (2d ed. 1886). Freeman, pointing out the lack of a prior remedy, believed that equity jurisdiction prior to Henry 8 was foreclosed by the language in 31 Hen. 8, ch. 1 (1539). *Id.*

[35] HALSBURY'S LAWS, *supra* note 33, § 744.

[36] *Id.* 3 & 4 Will. 4, ch. 27 (1833) provided that "no . . . Writ of Partition . . . shall be brought after the Thirty-first Day of *December* One thousand eight hundred and thirty-four."

[37] HALSBURY'S LAWS, *supra* note 33, §§ 744–45. 31 & 32 Vict., ch. 40 (1868) provided that:

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

Id. Prior to the Partition Act of 1868, the Court of Chancery was unable to vest the legal estate in a partitioning action, but could only direct the parties themselves to execute the necessary conveyances. HALSBURY'S LAWS, *supra* note 33, § 744.

[38] *Id.* §§ 746–47. The statutes provided that the court *was* to order a sale if requested by a party or parties representing at least a moiety (majority) interest unless there was good reason to the contrary or that the court *could* order a sale if requested by a party or parties representing less than a moiety interest if such a sale would be beneficial. *Id.* The Partition Acts subsequently were repealed in 1925. *Id.* § 748. 15 Geo. 5, ch. 20 (1925).

[39] R.B. MORRIS, STUDIES IN THE HISTORY OF AMERICAN LAW 12 (2d ed. 1974).

[40] L.M. FRIEDMAN, A HISTORY OF AMERICAN LAW 97–98 (1973).

[41] *Id.* The reliance on English common and statutory law is evident from the frequent references to it in early American cases. See *infra* note 50 for examples of English law cited in American case law.

independence.[42] Consequently, nearly all jurisdictions in the United States officially adopted some aspects of English law and equity,[43] including that of partitioning.[44]

Notwithstanding the extent to which English partitioning doctrine was incorporated into American common law, states and territories enacted statutes providing for the compulsory division of cotenancies.[45] Subsequently, each state promulgated statutes granting the courts jurisdiction to order sales in lieu of partitioning in kind. The sale statutes usually applied wherever the property was not reasonably divisible, where division in kind would injure or inconvenience the parties, or where both elements were present.[46] These partitioning sale statutes are present today in all fifty states,[47] operating

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[42] L.M. FRIEDMAN, *supra* note 40, at 97–98.

[43] E.G. BROWN, BRITISH STATUTES IN AMERICAN LAW 1776–1836 (Michigan Legal Studies) 24 (1964). Categories of state attempts to address the codification of English law include: (1) no reference to English statutes but provision that laws heretofore in force in the territory were to continue, (2) provision that the common law and English statutes were in force, (3) provision that the common law and English statutes as of a particular date were in force, and (4) provision that English statutes enacted prior to 1607 of a general nature were in force. *Id.* at 25.

[44] *Id.* at 306.

[45] G.W. THOMPSON, *supra* note 10, § 1822.

[46] *Id.* § 1828.

[47] Sales are generally justified in the following circumstances: ALA. CODE § 35-6-57 (1975): "just and equal division of the land cannot be made, or that a sale will better promote the interest of all the cotenants"; ALASKA STAT. § 09.45.330 (1983): "partition cannot be made without great prejudice to the owners"; ARIZ. REV. STAT. ANN. § 12-1218 (1982): "fair partition of the property cannot be made without depreciating the value thereof, or that for any reason a sale is more beneficial to the parties or any of them"; ARK. STAT. ANN. § 34-1826 (1962): "partition thereof cannot be made without great prejudice to the owners thereof"; CAL. CIV. PROC. CODE § 872.820 (West 1980): "sale and division of the proceeds would be more equitable than division of the property"; COLO. REV. STAT. § 38-28-107 (1973): "partition of the property cannot be made without manifest prejudice to the rights of any interested party"; CONN. GEN. STAT. ANN. § 52-500 (West Supp. 1985): "sale will better promote the interests of the owners"; DEL. CODE ANN. tit. 25, § 729 (1974): "partition of the premises will be detrimental to the interests of the parties entitled"; D.C. CODE ANN. § 16-2901 (1981): "property can not be divided without loss or injury to the interested parties"; FLA. STAT. ANN. § 64.071 (West 1985): "cannot be made without prejudice to the owners"; GA. CODE ANN. § 44-6-166.1 (Supp. 1985): "fair and equitable division of the property cannot be made . . . because of improvements made thereon, because the premises are valuable for mining purposes or for the erection of mills or other machinery, or because the value of the entire property will be depreciated by the partition"; HAW. REV. STAT. § 668-7 (1976): "partition in kind would be impractical in whole or in part or be greatly prejudicial to the parties interested"; IDAHO CODE § 6-512 (1979): "partition cannot be made without great prejudice to the owners"; ILL. ANN. STAT. ch. 110, para. 17-116 (Smith-Hurd 1984): "cannot be divided without manifest prejudice to the owners thereof"; IND. CODE ANN. § 32-4-5-13 (Burns 1980): "cannot be divided without damage to the owners"; IOWA CODE ANN. Rule of Civ. P. 278 (West 1951): "property shall be partitioned by sale and division of the proceeds, unless . . . partition in kind . . . is equitable and practical"; KAN. STAT. ANN. § 60-1003 (1983): "[w]here the property is not subject to partition in kind"; KY. REV. STAT. ANN. § 389A.030 (Bobbs-Merrill 1984): "indivisibility . . . shall be presumed unless . . . the property is divisible, without materially impairing the value of any interest therein"; LA. CIV. CODE. ANN. arts. 1339, 1340 (West 1972): "when the property is indivisible by its nature, or when it can not be conveniently divided" or "when a diminution of its value, or loss or inconvenience of one of the owners, would be the consequence of dividing it"; ME. REV. STAT. ANN. tit. 18-A, § 3-911 (1964): "cannot be partitioned without prejudice to the owners and which cannot conveniently be allotted to any one party" (probate only); MD. REAL PROP. CODE ANN. § 14-107 (1981): "cannot be divided without loss or injury to the parties interested"; MASS. GEN. LAWS ANN. ch. 241, § 31 (West 1959): "cannot be divided advantageously"; MICH. STAT. ANN. § 27A.3332 (Callaghan 1980): "cannot be made without great prejudice to the owners"; MINN. STAT. ANN. § 558.14 (West 1945): "cannot be

in conjunction with the original common law and equitable principles governing partitioning by divisions in kind or by sale.[48] Such statutes traditionally were construed narrowly because they were in derogation of the common law.[49] Early partitioning doctrine thus can continue to protect the interests and desires of cotenants within the framework of modern statutes.

B. *Alabama: A Case Study*

Many jurisdictions, including Alabama, experienced significant changes in partitioning law and its use during the twentieth century. During this time, the judiciary began to favor partitioning sales over divisions in kind. Alabama is a particularly fruitful state to survey because of its significant amount of partitioning sale litigation and legislative activity, although the problems discussed herein are not unique to this jurisdiction.

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had without great prejudice to the owners"; MISS. CODE ANN. § 11-21-27 (1972): "a just and equal division of the land cannot be made, or that a sale will better promote the interest of all the cotenants"; MO. ANN. STAT. § 528.340 (Vernon 1949): "cannot be made without great prejudice to the owners"; MONT. CODE ANN. § 70-29-202 (1985): "cannot be made without great prejudice to the owners"; NEB. REV. STAT. § 25-2181 (1979): "cannot be made without great prejudice to the owners"; NEV. REV. STAT. § 39.120 (1979): "cannot be made without great prejudice to the owners"; N.H. REV. STAT. ANN. § 538:25 (1974): "cannot be divided so as to give each owner his share thereof without great prejudice or inconvenience"; N.J. STAT. ANN. § 2A:56-2 (West 1952): "cannot be made without great prejudice to the owners, or persons interested therein"; N.M. STAT. ANN. § 42-5-7 (1978): "cannot be made without manifest prejudice to the owners or proprietors of the same"; N.Y. REAL PROP. ACTS. LAW § 922 (McKinney 1979): "cannot be made without great prejudice to the owners"; N.C. GEN. STAT. § 46-22 (1984): "cannot be made without injury to some or all of the parties interested"; N.D. CENT. CODE § 32-16-12 (1976): "cannot be made without great prejudice to the owners"; OHIO REV. CODE ANN. § 5307.09 (Baldwin 1980): "cannot be divided according to the demand of the writ of partition without manifest injury to its value"; OKLA. STAT. ANN. tit. 12, § 1509 (West 1980): "partition can [not] be made without manifest injury"; OR. REV. STAT. § 105.245 (1985): "cannot be made without great prejudice to the owners"; 231 PA. CONS. STAT. §§ 1563, 1568 (1984): "not capable of division without prejudice to or spoiling the whole"; R.I. GEN. LAWS § 34-15-16 (1984): "court may, in its discretion . . . order the whole premises . . . to be sold"; S.C. CODE ANN. §§ 15-61-50, -90 (Law. Co-op. 1976): "partition in kind or by allotment cannot be fairly and impartially made and without injury to any of the parties in interest" or "if it shall appear to the court that it would be more for the interest of the parties interested"; S.D. CODIFIED LAWS ANN. § 21-45-28 (1979): "cannot be made without great prejudice to the owners"; TENN. CODE ANN. § 29-27-201 (1980): "partition thereof cannot be made . . . [or where] it would be manifestly for the advantage of the parties that the same should be sold"; TEX. R. CIV. P. ANN. r. 770 (Vernon 1984): "a fair and equitable division of the real estate, or any part thereof, cannot be made"; UTAH CODE ANN. § 78-39-12 (1977): "cannot be made without great prejudice to the owners"; VT. STAT. ANN. tit. 12, § 5174 (1973): "cannot be divided without great inconvenience to the parties interested"; VA. CODE ANN. § 8.01-83 (1984): "partition cannot be conveniently made"; WASH. REV. CODE ANN. § 7.52.080 (1961): "cannot be made without great prejudice to the owners"; W. VA. CODE § 37-4-3 (1985): "partition cannot be conveniently made, if the interests of one or more . . . will be promoted by a sale . . . and the interest of the other person or persons . . . will not be prejudiced thereby"; WIS. STAT. ANN. § 842.11 (West 1977): "cannot be made without prejudice to the owners"; WYO. STAT. § 1-32-109 (1977): "cannot be divided according to the demand of the writ without manifest injury to its value."

[48] G.W. THOMPSON, *supra* note 10, § 1822. *See, e.g.*, Henkel v. Henkel, 282 Mich. 473, 478, 276 N.W. 522, 523–24 (1937) ("The statutory remedy for partition is generally held to be cumulative and not to supersede the original jurisdiction in equity.").

[49] Carolina Mineral Co. v. Young, 220 N.C. 287, 290–92, 17 S.E.2d 119, 121–22 (1941); Hale v. Thacker, 122 W. Va. 648, 650, 12 S.E.2d 524, 526 (1940).

1. Early Partitioning Trends

Partitioning suits in Alabama involve both statutory elements and a common law tradition composed of English and American elements.[50] Prior to the granting of Alabama's statehood in 1819, the territorial legislature established partitioning by division in kind.[51] This new action apparently did not include any judicial power to order a compulsory sale, as one early court was unable to comprehend how a court in equity could decree a sale unless with the consent of all the adult parties.[52] The Code of Alabama first provided for partitioning by sale where property could not be divided equitably by division in kind in 1854.[53] The present partitioning sale statute, consistent with its prior codifications, provides:

> If, after a decree for partition and the appointment of commissioners it shall appear from the report of the commissioners, or on exceptions to their report, that a just and equal division of the land cannot be made, or that a sale will better promote the interest of all the cotenants, the court shall order a sale of the land, or such part thereof as may be deemed proper, and a division of the proceeds among those interested, as provided for, and make an equitable partition as provided in this article of the land not sold.[54]

Recognizing that the statute superseded common law principles of division in kind, Alabama courts interpreted this partitioning sale language narrowly. In the 1889 case of *McEvoy v. Leonard*, for example, the Supreme Court of Alabama upheld a chancery

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[50] The acts establishing Alabama out of the Territory of Mississippi included both a grandfather clause adopting all prior territorial law and a statute rejecting any English statutes not already incorporated into the territory's volume of laws. E.G. BROWN, *supra* note 43, at 185. This contradiction resulted in differing judicial opinions as to which English laws were in effect. *Id.* at 27. As was the case elsewhere, however, Alabama courts frequently used by default the better documented English law. *See, e.g.*, Nelson v. McCrary, 60 Ala. 301, 309–10 (1877) (English debtor law); Carter v. Balfour, 19 Ala. 814, 823–29 (1851) (English estate law); State v. Cawood, 2 Stew. 360, 361–62 (1830) (English criminal law). In 1907, the Alabama legislature recognized the incorporation of English common law into its own common law. ALA. CODE § 1-3-1 (1975) (orig. ALA. CODE ch. 1, § 12 (1907)) provides:

> The common law of England, so far as it is not inconsistent with the Constitution, laws and institutions of this state, shall, together with such institutions and laws, be the rule of decisions, and shall continue in force, except as from time to time it may be altered or repealed by the legislature.

Id.

[51] Hillens v. Brinsfield, 108 Ala. 605, 607–08, 18 So. 604, 605 (1895). This enactment occurred in 1803 and 1806, superseding a common law writ of partition. *Id.* Presumably, this was the English writ.

[52] Deloney v. Walker, 9 Port. 497, 501–02 (1839). The court noted, however, that such power might exist where infants were involved. *Id.* at 502. For other cases refusing to order partitioning sales, see Wilkinson v. Stuart, 74 Ala. 198, 204 (1883); Oliver v. Jernigan, 46 Ala. 41, 43 (1871); Harkins v. Pope, 10 Ala. 493, 499 (1846).

[53] Hillens v. Brinsfield, 108 Ala. 605, 609–10, 18 So. 604, 606 (1895). Partitioning sales were at first limited to probate courts but subsequently were extended to the circuit courts as well. ALA. CODE § 3262 (1886).

[54] ALA. CODE § 35-6-57 (1975). This language pertains to probate actions, but circuit court powers of sale are merged into the statute. Hall v. Hall, 250 Ala. 702, 705, 35 So. 2d 681, 683 (1948).

court's denial of a partitioning sale.[55] In *McEvoy*, the petitioning cotenants failed to allege and prove the necessity of a sale because they did not show that the property in question could not be equitably divided in kind.[56] Consequently, the request for a sale was denied when the court refused to take judicial notice of the impossibility of dividing two city lots with houses among eight cotenants.[57] The Supreme Court of Alabama reasoned that "[i]t is always safest, in such proceedings, to conform to the letter of the statute."[58]

One year later, in 1890, the Supreme Court of Alabama again denied a request for a sale in lieu of partitioning in kind. In *Keaton v. Terry*,[59] the court reversed a lower court's judgment for a sale despite a petition alleging that the land could not be fairly and equitably divided.[60] The court found that a sale was not justified because the petition failed to present any evidence clearly supporting its allegations of impossibility of division.[61] The Supreme Court of Alabama further acknowledged the difficulties a petitioner would have in meeting this burden of proof, noting that few cases would arise where a court of equity would be unable to make an equitable partition by division in kind.[62]

Similarly, in the 1893 case of *Mitchell v. Mitchell*,[63] the Supreme Court of Alabama reversed a probate court's judgment for a partitioning sale of a homestead owned by the plaintiff husband and the defendant wife.[64] Denying the sale on other grounds,[65] the court noted that the husband failed to present evidence showing that the homestead could not be divided in kind fairly and equitably.[66] Thus, the court refused to assume the impossibility of dividing a homestead equitably between its two owners.[67]

Throughout its early decisions, the Supreme Court of Alabama recognized that while the right to partition was absolute, no cotenant had the right to force a sale of another cotenant's interest if such interests could be separated without injury.[68] Courts granted partitioning sales only when the petitioner clearly proved that an equitable division in kind could not be made, as mandated by the statute.[69] Thus, the Alabama judiciary always preferred partitioning by division in kind.[70]

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[55] 89 Ala. 455, 459–60, 8 So. 40, 41 (1889).

[56] *Id.* at 459, 8 So. at 41.

[57] *Id.* at 459–60, 8 So. at 41. *See also* Alexander v. Livingston, 206 Ala. 186, 188, 89 So. 520, 522 (1921) (Supreme Court of Alabama refused to take judicial notice of the indivisibility of 400 acres of property).

[58] *McEvoy*, 89 Ala. at 460, 8 So. at 41.

[59] 93 Ala. 85, 9 So. 524 (1891).

[60] *Id.* at 86–87, 9 So. at 524–25. The court noted, however, that such a bill was not subject to demurrer where the description of the property or facts averred show prima facie that the conclusion is warranted. *Id.* at 87, 9 So. at 524–25. In Musgrove v. Aldridge, 205 Ala. 189, 190, 87 So. 803, 803 (1920), the court termed this language dicta and not controlling.

[61] *Keaton*, 93 Ala. at 86–87, 9 So. at 524.

[62] *Id.* at 85, 9 So. at 524.

[63] 101 Ala. 183, 13 So. 147 (1893).

[64] *Id.* at 186, 13 So. at 148.

[65] *Id.* The sale was denied because the jointly owned property was a homestead to the husband and wife, and thus not subject to partition. *Id.*

[66] *Id.*

[67] *Id.*

[68] *See, e.g.*, *Keaton*, 93 Ala. at 86, 9 So. at 524; *McEvoy*, 89 Ala. at 457, 8 So. at 40.

[69] ALA. CODE § 35-6-57 (1975) ("a just and equal division cannot be made").

[70] Finch v. Smith, 146 Ala. 644, 649, 41 So. 819, 820 (1906). Chancellor Kent, in his 1884 survey of American law, barely mentions partitioning by sale in discussing partitioning in kind. 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 364–65, 369 (13th ed. 1884).

The judicial use of such ancillary remedies as owelty, allotment, and buy-out provisions to mitigate partitioning difficulties and injustices further reflected the judicial preference for divisions in kind. Owelty — the payment of money between cotenants to equalize unequal divisions — avoids the necessity of a sale, the latter being an additional remedy where the payment of owelty would be impractical.[71] For example, one cotenant might pay owelty to another cotenant because of physical differences between the respective portions of the division, or because fixtures or improvements exist on only one part of the property. In Alabama, owelty was available in common law independent of any like statutory remedy[72] wherever lands were "not susceptible of an exact division."[73] The Alabama legislature codified this owelty remedy in 1907.[74]

In addition to owelty, Alabama courts always recognized the ability of several cotenants to join their interests and have them allotted or set apart, while the court divided or sold the remaining portions.[75] The allotment remedy preserved the property interests of those cotenants wishing to retain them, while allowing other cotenants to sell their portions. The Alabama legislature later codified this remedy also.[76]

More recently, an Alabama statute provided cotenants with the right to purchase the interests of those cotenants petitioning for a partitioning sale.[77] Prior to this codification, this "buy-out" remedy existed as an equitable power of the courts.[78] Although the subject of much litigation, this statutory power to preserve cotenancy interests sur-

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[71] 20 R.C.L. *Partition* § 19 (1918).

[72] Smith v. Hill, 168 Ala. 317, 323, 52 So. 949, 950 (1910).

[73] Oliver v. Jernigan, 46 Ala. 41, 43 (1871). For other Alabama cases recognizing owelty, see Franklin v. Burnett, 457 So. 2d 407, 408 (Ala. 1984); Smith v. Hill, 168 Ala. 317, 323, 52 So. 949, 950 (1910).

[74] ALA. CODE § 35-6-24 (1975). The statute provides:

> If, at a hearing, it appears that the intervention of commissioners is unnecessary to secure an equal partition in kind, or that the same can be effected by providing owelty, and that it would best promote the interest of the parties, the circuit court may order the partition and fix the amount to be paid by one or several cotenants to another or others; or this may be done on hearing the report of the commissioners.

Id.

[75] Donner v. Quartermas, 90 Ala. 164, 171, 8 So. 715, 718–19 (1890). For other Alabama cases recognizing allotment, see Compton v. Simmons, 223 Ala. 352, 353, 135 So. 570, 571 (1931); Betts v. Ward, 196 Ala. 249, 253, 72 So. 110, 113 (1916); Smith v. Hill, 168 Ala. 317, 323, 52 So. 949, 950 (1910).

[76] ALA. CODE § 35-6-57 (1975). See *supra* text accompanying note 54 for statute.

[77] ALA. CODE § 35-6-100 (Supp. 1985). The statute provides:

> Upon the filing of any petition for a sale for division of any property, real or personal, held by joint owners or tenants in common, the court shall provide for the purchase of the interests of the joint owners or tenants in common filing for the petition or any others named therein who agree to the sale by the other joint owners or tenants in common or any one of them. Provided that the joint owners or tenants in common interested in purchasing such interests shall notify the court of same not later than 10 days prior to the date set for trial of the case and shall be allowed to purchase whether default has been entered against them or not.

Id. One purpose of the statute was to protect the title of family estates from passing to strangers, although it covers all real and personal property situations. Scott Paper Co. v. Griffin, 409 So. 2d 1375, 1381 (Ala. 1982).

[78] Copeland v. Giles, 271 Ala. 302, 304, 123 So. 2d 147, 148 (1960).

vived several constitutional challenges[79] and was used widely[80] before declared unconstitutional by the Supreme Court of Alabama in 1985.[81]

Alabama courts recognized and used the remedies of owelty, allotment, and buy-outs as integral parts of their statutory and equity partitioning powers throughout the nineteenth century.[82] Courts used these remedies to obviate the need for sales, based on the general premise that "[t]he lands of a tenant in common can not be sold against his consent, to gratify the preference or caprice of a co-tenant."[83] Consequently, the Supreme Court of Alabama concluded in 1890 that cases would seldom arise where a court of equity would be unable to partition by division in kind.[84]

2. The Twentieth Century Proliferation of Partitioning Sales in Alabama

The judicial preference for partitioning by division in kind in Alabama eroded in the twentieth century as courts ordered sales with greater frequency and under conditions of less necessity. In 1912, for example, the Supreme Court of Alabama affirmed an Alabama state chancery court's judgment for a sale in lieu of partitioning by division in kind in *Smith v. Witcher*.[85] In *Smith*, petitioner for the sale owned one-eighth of 1200 acres.[86] Three other cotenants owned the remaining property.[87] The court held that an averment that the land could not be equitably divided was a sufficient allegation of fact to sustain the petition.[88] Although it noted in dicta that the facts averred alone would not justify a sale, the court characterized the issue as one to be resolved by the lower court.[89]

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[79] *See, e.g.*, Gibbons v. Allen, 402 So. 2d 914, 916 (Ala. 1981) (Supreme Court of Alabama upheld buy-out statute against charges that it violated the equal protection rights guaranteed by the United States Constitution); Madison v. Lambert, 399 So. 2d 840, 843 (Ala. 1981) (Supreme Court of Alabama upheld the buy-out statute against charges that it violated the equal protection and due process rights guaranteed by the United States Constitution).

[80] *See* Gibbons v. Allen, 402 So. 2d 914 (Ala. 1981); Madison v. Lambert, 399 So. 2d 840 (Ala. 1981); Kittrell v. Benjamin, 396 So. 2d 93 (Ala. 1981); Prince v. Hunter, 388 So. 2d 546 (Ala. 1980).

[81] Jolly v. Knopf, 463 So. 2d 150, 153 (Ala. 1985). See *infra* notes 130–38 and accompanying text for a discussion of *Jolly*.

[82] *See* Donner v. Quartermas, 90 Ala. 164, 171, 8 So. 715, 718 (1890). The court stated:

> And it is well settled, that this [equity] jurisdiction, of which the [partitioning statute] is merely declaratory, will be exercised by a court of equity on its own established principles, and with the use of its own better adapted and more flexible modes of procedure, unembarrassed by the procrustean rules which cramp the statutory jurisdiction of courts of law.

Id. at 170–71, 8 So. at 718. The court subsequently allowed two cotenants to have their interests joined and set apart from the remaining interests. *Id.* at 171, 8 So. at 718–19.

[83] *Keaton*, 93 Ala. at 87, 9 So. at 525.

[84] *Id.* at 85, 9 So. at 524.

[85] 180 Ala. 102, 103–04, 60 So. 391, 392 (1912).

[86] *Id.* at 104, 60 So. at 392.

[87] *Id.*

[88] *Id.* The averment stated that "said land is of such character, some of it being improved and some unimproved, some of it level and some hilly, some of it timbered and some open, some of the soil rich and some poor, that it cannot be equitably divided or partitioned." *Id.*

[89] *Id.* The general standard of review of oral testimony by an appellate court in Alabama is to decide only if the trial court was "plainly and palpably wrong." Jordan v. Ellis, 278 Ala. 116, 118,

Two years later, the Supreme Court of Alabama sustained and extended the *Smith* deference to petitioner allegations of necessity for partitioning sales. In the 1914 case of *Trucks v. Sessions*,[90] the court upheld a partitioning sale on the basis of "[t]he bill's averments, general as well as particular, [which] show the *improbability of any practical method* for a partition of the land."[91] Noting that the averments in *Trucks* were much more conclusive as to the necessity of a sale than those in *Smith*, the court found that the sale was justified even if the particular averments only reiterated the general allegations of necessity.[92] Probably for the first time in Alabama, the Supreme Court of Alabama upheld a partitioning sale based upon conclusory allegations which showed that a fair and equitable division was improbable. This judicial deference allowed later courts to hold that merely averring that land could not be equitably divided was sufficient factual grounds to satisfy the partitioning sale statute.[93] And, rather than having to prove that the property could not be divided, cotenants after *Trucks* only needed to prove the improbability of a practical division in kind.

The result of this trend was the increasing use of partitioning sales where the remedy was not absolutely necessary. In the 1965 case of *Jordan v. Ellis*,[94] for example, the Supreme Court of Alabama upheld an Alabama state circuit court's judgment for a sale of 120 acres owned by a mother and her eight children.[95] The court accepted the lower court's determination of impossibility of division despite the admittedly "meager" evidence, consisting for the most part of the petitioner's conclusory testimony regarding

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176 So. 2d 244, 245 (1965). This so-called *ore tenus* rule is frequently invoked in appellate partitioning actions because plaintiffs typically give evidence of indivisibility orally at the trial level. As a result, it is very difficult to have an appellate court review the substantive aspects of partitioning sale decisions on appeal.

[90] 189 Ala. 149, 66 So. 79 (1914).

[91] *Id.* at 152, 66 So. at 80 (emphasis added). The averment stated:

> Said lands cannot be equitably divided or partitioned for the reason that only a small portion of the land is improved, and the small tracts in cultivation are badly scattered over the land; that most of the land not in cultivation is very rough, rocky, and hilly, the larger part of which cannot be utilized for farming purposes; that there are spots of timber scattered over said land which are also cut in two by Six Mile creek; that parts of said lands are supposed to contain mineral, but that the value of it as mineral land is unknown, and it is not known just what portion of said land contains the mineral.

Id. at 150, 66 So. at 80.

[92] *Id.* at 152, 66 So. at 80.

[93] *See* Musgrove v. Aldridge, 205 Ala. 189, 190–91, 87 So. 803, 803 (1920). In *Musgrove*, the Supreme Court of Alabama upheld a petition for a sale of lands against a demurrer which claimed that evidence was lacking as to the indivisibility of the property. The court held that the plaintiff's conclusions themselves were factual evidence, and sustained the petition against the demurrer. *Id.* Although the plaintiff still was required to present evidence of indivisibility at trial, the court gave the plaintiff's conclusory opinions considerable weight. *See also* Miles v. Miles, 207 Ala. 57, 58, 91 So. 886, 888 (1921), where the court stated:

> [The bill] charges that the said land cannot be equitably divided, and, while the reasons given therefor do not go further, and show an inequality of value, or other physical facts than that one lot is improved and the others are not, it does not affirmatively show or aver that said lands can be equitably divided, and it is not subject to the [demurrer].

Id.

[94] 278 Ala. 116, 176 So. 2d 244 (1965).

[95] *Id.* at 119, 176 So. 2d at 247.

the indivisibility of her rural lands.[96] Although the reviewing court thought it might have reached an opposite conclusion from the evidence, it declined to find the lower court's decision "plainly and palpably wrong."[97] Thus, the court upheld the trial court's order for a sale.[98]

This relaxation of judicial standards of necessity for partitioning sales developed in conjunction with a strong presumption of indivisibility wherever minerals were present.[99]

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[96] *Id.* at 118–19, 176 So. 2d at 246–47. At the hearing, the mother testified:

Q. In your best judgement is there any way in which two or three men or anybody could go out there and divide that place into, not necessarily in nine equal parts, but divide it into nine parts whereby the value of one part would be equal to the eight other parts?

A. No, sir, I tell you why, the biggest part of it is in branches; don't never go dry, never has been dry but one time since we lived on it. The pasture is just boggy people can't even cut the timber, its so boggy they can't get it out and for that reason it can't be divided.

Q. Is there not any way it can be divided?

A. No, sir, because it wouldn't give one justice. Some would have to take in the branches and what good would it be to them, just that branch. There is timber up in that branch, just some hardwood, gum timber.

Q. Then the house is situated so that somebody would get a branch and somebody would get a house, it couldn't be divided in equal parts?

A. Two houses on this side of the highway. There is one out there in front; one on the other side of the road and one down below.

. . . .

Q. Now, Mrs. Ellis, this 120 acres of land, if one man or three men or if the court appointed somebody to go out there to divide it, don't you think that land, even though they gave you more, could be divided into two fairly equal parts in value?

A. No, sir, I don't, because most of it is in the branch. The best land is above the house and the little patch across the creek and the rest is in hills, gulleys, and pastures.

Q. If they was to give you all of the houses and the best land that would be more than half wouldn't it?

A. I had rather just sell where they can all have their shares like we should have.

Q. If they were to give you the best land and all of the houses that would be more than the value of the rest wouldn't it?

A. I don't know, there ain't no house there no good without the land.

Q. There ain't no houses there no good?

A. No.

Q. Well, if they give you the best land then and give them the sorry land, so to speak, the best land would be more valuable than the rest wouldn't it?

A. The best land would be the value of the place.

Q. And if they give you all of that why, they could do that couldn't they? That would be two parts wouldn't it?

A. I reckon so.

Q. That could be done couldn't it?

A. It could but, they sure wouldn't have nothing.

Q. Well, if they didn't have nothing, if they were satisfied with it, it could be done couldn't it?

A. It could but, it couldn't be equally divided.

Id. The mother's children who were in court testified that the land could be equally divided into two parts because "one acre is as good as another." *Id.*

[97] *Id.* at 119, 176 So. 2d at 247. See *supra* note 89 for a discussion of the standard of review of oral testimony in Alabama appellate courts.

[98] Jordan v. Ellis, 278 Ala. 116, 119, 176 So. 2d 244, 247 (1965).

[99] For a comprehensive discussion of partitioning of lands containing minerals, oil, and gas, see Annotation, *Right to Partition in Kind of Mineral or Oil and Gas Land*, 143 A.L.R. 1092 (1943).

In the 1913 case of *Sheffield Coal & Iron Co. v. Alabama Fuel & Iron Co.*,[100] the Supreme Court of Alabama upheld a sale of 220 acres in lieu of partitioning it between two cotenants owning one-third and two-thirds respectively.[101] The court reasoned that the property was indivisible due to uncertainty over the quantity, quality, and extraction costs of the ore deposits which apparently lay under portions of the property.[102] The Supreme Court of Alabama subsequently interpreted *Sheffield Coal* seven years later in *Musgrove v. Aldridge*[103] to mean that land containing minerals required "less strict proof" to justify a sale in lieu of partitioning than ordinarily required where the value of the property was easily ascertainable.[104] Ultimately, the Supreme Court of Alabama declared the presumption that divisions in kind were feasible inapplicable wherever minerals were present.[105]

The presumption of indivisibility wherever minerals existed operated within a broader judicial trend of ordering partitioning sales of large properties. Courts routinely granted sales based on the premise that the property was topographically diverse and therefore not divisible into equal parcels.[106] For example, in 1980, the Supreme Court of Alabama upheld an Alabama state circuit court's judgment for a sale in *English v. Barnes*.[107] The court relied on the opinion of the petitioner, who argued that the 160 acres involved could not be divided "because some of it is in different types of land."[108]

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[100] 185 Ala. 50, 64 So. 67 (1913).

[101] *Id.* at 51, 64 So. at 68.

[102] *Id.* at 52, 64 So. at 68. Furthermore, the court pointed out that the ultimate saleable value of each portion of the division was unknown because the extent and extracting costs of the ore per portion were also unknown. *Id.*

[103] 205 Ala. 189, 87 So. 803 (1920).

[104] *Id.* at 191, 87 So. at 804. The parties involved owned the minerals and the rights to mine them. *Id.* at 190, 87 So. at 804.

[105] Dimmick v. First Nat'l Bank, 228 Ala. 150, 152, 153 So. 207, 208 (1934). This proposition has been rejected elsewhere. *See, e.g.*, Wight v. Ingram-Day Lumber Co., 195 Miss. 823, 829–30, 17 So. 2d 196, 197–98 (1944).

[106] The most outstanding example of this judicial preference for partitioning sales of large properties was illustrated by the United States Court of Appeals for the Fourth Circuit affirming a district court's decision to order the sale of approximately 167,000 acres of land owned by six cotenants in North Carolina. East Coast Cedar Co. v. People's Bank of Buffalo, 111 F. 446, 450 (4th Cir. 1901). The court based its decision on the tract's immense size and varied terrain and the expense of surveying it for partitioning, noting:

> This immense body of land is of very unequal value. Parts of it are almost, if not quite, valueless. The portions of it which have value vary in size, quality, and character and value of timber; are scattered over the tract; are at greatly unequal distances from the water courses by which the timber, when cut, would reach the market.

Id. at 449. Furthermore, the court refused to allot a one-sixth interest to one of the cotenants, which "would be so manifestly unjust to the other five-sixths as to need no discussion." *Id.* at 450. *See also* Stacy v. Stacy, 250 Ala. 187, 189, 33 So. 2d 898, 899 (1947) (sale upheld because "only 60 acres of this large tract are in cultivation. Of the remainder, in some portions there is valuable timber, and in others timber that is not so valuable; that some of the lands were broken, some level, some hills"); Thomas v. Skeggs, 223 Ala. 598, 599, 137 So. 443, 444 (1931) (sale upheld because property contained varying areas of timber, farmland, and possibly minerals); Ezzell v. Wilson, 200 Ala. 612, 612–13, 76 So. 970, 970–71 (1917) (sale upheld because property contained varying areas of timber, farmland, and water).

[107] 387 So. 2d 128, 130 (Ala. 1980).

[108] *Id.*

Presumably, this claim meant that equal parcels could not be created. The court accepted the premise and ordered the sale.[109] As in *English*, claims of topographical diversity often involve the presence of minerals on the property.[110]

The demise of the traditional judicial preference for divisions in kind and the growing use of and presumptions for partitioning sales are reflected in the limitations courts placed on the equitable remedies previously available to foster the use of divisions in kind. Whereas earlier Alabama courts had used the remedies of owelty and allotment to mitigate any unequal divisions,[111] later courts narrowed the applicable uses of these remedies. In the 1948 case of *Hall v. Hall*,[112] for example, a defendant cotenant offered to have his one-fifth interest in a forty-acre farm set apart and allotted to him before the sale and to pay owelty for any resulting inequality in the division.[113] The Supreme Court of Alabama denied the defendant's requests and ordered the sale.[114] The court reasoned that owelty was not available unless the entire estate was capable of being partitioned by division in kind.[115] Furthermore, the court held that it could set apart a portion of the property for the defendant only if he could demonstrate some equitable claim to that portion and that such an allotment would not affect the saleable value of the balance.[116]

For a brief time, the party seeking allotment satisfied Alabama's judicially imposed restrictions on the allotment remedy by offering to those petitioning for a sale the choice of which portion was to be sold.[117] In the 1977 case of *Hicks v. Hicks*,[118] however, the court refused to allow such a procedure.[119] The petitioner for a sale owned both a life estate interest and a one-third interest in the sale price of the estate.[120] The court reasoned that the defendants, who owned 240 out of the 1441 acres, were not entitled to an allotment because that remedy would be an inequitable interference with the petitioner's one-third interest in the sale price of the estate.[121] More importantly, the

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[109] *Id.*

[110] *See, e.g.*, Thomas v. Skeggs, 223 Ala. 598, 599, 137 So. 443, 444 (1931) ("It further appears an undefined area is underlain with an undeveloped seam of coal; that kaolin also appears on rather large but undefined areas."); *Trucks*, 189 Ala. at 150, 66 So. at 80 ("Said lands cannot be equitably divided or partitioned [for a variety of reasons, including] . . . that parts of said lands are supposed to contain mineral, but that the value of it as mineral land is unknown, and it is not known just what portion of said land contains the minerals.").

[111] See *supra* notes 71–76 and accompanying text for discussions of the owelty and allotment remedies and their early use in Alabama.

[112] 250 Ala. 702, 35 So. 2d 681 (1948).

[113] *Id.* at 703, 35 So. 2d at 681.

[114] *Id.* at 705, 35 So. 2d at 683.

[115] *Id.* at 704, 35 So. 2d at 682.

[116] *Id.* at 705, 35 So. 2d at 683. *See also* Washington v. Phillips, 257 Ala. 625, 625–26, 60 So. 2d 337, 338 (1952), where the court observed that owelty "should be sparingly used and with great caution" and denied its use where the defendant demonstrated no claim to the particular share of the property for which he desired to pay owelty. *Id.*

[117] Fendley v. Lambert, 286 Ala. 179, 182, 238 So. 2d 346, 348 (1970). The court found that the allotment would "probably not" affect the saleable value of the residue. *Id.* at 182, 238 So. 2d at 349.

[118] 348 So. 2d 1368 (Ala. 1977).

[119] *Id.* at 1369.

[120] *Id.*

[121] *Id.*

effect of *Hicks* was to require *the party seeking allotment* to demonstrate that the allotment would not affect in any way the saleable value or other elements of the cotenants' interests.[122]

This shift in the required burden of proof is illustrated by the subsequently decided 1982 case of *Ragland v. Walker*,[123] which drew heavily from *Hicks*. In *Ragland*, the Supreme Court of Alabama denied defendants the option to allow petitioners for a sale the choice of which portion of an eighty-acre estate owned by twenty-six cotenants was to be sold.[124] The court reasoned that the defendants had failed to present evidence which pointed to a "special equitable reason" for petitioners to choose a particular portion of the property.[125] Furthermore, according to the court, the defendants had not established that such an allotment would not affect the saleable value of the remaining portion.[126] As a result, the court denied any allotment remedy and ordered the sale.[127] The burden of proof to avoid the sale by using allotment was thus on those defendants who wished to preserve their property.

Finally, Alabama courts also have limited severely the "buy-out" remedy,[128] codified by the Alabama legislature in 1979.[129] In the 1985 case of *Jolly v. Knopf*,[130] the Supreme Court of Alabama held that the defendants' statutory option to purchase the interests of the petitioner for a partitioning sale violated the equal protection provisions of both the Alabama and federal constitutions.[131] The petitioner in *Jolly* sought to sell and divide the proceeds of the estate she owned with six other cotenants.[132] In response, the other cotenant defendants, invoking the buy-out statute, offered to buy the petitioner's interest.[133] The petitioner in turn offered to buy the defendants' interests.[134] The court, reversing the trial court's judgment for the defendants' offer to purchase, found that the statute as applied violated the equal protection rights of the petitioner by denying her the opportunity to purchase the other cotenants' interests.[135] The court saw no legitimate state interest in treating the petitioner differently from the defendants, all of whom the court reasoned were in the same class of cotenants.[136] But, as a concurring

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[122] *Id.* at 1371 (Jones, J., concurring in the result). *See also id.* at 1374 (Beatty, J., dissenting) ("Furthermore, if the defendants are required to prove that the saleable value of the residue will not be adversely affected, the effect of this is that the burden of proof (for a sale) will be shifted improperly to the defendants.").

[123] 411 So. 2d 106 (Ala. 1982). An earlier adjudication had remanded the same parties and action for a lack of evidence suggesting necessity for partitioning by sale. Ragland v. Walker, 387 So. 2d 184, 186 (Ala. 1980).

[124] *Ragland*, 411 So. 2d at 108.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] See *supra* notes 77–81 and accompanying text for a discussion of the buy-out remedy in Alabama.

[129] ALA. CODE § 35-6-100 (Supp. 1985). See *supra* note 77 for text of statute.

[130] 463 So. 2d 150 (Ala. 1985).

[131] *Id.* at 153. The court dismissed previous constitutional litigation in favor of the statute as relating solely to circumstances where the petitioners for a sale indicated no interest in purchasing the interests of other cotenants. *Id.* at 152.

[132] *Id.* at 151.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 153.

[136] *Id.*

opinion points out, *Jolly* allows a "stranger" cotenant to petition for a sale of the entire property and at the same time seek to buy-out the interests of the other cotenants.[137] The latter individuals consequently must out-bid the petitioner or lose their lands in a court-ordered sale.[138]

The consequences of the rising use of partitioning sales in Alabama and the demise of partitioning in kind remedies have not gone unnoticed. Recently, the Supreme Court of Alabama acknowledged the judicial predisposition for partitioning sales while outlining a typical case:

> Suppose six children of intestate parents wish to preserve the family property intact, but the seventh child wants his share of the inheritance. By invoking [the relevant statutes], he can enforce either a partition in kind or a sale of the whole and division of the proceeds. *Except in the rarest of circumstances which permit judicial equitable partition, the usual end result of such proceedings is the passing of title to a stranger* [through the sale of the entire estate].[139]

The result of this demise in the judiciary's preference for and practice of divisions in kind is that partitioning sales of property have become common in Alabama.[140]

The trend away from partitioning by division in kind and towards judicial sales is generally acknowledged to be universal.[141] No longer demanding that petitioners for a sale prove their allegations of necessity,[142] courts today generally do not use the equitable remedies which might obviate the need for a sale.[143] Several states have codified the

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[137] *Id.* at 154 (Torbert, C.J., concurring specially).

[138] *Id.* The opinion notes, however, that at least defendants will be protected from a *public* sale.

[139] Ragland v. Walker, 387 So. 2d 184, 185 (Ala. 1980) (emphasis added).

[140] For other recent Alabama partitioning sale cases, see also Cotton v. McMurtry, 440 So. 2d 1039, 1041 (Ala. 1983) (sale of 996.2 acres due to topographical "variables of the land"); Dougherty v. Hovator, 425 So. 2d 1082, 1085 (Ala. 1983) (sale of rental house and land owned by two cotenants due to presumption of indivisibility); Hanks v. Jewell, 401 So. 2d 29, 30 (Ala. 1981) (sale of 120 acres of farmland owned by five cotenants with no mention of impossibility of division); Millican v. Cantrell, 378 So. 2d 737, 738 (Ala. 1979) (sale of land where defendants offered no proof of indivisibility).

[141] 4A POWELL ON REAL PROPERTY ¶ 612 (1982) states:

> It is the author's judgement, unsupported by any actual statistical data, but amply supported by long years of practice, that division in kind has become actually infrequent of occurrence. Lip service is still given to the historical preference for physical division of the affected land, but sale normally is the product of a partition proceeding, either because the parties all wish it or because courts are easily convinced that sale is necessary for the fair treatment of the parties.

Id.

[142] The Massachusetts Supreme Judicial Court, for example, affirmed a lower court's judgment for a sale requested by three of four cotenants owning fifty-eight acres of land with a house. Fekkes v. Hughes, 354 Mass. 303, 305, 237 N.E.2d 19, 20 (1968). The court noted that while the petitioners offered, but did not actually present, evidence supporting their claim that the land could not be advantageously divided, the respondent failed to present evidence to the contrary. *Id.*

[143] In Johnson v. Hendrickson, 71 S.D. 392, 24 N.W.2d 914 (1946), the Supreme Court of South Dakota affirmed a lower court's judgment for a sale. *Id.* at 397, 24 N.W.2d at 916. In *Johnson*, six cotenants owned 200 acres of rural lands. *Id.* at 395, 24 N.W.2d at 915–16. The court refused to allot sixty-seven acres and the buildings thereon to those defendants owning one-third of the property on the basis that to do so would, "as a matter of common knowledge in this state . . . materially depreciate its value, both as to its salability and as to its use for agricultural purposes." *Id.* at 396–97, 24 N.W.2d at 916. The court would not allow the payment of owelty or the purchase

trend.[144] Jurisdictions such as Alabama, however, continue to adhere to the traditional formula of favoring partitioning by division in kind, while in practice ordering partitioning sales. This practice violates both the purpose and early use of the statutes and the common law and equitable principles upon which partitioning is based.

II. Re-aligning the Purpose and Use of Partitioning Actions

A. *Partitioning Sale Statutes Re-examined*

Despite the historical preference for partitioning by division in kind, the recent judicial predisposition in the United States generally, and in Alabama particularly, has been to sell jointly owned property and divide the proceeds.[145] This trend is the result of a twentieth century judicial practice of sustaining lower court findings of the impossibility of divisions in kind based solely on the mere allegations and opinions of petitioners.[146] Moreover, courts order partitioning sales on grounds of improbability or impracticability.[147] These practices directly contradict the purpose and language of partitioning statutes and the common law and equitable principles on which they are based. The judiciary in Alabama and elsewhere have misapplied the statutes and allowed private interests to use the statutory process as a land acquisition tool at the expense of cotenant landowners.

1. Legislative and Judicial Limitations on the Use of Partitioning Sale Statutes

Courts interpret partitioning sale statutes, most of which are relatively old,[148] in conjunction with prior common law and early judicial statutory interpretations. Although no documented legislative history exists pertaining to Alabama's partitioning sale statute,[149] it is nonetheless apparent that the purpose of the sale remedy was to modify the standard rule that a cotenant could demand and receive partition by division in kind although it might be "inconvenient or injurious . . . or even ruinous."[150] Prior to such statutes, rigid common law forced courts to partition properties clearly incapable of equitable division, as happened in the frequently cited English case of *Turner v. Morgan*.[151] In *Turner*, the court attempted to convince the parties to voluntarily partition by division

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of the interests of those cotenants desiring the sale by the defendants. *Id.* at 397, 24 N.W.2d at 916. The latter remedy was denied because it "does not present a justiciable question." *Id.*

[144] *See, e.g.*, Iowa Code Ann. Rule of Civ. P. 278 (West 1951) ("property shall be partitioned by sale and division of the proceeds, unless . . . partition in kind . . . is equitable and practical"); Ky. Rev. Stat. Ann. § 389A.030 (Bobbs-Merrill 1984) ("indivisibility . . . shall be presumed unless . . . the property is divisible, without materially impairing the value of any interest therein").

[145] See *supra* note 141 for a practitioner's opinion as to the judicial trend favoring partitioning by sale.

[146] See *supra* notes 85–98 and accompanying text for a discussion of the relaxation of the burden of proof.

[147] *Id.*

[148] California (circa 1851), Idaho (circa 1881), North Carolina (circa 1868–69), and West Virginia (circa 1849) are typical examples. See *supra* note 47 for partitioning statutes for all fifty states.

[149] Sanders Interview, *supra* note 20.

[150] Dimmick v. First Nat'l Bank, 228 Ala. 150, 152, 153 So. 207, 208 (1934) (quoting Donner v. Quartermas, 90 Ala. 164, 171, 8 So. 715, 719 (1890)).

[151] 32 Eng. Rep. 307 (1803).

in kind in some equitable manner.[152] When that failed, the court was compelled in the absence of a sale statute to divide a house between two cotenants by awarding to the plaintiff "the whole stack of chimneys, all the fire-places, the only staircase in the house, and all the conveniences of the yard" and the balance to the defendant.[153] Thus, in response to *Turner*, the American judiciary established and preferred sales in situations where division in kind would seriously impair or destroy the interests of all the parties as a whole.[154]

A well established principle of statutory interpretation is that courts construe legislation with reference to common law existing at the time of its enactment.[155] The Alabama legislature's codification of its partitioning sale statute in 1854 provided an additional remedy to the divisions in kind already allowed and preferred by the common law.[156] And, because partitioning sale statutes involve powers of sale not recognized by the common law, courts construed them strictly.[157] One state court, interpreting statutes similar to Alabama's, recognized that sales took "away from the owner the right to keep his freehold . . . converting his home to money."[158] Consequently, such sales were to be ordered by courts only in cases of "imperious necessity," and "avoided wherever possible."[159] In accordance with the prior common law, these sales were viewed as "merely incidental to prevent sacrifice by partition."[160] As a result, courts, including those in Alabama,[161] traditionally favored partitioning by division in kind.[162]

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[152] *Id.* at 308.

[153] *Id.* The only exception to this practice was with castles, apparently based on a public policy. *Id.*

[154] A.C. FREEMAN, *supra* note 34, § 542.

[155] 2A SUTHERLAND STAT. CONST. § 50.01 (4th ed. 1984). *See, e.g.*, Soud v. Hike, 56 So. 2d 462, 466 (Fla. 1952) (statutes describing deed forms to be interpreted by English and American common law); Ferullo's Case, 331 Mass. 635, 637, 121 N.E.2d 858, 859 (1954) (statute defining employee construed in light of pre-existing common and statutory law); Perry v. Strawbridge, 209 Mo. 621, 637, 108 S.W. 641, 645 (1908) (statutory rules of descent and distribution to be interpreted by common law on which they rest).

[156] See *supra* notes 51–53 and accompanying text for a discussion of the origin of Alabama's partitioning sale statute.

[157] *See* 3 SUTHERLAND STAT. CONST. § 61.01 (4th ed. 1974). *See, e.g.*, Westenhaver v. Dunnavant, 225 Ala. 400, 401, 143 So. 823, 823 (1932) (statutory remedies unknown to the common law, such as pertaining to securities sales, are to be strictly construed); Swogger v. Taylor, 343 Minn. 458, 465, 68 N.W.2d 376, 382 (1955) (partitioning sale statutes are in derogation of the common law, and are to be construed strictly so as not to violate the principles of that common law); Buroughs v. Oliver, 217 Miss. 280, 284, 64 So. 2d 338, 339 (1953) (statutory remedies in derogation of the common law, such as wrongful death statutes, are to be strictly construed); *In re* Estate of Tafel, 449 Pa. 442, 446, 296 A.2d 797, 799 (1972) (statutes contrary to the common law, such as those relating to distribution from a will, are subject to strict construction).

[158] Croston v. Male, 56 W. Va. 205, 210, 49 S.E. 136, 137 (1904).

[159] *Id.* at 210, 49 S.E. at 137–38.

[160] Roberts v. Coleman, 37 W. Va. 143, 158, 16 S.E. 482, 487 (1892). *See also* Brown v. Boger, 263 N.C. 248, 256, 139 S.E.2d 577, 583 (1965) (partitioning sale allowed only where injury to cotenant results in "substantial injustice or material impairment of his rights or position, such that it would be unconscionable to require him to submit to actual partition").

[161] Finch v. Smith, 145 Ala. 645, 649, 41 So. 819, 820 (1906); *Keaton*, 93 Ala. at 86, 9 So. at 524; *McEvoy*, 89 Ala. at 457, 8 So. at 41.

[162] A.C. FREEMAN, *supra* note 34, § 542. A.C. Freeman's widely known work on partitioning was frequently cited by Alabama courts. *See, e.g.*, Russell v. Stylecraft, 286 Ala. 633, 637, 244 So. 2d 579, 583 (1971); Wood v. Barnett, 208 Ala. 295, 297, 94 So. 338, 340 (1922); Smith v. Hill, 168

The early judicial aversion to partitioning sales remains an important factor in construing sale statutes today. Courts traditionally give deference to the interpretations of legislation by contemporaneous courts.[163] As contemporaneous actors, the courts are in an ideal position to know of the purpose, intent, and common law origins of the legislation.[164] In addition, if a court's interpretation is erroneous, legislative action can be expected to correct it.[165] Although the recent judicial trends favoring partitioning sales might suggest a rejection of prior case law and its precedential value,[166] courts continue to acknowledge the presence of a presumption favoring divisions in kind.[167] The continuing recognition of this presumption by the judiciary suggests that the twentieth century deviation from it has not overruled the precedential value of the contemporaneous interpretation and use of partitioning sale statutes.

Alabama's partitioning sale statute explicitly states that a sale can occur only where "a just and equal division of the land *cannot* be made."[168] Nonetheless, Alabama courts uniformly accept mere allegations as proof of impossibility and construe "impossible" as "improbable" or "impractical."[169] The result has been a judicial practice of using sales unless the defendant cotenants show the possibility of an equitable partition by division in kind.[170] This trend contradicts the language, purpose, and spirit of the statute, as

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Ala. 317, 323, 52 So. 949, 950 (1910); *Keaton*, 93 Ala. at 85, 9 So. at 524; Donner v. Quartermas, 90 Ala. 164, 171, 8 So. 715, 718 (1890); Wilkinson v. Stuart, 74 Ala. 198, 204 (1883).

[163] 2A SUTHERLAND STAT. CONST. § 49.05 (4th ed. 1984). *See, e.g.*, Union Elec. Co. v. Illinois Commerce Comm'n, 77 Ill. 2d 364, 380, 396 N.E.2d 510, 518 (1979) (judicial construction of utility rate-setting statute becomes a part of the statute); Harry C. Erb, Inc. v. Shell Const. Co., 206 Pa. Super. 388, 389–90, 213 A.2d 383, 383 (1965) (judicial construction of arbitration statute becomes part of legislation from the time of its enactment); James v. Vernon Calhoun Packing Co., 498 S.W.2d 160, 162–63 (Tex. 1973) (doctrine of stare decisis has greatest force in statutory construction of employment contract statute by judiciary).

[164] 2A SUTHERLAND STAT. CONST. § 49.08 (4th ed. 1984). *See* Lane v. Bigelow, 135 N.J.L. 195, 200, 50 A.2d 638, 641 (1947) (contemporaneous construction of zoning statute by court given due respect).

[165] 2A SUTHERLAND STAT. CONST. § 49.05 (4th ed. 1984). *See, e.g.*, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) ("considerations of stare decisis weigh heavily in the area of statutory construction [of Clayton Act], where Congress is free to change this Court's interpretation of its legislation"); James v. Vernon Calhoun Packing Co., 498 S.W.2d 160, 162–63 (Tex. 1973) (doctrine of stare decisis has greatest force in statutory construction of employment contract statute by judiciary where interpretation not changed by legislature).

[166] *See* 2A SUTHERLAND STAT. CONST. § 49.07 (4th ed. 1984).

[167] For recent cases in the Supreme Court of Alabama endorsing the statutory presumption for partitioning by division in kind, see Cotton v. McMurtry, 440 So. 2d 1039, 1040 (Ala. 1983); English v. Barnes, 387 So. 2d 128, 129 (Ala. 1980); Watson v. Durr, 379 So. 2d 1243, 1244 (Ala. 1980); Murphy v. Dees, 293 Ala. 529, 532, 307 So. 2d 1, 3 (1975); Jordan v. Ellis, 278 Ala. 116, 118, 176 So. 2d 244, 246 (1965).

[168] ALA. CODE § 35-6-57 (1975) (emphasis added). This same language is repeated in ALA. CODE §§ 35-6-58 and 35-6-61 (1975). Alternately, ALA. CODE § 35-6-57 (1975) allows a sale where it "will better promote the interest of *all* the cotenants" (emphasis added). It appears that Alabama courts have never used this provision, probably because any cotenants who oppose the sale could claim that it was against their interests and defeat the action.

[169] See *supra* notes 85–98 and accompanying text for a discussion of the relaxation of the burden of proof for partitioning sales in Alabama.

[170] *See* Millican v. Cantrell, 378 So. 2d 737, 738 (Ala. 1979) (defendant cotenants assessed double costs in a sale action due to the frivolous nature of their appeal and their failure to show evidence that partition in kind was feasible). See also *supra* notes 85–140 and accompanying text for development of this trend.

illuminated by common law and precedent. In the absence of compelling reasons, which have never been advanced by Alabama courts, express statutory language prohibits the court's use of partitioning sales unless the parties clearly prove the impossibility of division in kind.[171]

2. Equity Limitations on Partitioning Sales

The historical preference for partitioning by division in kind over sale in Alabama and elsewhere is supported not only by the contemporary statutory interpretation and use of the partitioning sale legislation, but also by the equitable principles upon which partitioning actions are based. Most jurisdictions recognize that in addition to statutory authority, jurisdiction to partition lies in equity.[172] In Alabama, courts recognize that equity jurisdiction to partition rests "on the inadequacy of remedies at law, and the capacity of the court to grant more complete relief, adjusting the equities of the parties, and meeting exigencies or necessities which may be peculiar to the particular [partitioning] case."[173]

Courts construe legislation which interferes with traditional property rights narrowly because equity seeks to protect such fundamental individual rights.[174] The Supreme Court of Mississippi recognized this principle in a 1944 partitioning sale action in *Wight v. Ingram-Day Lumber Co.*[175] In *Wight*, the court reasoned:

> A particular piece of real estate cannot be replaced by any sum of money, however large; and one who wants a particular estate for a specific use, if deprived of his rights, cannot be said to receive an exact equivalent or complete indemnity by the payment of a sum of money. A title to real estate, therefore, will be protected in a court of equity by a decree which will preserve to the owner the property itself, instead of a sum of money which represents its value.[176]

Thus, partitioning sale statutes should be construed narrowly and used sparingly because they interfere with property rights.

The ease with which equity courts assumed jurisdiction to partition by division in kind and the refusal of equity to sell in lieu of partitioning prior to the statutes suggest

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[171] Some have suggested that this trend is due to increased land values, judicial disfavor of co-ownership of land, and the legal community's greater interest in representing those parties seeking to have their interests sold. See *supra* notes 241–42 and accompanying text for one attorney's opinion on the reasons for this trend. These reasons, however, should not be compelling enough to justify divestment of settled property interests.

[172] G.W. THOMPSON, *supra* note 10, § 1822. *See, e.g.*, Beeler v. Bullitt, 3 A.K. Marsh. 280, 283 (Ky. 1821).

[173] Wilkinson v. Stuart, 74 Ala. 198, 203 (1883). Alabama has adopted English equity law as part of its common law. Goodman v. Carrol, 205 Ala. 305, 306, 87 So. 368, 369 (1921).

[174] 2A SUTHERLAND STAT. CONST. § 58.04 (4th ed. 1984). *See, e.g.*, Township of Maplewood v. Tannenhaus, 64 N.J. Super. 80, 89, 165 A.2d 300, 305 (1960) (zoning laws affecting private property must be clearly and expressly imposed and not be left to inference); Ice & Fuel Co. v. Kreuzweiser, 120 Ohio St. 352, 356, 166 N.E. 228, 230 (1929) (statutes imposing restrictions on the use of private property, such as zoning ordinances, will always be strictly construed).

[175] 195 Miss. 823, 831, 17 So. 2d 196, 198 (1944).

[176] *Id.* at 831, 17 So. 2d at 198 (quoting Lynch v. Union Inst. for Sav., 159 Mass. 306, 308, 34 N.E. 364, 364–65 (1893)). The court denied a sale of land containing minerals, arguing that the test was of the apparent practicability of division, not the speculative difficulty thereof. *Id.*

that equity courts recognized the unfair nature of such forced sales.[177] Consequently, partitioning sales are "not a matter of unconditional right."[178] Rather, they are contingent upon a clear showing by a party that the property cannot be divided in kind.[179] Even if division is impossible, equity remedies might still preclude or limit the use of partitioning sales.[180] Thus, the claim that judicial sales are an "absolute right,"[181] relied upon by so many courts, is misleading and probably erroneous.[182]

A court of equity cannot order a partitioning sale unless a party proves its necessity by showing that a physical division in kind would be inequitable and unfair.[183] In 1890, the Supreme Court of Alabama interpreted this equity burden of proof to mean that sales are justified only where division in kind cannot be made or where it would result "in a *total loss or destruction* of the property."[184] This standard contradicts the current Alabama practice of justifying partitioning sales based on the topographical diversity of properties[185] or the economic disadvantages of divisions in kind.[186] Particularly with large

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[177] *See, e.g.*, Oliver v. Jernigan, 46 Ala. 41, 43 (1871) (chancery court has no power to direct a partitioning sale); Deloney v. Walker, 9 Port. 497, 501–02 (1839) (chancery court would not sell property without the consent of all the parties, except possibly in the case of infants). South Carolina and Texas, however, appear to have found equity jurisdiction to direct sales. In Dinckle v. Timrod, 1 S.C. Eq. (1 Des.) 109 (1784), a South Carolina court ordered a cotenancy sold prior to the 1791 statute allowing such a sale. *See* Holley v. Glover, 36 S.C. 404, 419, 15 S.E. 605, 614 (1891) (citing *Dinckle*, 1 S.C. Eq. (1 Des.) at 109). The reporter in *Dinckle* noted:

> the power of ordering sales, where a division cannot be made advantageously, or where the land is unproductive to the children, is of very great importance in a country where landed property is held by almost every man, and is transferred from hand to hand, with the facility of personal estate; and which is very frequently uncultivated, and unproductive of any immediate revenue, though of increasing value.

Dinckle, 1 S.C. Eq. (1 Des.) at 109 (reporter's note). In Texas, early equity courts apparently assumed the power to sell jointly owned properties upon petition in deference to the existing power at law. *See* Moore v. Blagge, 91 Tex. 151, 166, 38 S.W. 979, 985 (1897).

[178] *Keaton*, 93 Ala. at 86, 9 So. at 524.

[179] *Id.* The *Keaton* court stated, "[t]he right of partition of lands, and the right to have lands sold for purposes of distribution, do not rest upon the same facts, and the averments which may be sufficient in one case will not support the other." *Id.*

[180] See *supra* notes 71–84 and accompanying text for a discussion of equity remedies.

[181] A.C. FREEMAN, *supra* note 34, § 539.

[182] *See, e.g.*, Kelly v. Deegan, 111 Ala. 152, 156–57, 20 So. 378, 379 (1896) (holding, citing Freeman, that a sale is an absolute right, merely converting property into money with no destruction or change in the rights or interests of the parties). Such claims must mean that partitioning sales are an absolute right wherever division in kind is proved impossible. But the effect of these sentiments has been to strengthen the judicial proclivity towards sales under circumstances of less necessity. *See* Finch v. Smith, 146 Ala. 644, 649, 41 So. 819, 820 (1906) ("when our decisions . . . use the expression that the right to partition is absolute, they must mean that the right of partition, either, by actual division or by sale, is absolute; *otherwise, there never could be a sale*" (emphasis added)).

[183] Porsch v. Porsch, 47 Ala. App. 33, 37–38, 249 So. 2d 855, 859 (1971), *denied on reh'g*, 47 Ala. App. 33, 38–39, 249 So. 2d 855, 860, *cert. denied*, 287 Ala. 740, 740, 249 So. 2d 860, 860–61, *cert. denied*, 287 Ala. 740, 740, 249 So. 2d 861, 861 (1971). The Alabama Court of Civil Appeals refused to allow a court-ordered sale of property owned by husband and wife independent of partitioning statute standards. Porsch v. Porsch, 47 Ala. App. 33, 38–39, 249 So. 2d 855, 860 (1971).

[184] *Keaton*, 93 Ala. at 86, 9 So. at 524 (emphasis added). This is analogous to partitioning sale statutes, which Freeman claims are valid only where division in kind would seriously impair or destroy the interests of the parties as a whole. A.C. FREEMAN, *supra* note 34, § 542.

[185] See *supra* notes 106–10 and accompanying text for partitioning sales granted for topographical reasons.

[186] Divisions in kind or the remedy of allotment are occasionally refused due to perceived

parcels of land,[187] some inconvenience or disincentive to partitioning by division in kind probably always exists.[188] This problem would seem to be an integral part of co-ownership. And, since the right to partition by division in kind is generally absolute,[189] ordering a sale and division of the proceeds where not clearly necessary defeats the purpose of vesting property rights through partitioning by division in kind. Courts should not justify sales on the basis of minor difficulties or injuries in partitioning by division in kind, such as slightly unequal divisions or changes in value caused by division. Equity can mitigate such problems while favoring and protecting the retention of private property.

B. *Toward a Clarified Balance of Equities*

According to Justice Story, equity seeks to accomplish what courts of law cannot; namely, to "vary, qualify, restrain, and model the remedy, so as to suit it to mutual and adverse claims, controlling equities, and the real and substantial rights of all the parties."[190] Wherever a petitioner submits a claim to equity jurisdiction, he or she submits it for consideration of *all* the equities involved in the action.[191] Furthermore, a court

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economic impacts of the physical division on the saleable value of the property. In Branscomb v. Gillian, 55 Iowa 235, 7 N.W. 523 (1880), a 160-acre farm divisible into two parcels was nonetheless ordered sold by the Supreme Court of Iowa due to the inequitable economic effect of division. *Id.* at 236, 7 N.W. at 523. The *Branscomb* court stated, "[i]f by a partition the value of all the shares would be much less by reason of the partition than the value of the whole tract as an entire farm, a partition would be manifestly inequitable." *Id.* In Washington v. Phillips, 257 Ala. 625, 626, 60 So. 2d 337, 338 (1952), the Supreme Court of Alabama ordered a sale because, among other reasons, the proposed allotment and owelty remedy would have affected the value of the property. For an analogous case, see also *Johnson v. Hendrickson*, discussed *supra* note 143. *But see* Sauri v. Sauri, 45 F.2d 90, 92 (1st Cir. 1930), where the court of appeals, upholding a sale on other grounds, noted that "[the economic effect doctrine] is neither the spirit nor letter of the law. There is a great difference between the thing indivisible by its nature and the possibility of a loss in value as a consequence of the division."

[187] Large properties will always involve different topographical elements. Yet, they nevertheless should be divisible in kind, with the various equitable remedies used to adjust any resulting inequities. This would prevent holdings such as that of *East Coast Cedar Co. v. People's Bank of Buffalo*, discussed *supra* note 106.

[188] *See, e.g.*, Brown v. Boger, 263 N.C. 248, 257, 139 S.E.2d 577, 583–84 (1965) (Supreme Court of North Carolina refused to order partitioning sale of 1250 rural acres owned by two groups of cotenants on petitioners' theory that division in kind would allegedly depreciate the saleable value of the land); Hale v. Thacker, 122 W. Va. 648, 650, 12 S.E.2d 524, 526 (1940) (Supreme Court of Appeals of West Virginia refused to order partitioning sale of 113 acres owned by two cotenants and discounted the exclusive importance of monetary considerations in determining the injury of division in kind to the other cotenants). These opinions seem reasonable because the value of property includes factors other than its saleable value.

[189] G.W. THOMPSON, *supra* note 10, § 1822. *See* Willard v. Willard, 145 U.S. 116, 120 (1892) ("In a court having general jurisdiction in equity to grant partition, as in a court of law, a tenant in common . . . is entitled to partition, as a matter of right, so that he may hold and enjoy his property in severalty.").

[190] J. STORY, *supra* note 34, § 28. The traditional definition of equity is by Blackstone: "'Equity, in its true and genuine meaning, is the soul and spirit of all law; positive law is construed, and rational law is made by it. In this, Equity is synonymous with justice; in that, to the true and sound interpretation of the rule.'" *Id.* § 6 (quoting Blackstone).

[191] A.C. FREEMAN, *supra* note 34, § 505. *See also* Clark v. Whitfield, 213 Ala. 441, 446, 105 So. 200, 206 (1925) (quoting Coburn v. Coke, 193 Ala. 364, 367, 69 So. 574, 575 (1915)):

> That whatever be the nature of the controversy between the parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon

exercising equity jurisdiction *must* consider all the equities involved; equity is not discretionary except where its use would be counterproductive to its principles.[192]

Wherever land in partitioning actions cannot be divided fairly,[193] equity courts protect the property interests of cotenants through a variety of remedies, such as owelty and allotment. Owelty is the payment of money between cotenants to equalize the division of unequal shares.[194] Allotment allows cotenants desiring to retain their interests to set apart or allot their portions from the property prior to the remainder being sold.[195] Both remedies were established and used early in Alabama,[196] and both are codified in Alabama partitioning law.[197] Nonetheless, both have been restricted severely by courts.[198]

The use of owelty, for example, has been judicially limited in Alabama to situations where the property is divisible in kind.[199] This precondition is inappropriate because properties divisible in kind by modern judicial standards are by definition divisible equally[200] and consequently have no need of adjustment. In addition, the owelty statute on which this judicial opinion is based expressly allows owelty to be used "*to secure* an

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> the party seeking its interposition and aid, unless he acknowledges or concedes, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adversary party, growing out of, or necessarily involved in, the subject-matter of the controversy.

Id.

[192] F.F. LAWRENCE, 1 EQUITY JURISPRUDENCE § 40 (1929). Lawrence believes that the prevailing use of the term "discretionary" in connection with powers of equity was meant to refer to the judicial practice of using equity with discretion, rather than at the judiciary's discretion. *Id. See* Hennessy v. Carmony, 50 N.J. Eq. 616, 625, 25 A. 374, 379 (1892) ("discretion is here meant that the judge must be discreet," not that equity power is a discretionary power).

[193] For good examples of such circumstances, see Ellis v. Stickney, 253 Ala. 86, 90, 42 So. 2d 779, 782 (1949) (sale ordered where lowest common denominator of cotenants' interests in 360 acres was 8640); Marshall v. Rogers, 230 Ala. 305, 306, 160 So. 865, 866 (1935) (sale ordered where forty-four cotenants' interests in 580 acres ranged from 31/350 to 19/11,200); Lyons v. Jacoway, 205 Ala. 479, 480, 88 So. 597, 598 (1921) (sale ordered where common denominator of cotenants' interests was 30,000).

[194] *See, e.g.*, Smith v. Hill, 168 Ala. 317, 323, 52 So. 949, 950 (1910); Brookfield v. Williams, 2 N.J. Eq. 341, 345–46 (1840); Conant v. Smith, 1 Aik. 67, 68 (Ver. 1826). For an older survey of the use of owelty, see Annotation, *Power to Decree Pecuniary Sum as Owelty in Order to Equalize Shares of Parties in Partition*, 65 A.L.R. 352 (1930).

[195] *See, e.g.*, Haywood v. Judson, 4 Barb. Ch. 228, 230 (N.Y. Ch. 1848) where the court stated:

> I see no reason why the court should be restricted to a partition of all the lands, or a sale of the whole . . . . [I]t seems to me to be an appropriate exercise of the power of the court to allot to such of the parties as can have their lands set off to them without prejudice either to themselves or to their co-tenants, their respective shares, and to direct a sale of the residue of the land which cannot be so divided. More complete justice might be done by such a decree than by a decree for the sale of the whole.

Id. See also A.C. FREEMAN, *supra* note 34, § 508.

[196] See *supra* notes 71–76 and accompanying text for a discussion of the early use of owelty and allotment in Alabama.

[197] ALA. CODE §§ 35-6-24 (owelty), 35-6-57 (allotment) (1975).

[198] See *supra* notes 111–27 and accompanying text for a discussion of the use of owelty and allotment in Alabama during the twentieth century.

[199] *See, e.g.*, Washington v. Phillips, 257 Ala. 625, 626, 60 So. 2d 337, 338 (1952) (court denied owelty where defendant did not establish special right to his allotted portion); Hall v. Hall, 250 Ala. 702, 704, 35 So. 2d 681, 682 (1948) (owelty denied because statute allowing it does not rise until partitioning is available).

[200] *See, e.g.*, ALA. CODE § 35-6-57 (1975), which orders a sale only when "a just and *equal* division *cannot* be made" (emphasis added).

equal partition in kind."[201] Most importantly, equity provides for owelty irrespective of any cumulative statute or restrictions.[202] Courts, therefore, should use owelty to adjust any unequal divisions to fulfill their statutory and equitable duties to favor partitioning in kind.

Likewise, the Alabama judiciary has restricted the equity remedy of allotment. The courts have narrowed its application to situations where the defendant seeking allotment demonstrates an equitable claim to the portions he or she seeks to have allotted and proves that the separation will not affect the saleability of the remaining interests in any way.[203] This practice reverses the burden of proof for a sale and the presumption favoring partitioning by division in kind by requiring *the defendants* who seek to preserve their lands to prove that they are entitled to retain their interests.[204] The result, as the dissenting opinion in *Hicks* pointed out, flatly contradicts prior decisions allowing such allotment wherever any special equitable reason to do so existed.[205] Such special equitable reasons include improvements made on the land by the defendant or an offer to the petitioner of the choice of parcels to be sold.[206]

Not only does the Alabama sale statute allow allotment without any of these judicial restrictions,[207] but it is incongruous for a court exercising its equity powers and favoring division in kind to demand that the allotment not affect the saleable value in any way. Nearly every allotment must have at least some effect on property value. And, as with the analogous standard for the feasibility of divisions in kind, a court should only refuse to allot where the set-off would impact *substantially* the value of the remaining portions.[208] This standard is especially pertinent where the petitioner has come to court seeking to sell under variable market conditions which may themselves affect the amount realized from the sale.[209] The petitioner should not be able to foreclose a division in kind because of some minor effect on the property's saleable value. Wherever possible, courts are

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[201] ALA. CODE § 35-6-24 (1975) (emphasis added). See *supra* note 74 for text of statute.

[202] See *supra* note 72 and accompanying text for the equity origins of owelty. Owelty apparently has existed in equity absent a statute since Roman law. BUCKLAND & MCNAIR, *supra* note 28, at 124.

[203] See *supra* notes 111–27 and accompanying text for a discussion of the use of the remedy of allotment in Alabama during the twentieth century.

[204] See *supra* notes 118–27 and accompanying text for a discussion of the burden of proof and its reversal.

[205] *Hicks*, 348 So. 2d at 1373–74 (Beatty, J., dissenting).

[206] *Id. See also* Hall v. Hall, 250 Ala. 702, 705, 35 So. 2d 681, 683 (1948) (Supreme Court of Alabama recognized allotment wherever any special equitable reason, including cotenant improvements on the property, existed). The court's denial of sentimental attachment to a house as an adequate equitable reason to justify allotment in Washington v. Phillips, 257 Ala. 625, 626, 60 So. 2d 337, 338 (1952) is incongruous with the familial basis of cotenancy property itself. *See* G.W. THOMPSON, *supra* note 10, § 1773. It is reasonable to identify a special equitable reason wherever the defendants are living on or working the property.

[207] ALA. CODE § 35-6-57 (1975) ("the court shall order a sale of the land, or such part thereof as may be deemed proper . . . and make an equitable partition as provided in this article of the land not sold").

[208] See *supra* notes 183–89 and accompanying text for a discussion of equity and the burden of proof for partitioning sales.

[209] Disallowing an allotment scheme due to a substantial impact on the saleable value is analogous to reversing a partitioning sale where the land sold for much less than its market value. *See* Dimmick v. First Nat'l Bank, 228 Ala. 150, 153, 153 So. 207, 209 (1934) (Supreme Court of Alabama recognized its power to reverse any sale of the property where it "sells for a price greatly disproportionate to its market value under normal conditions").

bound by principles of equity to allot property not severely impairing the saleable value of the land being sold to preserve the traditional preference for divisions in kind.[210]

The Supreme Court of Alabama's recent decision holding as unconstitutional the Alabama "buy-out" statute used by those cotenants wishing to retain their interests against those cotenants desiring to sell represents an unusual equal protection analysis.[211] Not only is the remedy available in equity absent any statute,[212] but the Supreme Court of Alabama had previously upheld its constitutionality[213] in the 1981 case of *Madison v. Lambert*.[214] In *Madison*, the court found the buy-out statute's classification of parties and their respective rights through a plaintiff-defendant distinction, allowing only defendants to purchase petitioner's interests, to be rationally related to a legitimate state interest.[215] The court reasoned that the state had an interest in protecting cotenants from unnecessarily being divested of their property by other cotenants seeking the property or the proceeds of a sale.[216] Four years later, the same court found that the statute violated the petitioner's equal protection rights in *Jolly v. Knopf*.[217] The court noted that, unlike in *Madison*, the petitioner in *Jolly* desired to purchase the defendants' interests.[218] Because the statute impliedly denied the petitioner this right and because the court included her in the general class of "cotenants," the court found an equal protection violation.[219]

The equal protection analysis by the *Jolly* court is misguided. The distinction which the court ignored is that the petitioner for a sale and the defendants who wish to retain their interests are in fact separate classes in the statute.[220] And, given the abuses of divestiture the statute was meant to remedy,[221] this distinction is rationally related to the legitimate state interest in protecting the property rights of cotenants. As the specially concurring opinion pointed out, the result of *Jolly* is that a stranger now will be able to "buy shares of an estate, file a petition for sale for division, and buy the remainder of the estate by being the highest bidder as against family owners."[222] Giving petitioners the right to participate in such a buy-out reinforces their power to divest others of their property interests.[223] Those cotenants who wish to retain their interests are forced to

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[210] *See generally* Swogger v. Taylor, 343 Minn. 458, 467, 68 N.W.2d 376, 383 (1955) (court allowed allotment as an equitable remedy where not resulting in great prejudice to any of the owners); Recent Cases, 40 MINN. L. REV. 730, 732–73 (1956) (analyzing *Swogger*).

[211] Jolly v. Knopf, 463 So. 2d 150, 153 (Ala. 1985). See *supra* notes 130–38 and accompanying text for *Jolly* equal protection analysis.

[212] Copeland v. Giles, 271 Ala. 302, 304, 123 So. 2d 147, 148 (1960).

[213] United States Constitution equal protection analysis is deemed to be equally applicable to Alabama's constitution. Jefferson County v. Braswell, 407 So. 2d 115, 121–22 (Ala. 1981).

[214] 399 So. 2d 840 (Ala. 1981).

[215] *Id.* at 843.

[216] *Id.*

[217] 463 So. 2d 150 (Ala. 1985).

[218] *Id.* at 153.

[219] *Id.* at 153–54. See *supra* notes 130–38 and accompanying text for further presentation of *Jolly* analysis.

[220] ALA. CODE § 35-6-100 (Supp. 1985) provides that "[t]he court shall provide for the purchase of the interests of the joint owners or tenants in common filing for the petition or any others named therein who agree to the sale by the other joint owners or tenants in common or any one of them."

[221] See *supra* note 77 for the statutory purpose behind ALA. CODE § 35-6-100 (Supp. 1985).

[222] *Jolly*, 463 So. 2d at 154 (Torbert, C.J., concurring specially).

[223] It is unusual to see the equal protection clause successfully invoked to disturb settled property rights such as those of defendant cotenants. In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), for example, the Supreme Court of the United States upheld a zoning ordinance prohibiting land

finance the purchase of property they already own. This burden is particularly difficult where the owners have no other resources than the equity in the land they are trying to retain. Predictably, the court in *Jolly* dismissed the defendants' contention that the property was capable of division and failed to explore alternative remedies to avoid any property divestiture.[224]

Furthermore, petitioners who file bills to have their lands sold because they are not subject to division presumably are not interested in acquiring ownership of the entire property. That the petitioner in *Jolly* acknowledged that she desired to buy the defendants' property subsequent to filing for a sale,[225] clearly suggests that the petitioner was using the sale statute as a means to obtain lands over which she had no legal claim. In the 1962 case of *Gilmore v. Robinson*,[226] the petitioner purchased a one-third interest in twenty-one acres and then demanded a sale of the land on the basis of its indivisibility.[227] The Supreme Court of Alabama, upholding the trial court, refused to grant the sale because to allow the petitioner to buy the land would be unconscionable.[228] The court found that "[h]is motive is crystal clear. He wanted to get his hands on all of the lands."[229] Although the facts in *Gilmore* are similar to those in *Jolly*, the *Jolly* court disregarded the petitioner's self-serving and questionable motives in using the partitioning sale statute to acquire property.[230] Rather, the *Jolly* court's holding validated that method of property acquisition.

It may be that the *Jolly* court was concerned about the effect of a procedural distinction between plaintiffs and defendants on their respective rights in a partitioning suit.[231] But, in addition to misapplying the rational relationship test,[232] the court's use of the equal protection clause to undermine Alabama's buy-out statute substantially deviated from accepted equal protection analysis. It is well established that the legislature may, in addressing a problem, treat one class of people differently from another without raising problems of equal protection. In *Railway Express Agency, Inc. v. New York*,[233] for example,

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use to households of more than two unrelated persons. *Id.* at 9–10. Writing for the majority, Justice Douglas noted that legislative line-drawing was discretionary as to those persons included or excluded by the statute. *Id.* at 8. As a result, the vested property interests of those landowners the statute sought to protect by zoning restrictions were insulated against charges of equal protection violations. *Id.* at 7–8. Those who sought to be included within the statute were not able to convince the court of the applicability of the equal protection clause. *Id.* This same judicial deference to legislative choice ought to be equally applicable to Alabama's buy-out statute.

[224] *Jolly*, 463 So. 2d at 153–54.

[225] *Id.* at 151.

[226] 273 Ala. 231, 139 So. 2d 604 (1962).

[227] *Id.* at 232, 139 So. 2d at 605–06.

[228] *Id.* at 233, 139 So. 2d at 607.

[229] *Id.* Furthermore, the court refused to take judicial cognizance of the impossibility of dividing 21 acres among 3 cotenants. *Id.* at 234, 139 So. 2d at 608.

[230] Questionable motives may also be deduced from the nature of the parties themselves. In Watson v. Durr, 379 So. 2d 1243, 1243 (1980), the petitioning cotenant sold his interest to the Tri-County Land Company after filing for a sale at Tri-County's behest. Nonetheless, the court upheld the sale despite this apparent stratagem.

[231] *Jolly*, 463 So. 2d 150, 153 (Ala. 1985) ("The legislature may not prejudice or discriminate against a co-tenant of an unpartible parcel of land by denying him or her the opportunity to purchase the interests of the other co-tenants merely because he or she has initiated the proceeding by the filing of a complaint.").

[232] See *supra* notes 211–24 and accompanying text for *Jolly* court's misapplication of the rational relationship test.

[233] 336 U.S. 106 (1949).

the Supreme Court of the United States upheld a local traffic regulation prohibiting the use of street vehicle advertising other than on those vehicles advertising their own businesses. Justice Douglas characterized the argument that the regulatory "violation turns not on what kind of advertisements are carried on trucks but on whose trucks they are carried," as "a superficial way of analyzing the problem."[234] Instead, the Court deferred to legislative judgment, noting that "[i]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all."[235] *Railway Express* enunciates a basic tenet of equal protection analysis: a judicial presumption that the legislature had a legitimate rational reason for using a remedy adversely affecting some party.[236] As such, the *Jolly* court's scrutiny of the legislative distinction between plaintiffs and defendants in the buy-out statute is inappropriate to equal protection analysis and counterproductive to the Alabama legislature's intent.

Jolly represents one element of a broader trend, in Alabama and elsewhere, of cotenants using partitioning sale statutes to acquire property otherwise unavailable.[237] Courts are allowing themselves, perhaps unwittingly, to be used as tools to serve the ends of these private interests. Professor Reich found this growing phenomenon alarming in *The New Property*.[238] There, he outlined what roles the institution of property should and does fulfill:

> [P]roperty performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner . . . . The Bill of Rights also serves this function, but while the Bill of Rights comes into play only at extraordinary moments of conflict or crisis, property affords day-to-day protection in the ordinary affairs of life.[239]

Such protections are precisely what is needed to insulate black-owned farmland from a hostile economic environment.[240]

Yet, the courts have not assumed this responsibility. One attorney with considerable experience in litigating partitioning actions in Alabama attributes the judiciary's reticence

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[234] *Id.* at 110.

[235] *Id.*

[236] *See also* Williamson v. Lee Optical Co., 348 U.S. 483, 488–89 (1955) (no equal protection violation by statute prohibiting opticians from rendering certain nonmedical services while allowing optometrists or ophthalmologists to perform the same services); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 562–64 (1947) (no equal protection violation where port-pilot positions, mandated by statute, are preferentially filled by apprentices who are relatives and friends of incumbent pilots).

[237] Fuller, *supra* note 18, at 52. It is interesting that, like Alabama's buy-out statute, old English partitioning writs favored actions by the original owners or their heirs (coparceners) but not any subsequent buyers of their interests. *See* J. STORY, *supra* note 34, § 647 (quoting Littleton) ("'if two coparceners be, and one should alien in fee, the remaining parcener might bring a writ of partition against the alienee; but the alienee could not have such a writ *against* the parcener'"). These writs were construed very narrowly to protect family property from stranger cotenants. *Id.*

[238] Reich, *The New Property*, 73 YALE L.J. 733, 764–66 (1964).

[239] *Id.* at 771.

[240] The similarities in vulnerability to the marketplace between black-owned farmland in the South and Native American-owned lands throughout the United States are striking. With Native Americans, however, the United States government has established numerous programs and remedies aimed at protecting the integrity of Indian lands to preserve tribal structures and culture from the pressures of the marketplace. These efforts have included a wide variety of social and economic initiatives and statutory and judicial relief. *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 508–28 (1982).

to oppose sales to several factors.[241] He has found that the judicial system implicitly disfavors the co-ownership of land. Furthermore, when faced with the practical difficulties of and the efforts involved with partitioning generally, courts find it easier to conduct a sale, rather than a partition by division in kind. Finally, he notes that because partitioning sale actions involve considerably less effort while generating greater legal fees than actions in which property is divided in kind, lower income cotenants desiring to protect their interests frequently are unable to procure adequate legal representation. Thus, he found that courts in Alabama rarely discourage the use of partitioning sales.[242]

Alabama's partitioning sale statute and those of other jurisdictions are broad enough to allow the judiciary in its equitable capacity to fashion protections and remedies to preserve the property interests of cotenants. These initiatives could include favoring the wishes of the majority of cotenants or interests, rather than those of a single cotenant owning a fractional share, allowing the defendant cotenants rights of first refusal in a sale, or allowing defendant cotenants to post bond for only the portion on which they are bidding, rather than for the entire estate. In addition to these suggested remedies, the traditional devices of owelty, allotment, and buy-outs provide the judiciary with common law and equitable powers to prevent the divestiture of property from those cotenants who legitimately own it.[243] This is a function to which the courts can and should return.

Conclusion

Co-owners of property in the United States traditionally have exercised the right to divide their interests by physical partitioning. Where such division was impossible, statutes have allowed partitioning sales. Although courts generally favored divisions in kind, the judicial record in Alabama and elsewhere shows a twentieth-century deference to the interests of those cotenants seeking to sell the estate, rather than to those trying to retain their interests. This recent trend not only contradicts the historical purpose and use of partitioning statutes but also fails to recognize the equities courts are bound to consider in protecting the rights of all the parties involved. As land values rise, courts allow partitioning sales even where outwardly aimed at acquiring the property of other cotenants against their desires. This is nowhere more evident than in the area of black cotenant farmland, whose misinformed and poorly financed owners are an easy target for judicially and politically connected wealthy white real estate developers. It is both the province and duty of the courts to protect such property interests from deprivation with traditional and modern remedies. Failure to do so is an abdication of a moral responsibility, and a rejection of hundreds of years of Anglo-American jurisprudence.

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[241] Sanders Interview, *supra* note 20. Mr. Sanders has represented many cotenants seeking to protect their property interests from partitioning sale actions throughout Alabama.

[242] *Id.*

[243] It is unlikely that legislative responses will ever be meaningful. The societal pressures affecting the judiciary are even more apparent in the Alabama legislature. Notwithstanding Ala. Code § 35-6-100 (1985), passage of strong pro-cotenant legislation is therefore unlikely. Sanders Interview, *supra* note 20.