PARTITION.

Partition proceedings can hardly be classed among topics for enlivening discussion, text books say little about them and case books less; they lack the dramatic elements present in crime and tort. Yet every lawyer welcomes a brief in a partition suit; for, today, the difficulties are few and the fees comparatively generous. There are local statutes and rules which must be followed with implicit attention; the pace is leisurely and sedate, as befits the disposal of real property; and if, when all is done, the co-owners appear shocked at their diminished shares, there is at least a little morsel for everyone, which is more than can be said of other forms of litigation. Yet there was a time when the path of co-owners who would dissolve their union was beset with obstacles almost insurmountable; the gradual removal of which constitutes a chapter in legal history not wholly devoid of interest.

Necessarily the development of the law of partition is dependent upon social and economic conditions. Before a system for the division and allotment of property can be adopted the principle of division must be admitted. In one place and period it may require the united efforts of a large family group to wring a hard living from the land. Another group may have land, slaves and cattle in sufficient abundance to permit of subdivision. The great variety of customs relating to inheritance to be found throughout Europe, shows that the human race, however unconsciously, was then as always, engaged in experiments in living. One point not always brought out with sufficient clearness is that the recognition of the principle of equality of interest on the part of the heirs or a group of heirs in the ancestral property does not necessarily lead to its division. The claims of a chief, suspicion of the stranger, conditions of agriculture, lack of capital represented by oxen and plows, one or all may tend to check the distribution of the family estate. As Sir Henry S. Maine has pointed out, the equal division of the property among the children of the deceased, frequently with a

preference for males over females, is the practice most usual at the period when the joint family is disintegrating and society is assuming its modern form. Such was the case under Hellenic, Roman and Jewish law.[1] So also, among the early Teutonic tribes.[2] With the development of the Feudal system came primogeniture, the exclusive succession of the eldest son to estates held by military tenure, the starting point of a new policy of impartible inheritance which has survived the Feudal system itself in Great Britain and parts of Continental Europe through the medium of family settlements, and trust entails, (*fideicommissa, substitutions, majorats*).

At Roman law co-owners could enforce a division of the common property by the action *communi dividundo*.[3] Co-heirs had a special action of their own *familiae erciscundae*[4] for the division of the inheritance, given by the law of the Twelve Tables. Both actions were admirably adapted to their purpose. The judge in making a division was to be guided by considerations of what was most beneficial to all concerned, or what the parties preferred.[5] If land admitted of easy division, allotments were to be adjudged to the respective co-proprietors; and if one received too large a share he was required to compensate the others. If the subject of partition could not be advantageously divided, then the whole was allotted to one who compensated the others.[6] In the time of the Empire the property was awarded to the highest bidder, and even a stranger might be admitted to bid at the request of a co-owner who was unwilling or unable to bid for himself.[7] These principles which ap-

[1] Maine's Ancient Law 221; Maine's Early History of Institutions 799; Robinson on Gavelkind (5 Ed.) 13.

[2] Tacitus, Germania, c. 20; Huebner's History of Germanic Private Law (Cont. Leg. Hist. Series), p. 708; Leges William 1, 34; 2 Blackstone's Commentaries 215.

[3] Digest, Lib. X, tit. 3; Institutes IV, tit. 17, Sec. 5.

[4] Digest, Lib. X, tit. 2; Gaius, IV, Sec. 42; Institutes IV, tit. 17, Sec. 4.

[5] Digest, Lib. X, tit. 3, Sec. 21.

[6] Digest, Lib. X, tit. 2, Sec. 55.

[7] Law of the Emperor Alexander (A. D., 223), Code, Lib. III, tit. 37, Sec. 3.

plied equally to real and personal property are the basis of the modern civil law on this subject as found in the continental code.[8] But their reception was attended in many places by a long struggle against feudal customs and ancient local practice.

In Great Britain the policy which from the Norman Conquest onward was ever directed in favor of indivisible inheritance, making, as it were, the law of the noble the common law of the realm, left little room for the operation of partition. Pollock and Maitland call attention to the small number of cases in the time of John and of Henry III which refer to partible land.[9] According to Glanvill and Bracton the eldest son of a knight or one holding by military tenure succeeds to all that was his father's; while sockage land that had been divided from of old descends to all the sons. If the decedent leaves daughters only, then the inheritance is divided whether the father was knight or sockman. Such co-heiresses as well as co-heirs where division was the ancient custom were called "co-parceners" or "parceners" for the very reason that the law would compel partition among them. In their favor alone lay the writ *de partitione facienda.*[10] For a time primogeniture threatened to extend to daughters as well as to sons, indeed some progress was made in that direction resulting in the recognition of the eldest daughter as the representative of the inheritance in special instances; but as wardships and marriages of heiresses were highly profitable to the feudal lord, king and baron soon perceived they had most to gain by taking the homage of all the daughters.[11] As for non-military tenures, there were

[8] Domat's Civil Law (Strahan's Ed.) Pt. 1, Bk. 2, tit. V. 2, 12; Pt. II, Bk. 1, tit. 1, Sec. 1, 11; Brissaud's History of French Private Law (Amer. Ed.), Secs. 480-482; French Civil Code, Secs. 815-842; German Civil Code, Secs. 752, 753, 2038; Erskine's Principles of the Law of Scotland (21 Ed.) Bk. III, tit. 3, Sec. 18, p. 435; Civil Code of Louisiana, Secs. 1289-1381; Hache v. Ayrand, 14 La. Ann. 178 (1859); Succession of Becnel, 117 La. 744 (1906).

[9] II Pollock & Maitland Hist. 270; Bracton's Note Book, 154, 499; Select Civil Pleas (Seld. S.) Cases 6, 57, 61, 121.

[10] Glanvill, VII, 3; Bracton, f 76; Fleta, 1, 5, 3. 9, Sec. 151; Mirror Bk. I, c. 3; Y. B. 2 and 3; Edw. II (Seld. S.) 76, 97; Fitzherbert Natura Brevium 62; Littleton, Sec. 241.

[11] Britton II, 29, 40.

districts scattered throughout the country where partible descent was and continued to be the custom, but they gradually diminished in number. The royal courts were strongly set against customs that did not conform to the common law and the force of fashion was also strong.

A charter of Edward I voices the feeling of the time—"that lands and tenements, which in certain hands when undivided are quite sufficient for the service of the state, and the maintenance of many, are afterwards divided and broken up among co-heirs into so many parts and particles that no one portion suffices for its owner's maintenance."[12] The county of Kent was the stronghold of partibility, for the custom of gavelkind was the custom of the whole county—in the words of Littleton "every son is as great a gentleman as the eldest son is", yet even in Kent a considerable number of estates were disgavelled by acts of Parliament between Henry VII and James I because, as Coke puts it, "by means of that custom divers ancient and great families after a few descents came to little or nothing."[13] If the estate of the noble was indivisible so also was that of the villein.[14] Manorial custom usually required that one heir succeed to the dead man's tenement, sometimes the eldest son, sometimes the youngest where the very old custom known as Borough English prevailed. In either case it was in the interest of the lord of the manor that the holding of the villein remain undivided, with a single heir answerable for the customary services, although the brothers for whom no other employment could be found frequently remained together on the parental plot.[15]

As an economic problem impartible inheritance has been the subject of heated controversy. In England and in some of her

[12] Robinson on Gavelkind (5th Ed.), 32.

[13] Co. Litt. 140 b; Wiseman v. Cotton, 1 Sid. 135 (1662).

[14] Elton on Copyholds (2d Ed.) 128; II Pollock & Maitland Hist. 282.

[15] Vinogradoff, Villeinage in England 246. This was once true in the higher ranks of society. Domesday shows groups of thegns holding land in common; holding "in parage" as the Norman's called it; one of the pares rendering the services due the king. Maitland, Domesday Book and beyond 145. Compare the co-heir communities of knights in Germany. Huebner's Hist. Germ. Priv. Law. 142.

colonies the principle has been maintained with more unanimity than in Continental Europe, but there is a growing sentiment against entails and doubtless when Parliament has time to consider private law, a further approximation of the rules of descent of realty to those of personalty will be the outcome.[16] In France the rule of equal division, in common use among the peasantry before the Revolution and embodied in the code Napoleon, has been attacked as tending to split up estates into minute parcels to the detriment both of agriculture and the worker, (*Morcellement*).[17] The difficulty lies in deciding where physical division must stop and superfluous members of the family seek another outlet for their activities, if any are to remain on the ancestral acres—a problem most acute where the agricultural population is rooted to the soil and not, as in this country, always on the move. But whatever may be the true view today, medieval England had no doubt whatever as to the superiority of an indivisible inheritance. In the words of Adam Smith, who did not favor primogeniture in his own time, "The security of a landed estate, the protection which its owner could afford to those who dwelt on it, depended upon its greatness. To divide it was to ruin it and to expose every part to be oppressed and swallowed up by the incursions of the neighbors."[18]

Although the scope of the action of partition was greatly circumscribed by the common law of inheritance there were a sufficient number of instances in which it could be called into operation to build up a modest body of learning on the subject which lies buried in the old abridgments and Coke on Littleton. Now and again a worthy knight would have the misfortune to die "having several daughters and no son". Lands held by tenure of gavelkind lay scattered throughout the kingdom and abounded in Kent. Then too, town law was tenacious of old customs and the rule of partible inheritance was to be found

[16] The Need of Law Reform, Sir Alfred. Hopkinson, K. C., Edinburgh Review, Oct., 1918.

[17] Economic Development of Modern Europe, Ogg. 191; Cecil on Primogeniture 100; Lawrence on Primogeniture 41.

[18] Wealth of Nations Bk. 3, ch. 2.

frequently in the custumals of ancient boroughs.[19] When the common law action was brought there were two judgments. The first, that partition be made; whereupon the sheriff with a jury of twelve went upon the land, made a division of it and allotted the shares or purparts to the heirs respectively. Upon the sheriff's return followed the second and final judgment—*"quod partitio praedicta firma et stabilis in perpetuum teneatur"*,[20] a formula that still survives. Bracton gives a full account of the duties of the viewers in appraising and allotting the land. The division is physical. "A hall is sometimes divided into two or more parts, and sometimes a chamber is divided from the hall." But a castle used for the defense of the realm is not to be divided but to remain to the eldest born, satisfaction being made to the juniors. In the case of indivisible hereditaments, Sir Edward Coke declares that the eldest shall enjoy them, making contribution; but if the ancestor left nothing else, then the parceners are to enjoy in turn; as in case of a piscary "the one may have one fish and the other the second", or if a mill, "one to have the mill for a time and the other the like time".[21] If, however, the property was capable of division, division was a matter or right no matter how inconvenient. A sale was out of question, and so the law continued until modern times.

Additional forms of co-ownership were evolved at common law to which compulsory partition was not an incident. In the case of tenancies by entireties, partition could not come in question by reason of the unity of husband and wife in marriage and the fact that on the death of one, the entire estate passed to the other by force of the original gift.[22] As early as 1302

[19] Borough Customs (Seld. S.) Vol. 11, p. 132; Elton, Tenures of Kent, 54.

[20] Co. Litt. 168a; Countess of Warwick v. Lord Berkley, 11 Co. 40 (1596); Booth on Real Actions, 245.

[21] Bracton f. 75. In Y. B. 19 Edw. III (R. S.) 12-14 a mill is divided. Temple v. Cook, Dyer 265 (1567); Co. Litt. 165a. In modern times, on grounds of public policy partition of a railroad has been refused, Railway v. Railroad Co., 38 Ohio St. 614 (1883), and of a burying ground, Brown v. Lutheran Church, 23 Pa. 495 (1854).

[22] Den v. Hardenbergh, 10 N. J. L. 42 (1828), s. c. 18 Amer. Dec. 371

it is stated in a reporter's note that—"a writ *de participatione faciendo* does not lie between strangers as it does between privies",[23] and, later, Littleton tells us "joint tenants (if they will) may make partition between them and the partition is good enough; but they shall not be compelled to do this by law". The same was true of tenants in common.[24] Modern writers give as the reason for this, the fact that these estates were created by the act of the parties and any inconvenience arising out of the co-ownership resulted from the voluntary act of the parties.[25]

The logic of this reasoning, if applicable to estates created by deed, is hardly admissible in the case of estates created by devise. But lands were not devisable by will, except by special custom until 1540. It is significant that the custom of partible descent is frequently, as in Kent, accompanied by the custom of devising lands.[26] So in London, where lands were to some extent devisable, partition would lie at the instance of a joint tenant or tenant in common.[27] A simpler explanation is that when these later forms of co-ownership were developed, no writ for their partition was to be found in the register and the age for inventing writs had passed. Co-owners, therefore, who were not co-parceners or whose lands were not governed by special custom were forced to hold unitedly unless they could arrange for the purchase of their interests or agree upon an amicable partition, until the remedial legislation of 1539.

The statute of Henry VIII[28] which conferred upon joint tenants and tenants in common of estates of inheritance the right

note; Hoag v. Hoag, 213 Mass. 50 (1912), s. c. A. & E. Ann. Ca. 1913 (E) 886.

[23] Y. B. 30-31 Edw. I (R. S.) 324.

[24] Littleton, Sec. 290, Sec. 318; Brook's Abr. Partition, Pl. 35.

[25] II Blackstone's Comm. 185; Freeman on Co-tenancy, Sec. 421. Story says this reasoning is "more specious than solid." Equity Jurisp., Sec. 647.

[26] Robinson on Gavelkind (5th Ed.) 191; Littleton, Sec. 167.

[27] Bohun's Privilegia Londini, 73; Comyn's Dig. London (N. 3); Fitzherbert Natura Brevium, 62; Liber Albus (Riley) 169.

[28] 31 Hen. VIII; c. 1. applicable to joint tenants and tenants in common of estates of inheritance. In the following year the Act of 32 Hen. VIII, c. 32, s. 1. extended partition to persons holding limited estates for lives or years.

to a compulsory division of the common property by writ of partition, is preceded by a lengthy preamble which with the circumlocution of the day sets forth the purpose of the law. It would seem that the principal complaint was of acts of waste and spoliation on the part of co-owners for which there was no remedy. This, however, cannot have been anything new. The instances of such abuses of power were probably fewer than in the disorderly period that had preceded. It is a safe inference that the true reason that led parliament to turn aside for a moment from the more exciting work of dissolving monasteries and "abolishing diversity of opinion on religion" [29] and enact this fragment of private law, was the silent force of economic pressure, resulting from a new attitude toward land. Feudalism was in decay, commercialism in the ascendant and real property rapidly becoming a form of investment. Fractional shares in estates would for all practical purposes remain unmarketable if no means was provided by which a purchaser could dissolve an uncongenial partnership and protect his interests. Even so, the relief afforded by the act was, from the modern viewpoint, or judged by Roman standards, far from adequate. The remedy provided was an action unchanged since the days of Bracton, technical, dilatory, and frequently ineffectual, as was frankly admitted in the act of 1696 [30] intended to remedy some of the more glaring defects in the procedure at law. But before that time arrived the more flexible practice developed in the court of chancery rendered the common law jurisdiction practically obsolete and it was abolished in 1833.[31] It should be added that there could be no partition of copyhold lands without the lord's consent until 1841 when power was conferred on chancery to direct their partition.[32]

The origin of equitable jurisdiction in partition is obscure.

[29] This was the parliament of the Six Articles, 31 Hen. VIII, c. 14.

[30] 8 & 9 William III, c. 31.

[31] 3 & 4 William IV, c. 27, s. 36.

[32] Scott v. Fawcett, 1 Dick, 299 (1757); Oakley v. Smith, 1 Eden 261 (1759); Horncastle v. Charlesworth, 11 Simon 315 (1840); Act 4 & 5 Vict. c. 35, Sec. 85; Copyhold Act of 1894, Sec. 87.

Many years ago Mr. Hargrave started a rather sharp controversy on this subject in a note to Coke on Littleton by referring to the jurisdiction of chancery as "A new compulsory mode of partition . . . trenching upon the writ of partition and wresting from a court of common law its ancient exclusive jurisdiction over this subject". The earliest instance of which, that he could find, was a case in 40 Elizabeth (1598).[33] To which Mr. Fonblanque replied—"A practice sanctioned by a precedent of so early a date as the 40 Elizabeth cannot reasonably be described as a *new* mode, particularly when it is considered that there are few, if any, reports of decisions in equity of an earlier date."[34] Mr. Justice Story was not only opposed to Mr. Hargrave's view, but assigned to such proceedings a date far earlier and a scope more extended than was suggested by Mr. Fonblanque, or by Mr. Spence who fixed the assumption of this jurisdiction in or about the reign of Elizabeth.[35] The final solution of this problem must await a careful examination of the many thousands of unpublished petitions in chancery from the time of Richard II to Henry VII now in the Public Record Office in London. The Selden Society's selection from these records contains one case of this description during the chancellorship of John Stafford, Bishop of Bath, that is, between 1432 and 1443.[36] The petitioner William Brigge alleges that he and his brother Thomas were joint tenants of certain lands under the terms of their father's will; that the feoffees to the uses of the will attempted to assign part to each, but the defendant Thomas, the elder son, had occupied the whole and petitioner could not have his part "because ther is no particion made ther offe, for the which particion to be made ther is non accyon atte common lawe". The prayer is for a subpoena to Thomas to appear in chancery

[33] Co. Litt. 169a, Hargrave's note; Speke v. Walroud, Toth 155 (1598).

[34] Fonblanque's Note, Treatise of Equity, Bk. 1, ch. 1, s. 3.

[35] Story's Equity Jurisprudence, Chap. 14; Spence's Equitable Jurisdiction of Court of Chancery 654.

[36] Select Cases in Chancery, p. 129, No. 136. There are supposed to be about 300,000 of these petitions collected in 377 bundles, Barbour, Oxford Univ. Studies, Vol. IV, 67. Two bundles are printed in the calendar of proceedings in Chancery. Record Commission 1827. A third bundle and some selections are printed by the Selden Society.

and make partition. The result of the application is not given and while it is possible to account for this case on the theory of a trust, it is more reasonable to suppose that the petitioner intended to rely on the grounds stated in his bill—that is, the absence of a remedy at law for the injured joint tenant. At least, it is a bill for partition in chancery one hundred and fifty years before the first previously reported case, tending to confirm Mr. Justice Story's view.

From an early period, when land descended to coparceners who held of the king *in capite,* a writ of livery and partition issued out of chancery directed to the king's escheator commanding him to make partition and deliver seisin of the respective shares.[37] The partition so made was enrolled in chancery, but, unconfirmed by judgment or decree, was not conclusive against an infant parcener and hence was open to attack by *scire facias* or partition proceedings at law. This practice, induced by a policy of increasing the king's tenants *in capite,* disappeared with the abolition of tenure by knight's service and its incidents;[38] but the fact that chancery, on its law side, was at one time accustomed to deal with partition problems may possibly have tended to facilitate the growth of the purely equitable jurisdiction.

In the present state of the records it would be difficult to discover the actual grounds upon which chancery first assumed jurisdiction in partition—it could hardly be done without an expenditure of labor out of all proportion to the result. Independently of those cases which before the legislation of Henry VIII might have been put on the ground of lack of any remedy at law, there were other cases in which the legal remedy was inadequate and imperfect, as where the titles of the parties were complicated, discovery or an accounting required, or compensatory adjustments necessary. Mr. Spence thinks a reference to

[37] Fitzherbert, Natura Brevium, 256-263, Stanford, Prerogative 24-25; Y. B. 2 Edw. III. 20 pl. 5; Y. B. 15 Edw. III. (R. S.) 99 pl. 42; Y. B. 21 Edw. III. 31.

[38] 12 Charles II. c. 24 (1661). See for Court of Wards and Liveries, 3 Co. Inst. 188.

Roman models can be discerned,[39] but if the clerical chancellors took a hint from the civil law the borrowing was slight; chattels were ignored; the public sale not even considered; equity in this regard proposing no innovations upon common law theories of property. The earliest reported cases in Tothill [40] are brief memoranda that throw little light on the subject and the same is true of such cases as occur in the early years of the seventeenth century. In *Manaton* v. *Squire* in 1677, on bill by a tenant in common, it was held by Lord Nottingham, "that the chancellor had equal power to make partition by commission as the common law had by writ of partition; for it cannot be denied but by statute 32 Hen. VIII a tenant in common hath a right to partition; and the delays at common law many times are such, it being a real action (if the demandant happen to bring his writ against the persons that are not tenants, etc.) that he shall never attain the end of it; and he said he did no more question the jurisdiction of chancery in this case, than he did, whether a gift to a man and his heirs were a fee simple." [41] And, if, as Lord Hardwicke put it, the complainant's title was equitable, a court of equity alone could determine the application.[42] In *Agar* v. *Fairfax* [43] it was said by Lord Eldon: "This court issues a commission not under the authority of any act of Parliament, but on account of the extreme difficulty attending the process of partition at law; where the plaintiff must prove his title as he

[39] Spence, Equitable Jurisdiction 653. See also Fulbecke's Parallel, part 2, p. 55.

[40] Tothill 155. Seven cases between 1586 and 1640. See also Spyer v. Spyer, Nelson 14 (1631-32); Drury v. Drury, 1 Chan. Rep. 49 (1630-31).

[41] 2 Freeman 26 (1677) S. C. 2 Chan. Ca. 237, where it is reported as follows: "A partition between tenants in common of a great waste decreed tho' many reasons tending to great inconveniences, via: want of pasture, shade, etc." In Carteret v. Petty, 2 Swanst. 323 note a (1675), s. c. 2 Ch. Ca. 214 Lord Nottingham refused to partition lands in Ireland. In Earl of Kildare v. Eustace, 1 Vern. 419 (1686) s. c. 2 Ch. Ca. 189, it was said in argument that "bills are common here for a partition." Mayfair P. Co. v. Johnson (1894) 1 Ch. 508.

[42] Cartwright v. Pultney, 2 Atk. 380 (1742). But the necessary conveyances could not be ordered unless the parties able to convey the legal title were also before the court. Miller v. Warmington. 1 Jac. & W. 484 (1820).

[43] 17 Vesey 533 (1808-11), s. c. White & Tudor's Leading Cases in Equity.

declares, and also the titles of the defendants; and judgment is given for partition according to the respective titles so proved." In chancery the practice was to direct an inquiry before a master to determine the estates and interests of the parties, and, if it appeared that complainant was entitled to partition, then a decree was made appointing commissioners (usually surveyors) to divide the estate into the specified number of shares. Upon a return of the commission and confirmation by the court the partition was completed by mutual conveyances of the allotments under the supervision of the master, a practice that had this advantage over proceedings at law, that the parties were furnished with permanent muniments of title.[44]

If the title was doubtful or disputed equity required that it should be first established at law;[45] but if clear, then physical partition of the land was a matter of right and the court could not refuse it or order a sale, although the result might be inconvenient or even absurd. Sir Thomas Clark, Master of the Rolls, stating the rule in 1754[46] refers to *Nevis* v. *Levene*, where "the plaintiff was entitled to three or four hundred acres and the defendant to four or five only; and though the defendant would have rather given up his part than he at the expense of a partition yet it was decreed". The partition of the estate called Cold Bath Fields, which included complicated rights to ancient conduits and water rents, bristled with difficulties; nevertheless Lord Hardwicke made a decree.[47] Excepting its power to award compensation for inequalities in the allotments, called owelty, equity offered little advantage over law in its actual dealing with

[44] Mitford's Chancery Pleadings 141. As to the Commissioners, see Watson v. Northumberland, 11 Ves. 153 (1905). If one of the parties was an infant no conveyance could be directed in his case until he came of age. Lord Brook v. Lord Hertford 2 P. Wms. 519 (1728); Tuckfield v. Buller, 1 Dick. 240 (1753).

[45] Bishop of Ely v. Kendrick, Burnb, 322 (1732); Wilkin v. Wilkin, 1 Johns. Ch. 111 (1814); Phelps v. Green, 3 Johns. Ch. 302 (1818). In Blyman v. Brown, 2 Vern. 232 (1691), the court gave plaintiff a year in which to try his title and after a verdict in his favor decreed partition.

[46] Parker v. Gerard. Amb. 236 (1754).

[47] Warner v. Baynes, Amb. 589 (1750). See also, Baring v. Nash, 1 V. & B. 551 (1813); Calmady v. Calmady, 2 Ves. Jr. 568 (1795); Earl of Clarendon v. Hornby. 1 P. Wms. 446 (1718).

the property. In the well known case of *Turner* v. *Morgan*,[48] the bill was for the partition of a single house. Lord Eldon granted a commission with great reluctance after trying to induce the parties to come to an agreement. On the return of the commission an exception was taken on the ground that the commissioners had "allotted to the plaintiff the whole stack of chimneys, all the fire places, the only staircase in the house and all the conveniences in the yard". Lord Eldon overruled the exception, saying he did not know how to make a better partition and that he was bound by authority.

Such was the extent of equitable jurisdiction in partition; development went no further. The procedure represented an advance beyond the common law action, but was too rigid, too limited and ineffective to answer modern conditions. But the problem of improvement did not seem pressing; the number of partition suits was not large and Lord Holt could say with little fear of contradiction, "the law loves not fractions of estates, nor to divide and multiply tenures".[49] The greatest procedural defect was the lack of power to order a sale, where a division of the property was distinctly injurious. But, doubtless, public opinion of that day, if voiced, would have concurred in preferring to endure the discomforts of an occasional grotesque division rather than concede to the courts the power to lay sacreligious hands upon the family acres. Even in an American court it could be urged insistently that "a man cannot be compelled to change his investment and give up his fee simple against his will".[50] It is needless to add, however, that the law was quite incompetent to deal adequately with many settled

[48] 8 Ves. 143 (1803). On argument Mr. Romilly cited a case at Cockermouth where partition had been made of a house by building up a wall in the middle. In North v. Guinan, Beatty 342 (1829), the chancellor refused partition of a house held under a lease for a term of years on the ground that it would be waste as against the landlord. Advowsons were partioned by ordering presentation by turns. Seymour v. Bennet, 2 Atk. 482 (1742).

[49] Fisher v. Wigg. 1 Salk. 391 (1700). But compare Lord Hardwicke in Hawes v. Hawes, 1 Wils. 165 (1747). "In this court joint tenancies are not favored because they are a kind of estates that do not make provision for posterity."

[50] Arguendo in Pell v. Ball, 1 Rich. S. C. Eq. 361 (1845).

estates where complex titles, scattered holdings and heavy encumbrances called for special powers. Hence arose the practice of making partition by private act of Parliament, a method that may still be resorted to in case of need.[51] So also, under the inclosure acts, power to make partition among the joint owners was conferred upon the commissioners, whose powers have since devolved upon the Board of Agriculture.[52] But at last came the era of law reform and with it the Partition Act of 1868[53] by which the court must order a sale on request of the owners of a moiety in the property unless good reason is shown to the contrary; and may, in its discretion, order a sale at the request of any owner, if it appears that it will be beneficial by reason of the nature of the property, the number or disability of the parties, or other circumstances.[54] All actions for partition or sale are assigned to the Chancery Division of the High Court of Justice, and, generally, partition is made in chambers by laying proposals before the judge. Indeed, in order to avoid expense or delay the judge may order proceedings out of court.[55] The appointment of commissioners, which Vice Chancellor Stuart described as "a remnant of barbarism",[56] although still possible is never resorted to and is practically obsolete.

In the United States the law of partition is statutory, the laws of the different states varying so greatly in detail that they are bewildering to read and unprofitable to remember. Nevertheless, they bear a certain family resemblance due to the fact that their ultimate source is the English system, either that of law or equity, a result of colonial experiments before the English

[51] 21 Halsbury's Laws 812 See also Provincial Laws of New Hampshire, Vol. 3, pp. 33, 76, 373 for special partition acts.

[52] 8 & 9 Vict. c. 118; Foster on Partition 164; 21 Halsbury's Laws 824; Jacomb v. Turner (1892), 1 Q. B. 49.

[53] 31 & 32 Vict. c. 40.

[54] Pemberton v. Barnes (1871), 6 Ch. App. 685; Porter v. Lopes (1877), 7 Ch. D. 538; Gilbert v. Smith (1879), 11 Ch. D. 78; Saxton v. Bartley, 48 L. J. Ch. 519 (1879); Re Whitwell's Estates, 19 L. R. I., 45 (1887); Hills v. Archer, 91 L. T. 166 (1904).

[55] Rules of Supreme Court. Order 51. rule 1a.

[56] Clarke v. Clayton, 6 Jurist (N. S.) 1238 (1860); 21 Halsbury's Laws 858.

law itself had reached its maturity. Partition is of more importance in this country than in England and the cases more numerous. Joint adventures in land speculation, popular from early days, have called for legal assistance in disentangling the confused titles that were their result. So, also, the universal adoption of the policy of equal division of the property of a decedent among his children has contributed to the increase of such litigation. In the colonies more directly under the influence of the Crown, New York, New Jersey, Virginia, the Carolinas, and Georgia, primogeniture prevailed until the Revolution; it was also the rule for a time in Rhode Island and Maryland.[57] As early as 1641 Massachusetts provided for a division of the inheritance giving the eldest son a double portion in accordance with the Old Testament law and this principle was followed in Connecticut.[58] William Penn proposed a similar law to the provincial assembly held at New Castle in 1684. Whether the idea was derived from the Massachusetts law or directly from Deuteronomy does not appear, but the principle of a double portion to the eldest son was adopted [59] and retained in the various revisions of the intestate laws of both Pennsylvania and Delaware until repealed in both States in 1794,[60] the Delaware act containing the significant preamble that it was "the duty and policy of every republican government to preserve equality among its citizens by maintaining the balance of property as far as is consistent with the rights of individuals". A statement that accords with thought of the period, as summarized by Chan-

[57] 4 Kent's Commentaries (14 Ed.) 375 note; N. Y. Act of July 12, 1782, 3 Rev. Stat. N. Y. (1829) 47.

[58] Laws of Massachusetts (Ed. 1672), p. 158; Deuteronomy, ch. 21, v. 17; Laws of Colony of New Plymouth revision of 1671 (Ed. 1836) 299. The rule was abolished in Mass. by Act of June 8, 1789, Laws of Mass. (1807) 464; in Connecticut in 1792, Swift's system of Laws of Conn. Vol. 1, p. 282. In New Brunswick the practice was continued. Revised Stat. New Brunswick (1854), part II, tit. 30, ch. 111.

[59] Charter and Laws of Penna. (Ed. 1879) 174. In 1683 an act was passed disposing of decedent's estates, one-third to the wife, one-third to the children, and "the other one-third as he pleases," a curious attempt to revive an ancient custom (see 2 Pollock & Maitland Hist. 349), which was abandoned as quickly as it was adopted. Charter & Laws of Pa. 141.

[60] Pa. Act., April 19, 1794, 3 Smith's Laws 143; Act of Jan. 29, 1794, 2 Laws of Delaware (1797) 1172.

cellor Kent, that the common law doctrines of descent were incompatible with that equality of right and universal participation in civil privileges which it was the policy of the country to preserve.[61] Primogeniture received its deathblow in the United States when Jefferson lent the weight of his powerful influence to procure its abolition in Virginia, then the stronghold of entails. "Mr. Pendleton", says Jefferson, "wished to preserve the right of primogeniture, but seeing at once that it could not prevail, he proposed we should adopt the Hebrew principle, and give a double portion to the eldest son. I observed that if the eldest son could eat twice as much, or do double work, it might be a natural evidence of his right to a double portion; but being on a par in his powers and wants, with his brothers and sisters, he should be on a par also in the partition of the patrimony, and such was the decision of the other members."[62] The rule of division among all the children which American opinion now accepts as fundamental is no doubt a product of that strong feeling for equality which the public men of the Revolutionary period voiced so effectively. But economic conditions had a part in strengthening that feeling; the abundance of land, the variety of opportunity offered by a new and growing country, and not least, the restless American temperament which ever seeking a new habitation and never satisfied, regards the unity of the family with something like aversion. Only in rare instances is there displayed that tendency to cling to the homestead which marks the European. Among emigrants and pioneers, now as ever, the usual desire is to divide the inheritance and start anew. A similar antagonism to the unification of land holding is indicated in the attitude toward survivorship in joint tenancies, repudiated in Plymouth colony as early as 1643 and now generally restricted to the estates of trustees.[63]

[61] 4 Kents Commentaries 383.

[62] The Writings of Thomas Jefferson (Ford's Ed.), Vol. 1, p. 60.

[63] Laws of Colony of New Plymouth (Ed. 1836) 75,279; Act of Mar. 16, 1783-4, 1 Laws of Mass. (Ed. 1807), p. 161, Sec. 4. In the act of Mar. 9, 1786, Sec. 3 it is said that tenancies in common are "more beneficial to the Commonwealth and consonant to the genius of republicks." See also Jenks v. Backhouse, 1 Binn. Pa. 91 (1833); 1 Washburn on Real Property (5th Ed.) 677.

Massachusetts commenced early to legislate on partition. An act of 1692 conferred upon the judge of probate jurisdiction to distribute the real and personal property of an intestate among his children, the division of houses and lands to be made by five sufficient freeholders appointed by the judge; provided that where the lands could not be divided without prejudice to or spoiling of the whole, the judge might order the whole to the eldest son, or the other sons successively on his refusal, he paying owelty to the other children.[64] In the following year it was enacted that all co-owners might be compelled to divide by writ of partition at the common law.[65] In 1727 guardians of infants were empowered to join in the partition of lands, to be made by five freeholders appointed by the justices of the Superior Court.[66] The interesting feature in the legislation of 1692 and 1727 is the departure from the sheriff's jury and the adoption of the principle of a small committee corresponding to the commissioners of the English chancery court. More important was the innovation made in the act of 1748 which provided that where any person was interested with others in any lot or grant of land, the superior court was authorized on application to cause partition to be made and the share of the party or parties applying for the same to be set off and divided from the rest; the partition to be made by five freeholders.[67] In Dane's Abridgment the learned editor explains the policy of this legislation as follows: "From very early times we have had many estates held in common of so large tracts of land, and by such numerous

[64] 1 Prov. Laws (State Ed.) 43; 2 Laws of Mass. (Ed. 1807) 969, supplied by the act of Mar. 9, 1783-4, Secs. 4 & 5, 1 Laws of Mass. (Ed. 1807) 124. See also the earlier acts of 1641 and 1649, 3 Prov. Laws. (state Ed.) 426, Laws of Mass. (Ed. 1672) 158. The act of 1750, 2 Laws of Mass. (Ed. 1807) 1030 provided for partition where the intestate died without issue. An act of 1752 empowered the probate Judge to make partition between devisees.

[65] 1 Prov. Laws (state Ed.) 122; 2 Laws of Mass. (Ed. 1807), supplied by the act of Mar. 9, 1785-6, ch. 62, Sec. 2, 1 Laws of Mass. (Ed. 1807) 296; O'Brien v. Mahoney, 179 Mass. 200 (1901). The writ is now abolished, Rev. Laws Mass. (1901) Ch. 184, Sec. 1.

[66] 2 Laws of Mass. (Ed. 1807) 1002.

[67] Prov. Stat. 1748-9, c. 12, 3 Prov. Law (State Ed.) 426, 2 Laws of Mass. (Ed. 1807) 1040, supplied by the act of Mar. 11, 1783, ch. 41, Rev. Sts. c. 103, 1 Laws of Mass. (Ed. 1807) 144. An act of 1760 authorized the appointment of either three or five freeholders to make the partition.

owners that it must have often been utterly impracticable to have commenced and carried a writ of partition through all its stages, without the death of some one of the parties happening pending the suit, and totally impracticable in a single action to have divided a great tract of land into hundreds or thousands of parts or shares. Some mode then evidently became necessary to enable some one or more of these owners to have his or their shares set off from the rest, without making as many divisions as owners."[68] An illustration of this type of proceeding will be found in *Vaughn* v. *Noble*[69] where the petition was for the partition of a tract eight miles wide and twenty-five miles long, comprehending "several townships and parts of townships which contained several thousand inhabitants". This legislation introduced two distinct novelties into the law of partition. One, in permitting a single co-owner to have his share set out for him leaving the residue subject to future partition. The common law action required that each co-owner should have his part allotted in severalty[70] and, no doubt, a suit for partition should embrace the whole tract and all persons interested should be joined as parties for the protection of their rights. But, on principle, there is no reason why those who do not wish to sever should be required to do so because others desire to hold alone.[71] Another feature was the adoption of a new procedure based on petition more akin in some respects to proceedings in equity than at law. Massachusetts was at that time without a court of chancery and the method adopted may be regarded as one of the consequences of that lacuna in its system of justice. In later years, it was held that the statutory proceeding excluded equity from jurisdiction in partition.[72] The

[68] Dane's Abridgment, Ch. 191, Art. 5. The editor overstates the case in attributing this method to "most of the English colonies in America."

[69] 6 Mass. 252 (1810). See also Mitchell v. Starbuck, 10 Mass. 5 (1813).

[70] Hauson v. Willard, 12 Me. 142 (1835); Sweeney v. Meany, 1 Miles Pa. 167 (1836); Sutter v. San Francisco, 36 Cal. 112 (1868).

[71] McWhorter v. Gibson, 2 Wend, N. Y. 443 (1829); Abbott v. Berry, 46 N. H. 369 (1866); Battle v. John, 49 Tex. 202 (1878).

[72] Husband v. Aldrich, 135 Mass. 317 (1883). Prior to 1870 there was no power in Massachusetts to order a sale, Ramsey v. Humphrey, 162 Mass. 385 (1894).

practice spread to other colonies and is the probable source of, or at least furnished the suggestion for, the summary and convenient remedy by petition without writ found in the laws of many states.[73]

In *Gallatian* v. *Cunningham*[74] it is said by the court that English law continued to be the law of New York as regards partition until 1785 when the first act on that subject was passed. This is not quite accurate. As early as 1762 an act was passed "for the more effectual collection of his Majesty's quit-rents in the colony of New York and for partition of lands in order thereto". The act after referring to the difficulties growing out of grants of large tracts, some of which had been subdivided informally while others could not be divided, as the law now is, by reason of absence, infancy, or coverture of some of the proprietors and the great number of shares, goes on to provide for the partition, by three commissioners, appointed by the parties, or by one of the judges of the supreme court in case of dispute, who were to cause a survey to be made of the land, which was to be divided by lot. The act was to continue in force until 1770 but was in 1768 continued until 1780.[75] The act of March 16, 1785, is practically a re-enactment of the earlier act in more extended form, with some additions, the most important of which is the provision of a more easy and less expensive procedure for the division of small estates in the county court of common pleas, which authorized the sale of the property where a division could not be made without prejudice to the owners.[76] After that partition statutes came thick and fast explaining and modifying the prior legislation and indicating that the practice was still unsettled. One may suspect

[73] For example, New Hampshire. Act of 1766. Laws Prov. Period. Vol. 3, p. 396; New Hampshire Pub. Stat. Ch. 243, Sec. 2; Maine Rev. Stat. Ch. 93, Sec. 2; Vermont Gen. Stat. (1917), Sec. 2156; New Jersey Comp. Stat. Vol. 3, p. 3897; Illinois Ann. Stat., Vol. 4, Sec. 8314; Ohio Bates' Ann. Stat. Vol. 2, Sec. 5766; Missouri Ann. Stat., Sec. 4373.

[74] 8 Cowen, N. Y. 361 (1836).

[75] Act of Jan. 8, 1762, Rev. Stat. N. Y. (Ed. 1829), Appendix, pp. 11, 19.

[76] Rev. Stat. N. Y. (Ed. 1829), Appendix, p. 61. See further this appendix for a collection of various partition acts prior to the adoption of the Revised Statutes in 1827-8.

that the curse of over-elaboration had already fallen upon New York procedure. One act, that of February 6, 1788, is a re-enactment of the English act of 8 & 9 William III ch. 31, indicating that the common lawyer was still holding his own; another, that of April 7, 1801, provided more explicitly for the commencement of proceedings by petition; another, that of April 12, 1813, authorized the court of chancery to direct a sale in partition where the ends of justice required it, indicating that the concurrent jurisdiction of that court was fully recognized. The acts were brought together and clarified in a title of the Revised Statutes of 1827 [77] which made the petition the basis of proceedings at law, with concurrent jurisdiction in equity. This legislation is substantially the basis of the present practice as found in the code of civil procedure,[78] although petition and bill have both yielded to the statutory summons and complaint. The proceedings may lead either to a physical division of the property by commissioners,—three reputable freeholders, as of old,—or to a sale by a referee or the sheriff under the direction of the court.

In Pennsylvania, as in Massachusetts, the earliest legislation on partition is connected with the settlement of decedents' estates. An act passed in 1693, while Governor Fletcher of New York was in charge of the province and confirmed upon the restoration of Penn's government, provided for the allotment and distribution of the property of decedents among their heirs by the register general.[79] The substance of this law was embodied in the act of November 27, 1700, which was refused confirmation by the Queen in Council, on the advice of the attorney general because it made real estate distributable in the same manner as personalty and differed from the English rules of inheritance.[80] A new act was passed in 1705 conferring upon

[77] Rev. Stat. N. Y. (Ed. 1829) Chap. 5, tit. 3, p. 317.

[78] N. Y. Code Civ. Pro., Secs. 1532-1595; Matter of Cavanagh, 37 Barb. 22 (1862); Crogan & Livingston, 6 Abb. Pr. 350 (1858); Myers v. Rasback, 4; How. Pr. 83 (1849).

[79] Charter and Laws of Penna. (Ed. 1879), 231, confirmed by the act of May 10, 1696, *id.* 264.

[80] 2 Stat. at Large Penna., pp. 31, 449, 492. The attorney general's criti-

the orphans' court jurisdiction to distribute the estates of persons dying intestate and providing that lands not sold to pay debts should be divided between the intestate's widow and children who were to "make partition as tenants in common may or can do".[81] Did this mean by action at law or by proceedings the orphans' court? The language was ambiguous, but the doubt was set at rest by the act of 1748-49 which authorized the orphans' court, on petition, to appoint four persons chosen by the parties to make partition, or, where the parties could not agree, to award an inquest. To this there was a proviso clearly derived from the Massachusetts act of 1692—the language is almost the same—which enacts that lands which cannot be divided without prejudice to or spoiling of the whole shall be awarded to the eldest son, or to the other sons successively, on paying proportionable parts of the value to the other children.[82] In the acts that succeeded amendments and additions did not change substantially the character of the proceedings which are still open to those interested in the land of a decedent whether testate or intestate and whether or not sole seised.[83] The act of 1794 increased the number of commissioners to seven, now reduced to three. The act of April 2, 1804, authorized a sale of land where it could not be divided and the heirs refused to take at the appraisement, a provision that had been adopted five years earlier in actions a law.[84]

cism was so effective that the distinction between the descent of real and personal property was preserved until the act of June 7, 1917, P. L. 429, Sec. 1, passed on the recommendation of the commission to codify the law of decedents' estates.

[81] June 12, 1705, 2 Stat. at Large Penna. 199. The widows' interest was by the act of 1748-49, construed to be a life interest only. The act of 1705 was repealed by the act of 1794 *infra*.

[82] Feb. 4, 1748-49, 5 Stat. at Large Penna. 62. The act of 1764 gave the daughters also the right to accept at the appraisement. The act of 1917 awards the property first to the surviving spouse and second to the other parties in the order of seniority in age.

[83] See the Orphans' Court Partition act of 1917, P. L. 337 and the report of the Commission to codify the law of decedents' estates. See also the intestate acts of Mar. 23, 1764, 6 Stat. at Large, Pa. 339; April 19, 1794, 3 Smith's Laws, Pa. 143; Mar. 29, 1832, P. L. 190, Sec. 36. The Court of Common Pleas has concurrent jurisdiction, act of April 21, 1846, P. L. 426, Sec. 1.

[84] 4 Smith's Laws, Pa. 183—Compare the act of April 11, 1799, 3 Smith's Laws 386, Sec. 2.

The action of partition may be regarded as part of the common law of the state, for the two statutes of Henry VIII were reported by the judges as in force in Pennsylvania.[85] The act of 8 & 9 William III was not in force, since it was passed after the settlement and never extended to the province in practice.[86] In the act of 1710-11 establishing courts of judicature it was provided that writs of partition might be brought and proceeded on in the courts of common pleas according to the course in Great Britain and as the statute of 8 & 9 William III directed; but the act, lengthy and intricate, was repealed by the Queen in Council, and its successor the act of 1722 merely conferred upon the justices in general words the power to grant writs of partition.[87] The first important statute dealing with partition at law is the act of 1799 which after conferring jurisdiction on the supreme court, which still went on circuit as well as the common pleas, went on to provide that if the estate could not be divided without prejudice to or spoiling the whole, the inquest should return its value and the court should adjudge the whole to one of the parties at the appraised value on securing the others their respective shares, and if none of the parties would take at the appraisement, the court might order a sale at public auction by the sheriff.[88] Part of this procedure was, no doubt, borrowed from the long established practice of the orphans' court although the method of allotment was different. In the orphans' court the right of election was reminiscent of the course of descent at common law, inapplicable to co-tenancies by purchase; hence in the common pleas the court decided to whom the land should be conveyed.[89] The provision for a sale in case

[85] Roberts' Digest of English Statutes in Force in Penna., p. 226; Duke v. Hague, 107 Pa. 57 (1884).

[86] M'Kee v. Straub, 2 Binn. Pa. 1 (1809).

[87] Feb. 28th, 1710-11, Sec. 24, 2 Stat. at Large Pa. 301, 548; May 22, 1722, Sec. 10, 3 Stat. at Large Pa. 298.

[88] Act of April 11, 1799, 3 Smith's Laws Pa. 386, 3 Pepper & Lewis Dig. (2 Ed.) 5560.

[89] Clawges v. Clawges, 2 Miles Pa. 34 (1836). An act of May 5, 1841, P. L. 350, directed that the co-tenants should elect "according to the dates

of refusal to take at the appraisement was new and may have been suggested by the then recent legislation in New York; it is significant that a section of the act of 1799, soon after repealed, provided a summary method by petition for the sale of unseated and unimproved tracts.[90] It is unnecessary to refer to the subsequent amendments to this legislation; the number of the inquest has been reduced to six, or the parties may agree on three or more commissioners;[91] but the scope of the proceedings has changed little. In 1845 equity jurisdiction in partition was conferred on the courts of Philadelphia which by subsequent legislation was extended throughout the state [92] and the present tendency in practice is to proceed by bill in equity rather than by action at law.

To trace further the history of early American statutes on partition would unduly prolong a discussion that has already extended too far into details. The experience of each colony was different and the exact extent of their respective borrowings difficult to estimate.[93] The three provinces selected will serve to illustrate the striving to obtain an equable system where the law and practice of the mother country was of little help but still dominated the legislative mind. The early session laws of the original states show great activity in real property legislation during the generation that succeeded the Revolution, in which partition had its share but like other subjects was adversely affected by the careless drafting of the laws and their frequent amendment. Later revisions of the statutes have re-

of their respective titles legal or equitable.". Dana v. Jackson, 6 Pa. 234 (1847).

[90] Section 3 of the act of 1799, repealed by the act of Mar. 28, 1806, 4 Sm. L. 335. Sec. 2.

[91] Acts of May 1, 1879, P. L. 40; April 27, 1853, P. L. 368, Sec. 4.

[92] Acts of March 17, 1845, P. L. 158, Sec. 3; Feb. 14, 1857, P. L. 39; July 7, 1885, P. L. 257; Sheridan v. Sheridan, 136 Pa. 14 (1890).

[93] See Laws of New Hampshire (Prov. Period) 9, act of Sept. 27, 1745; Vol. 3 *id.* 396, Act of July 3, 1766. Connecticut Laws (Ed. 1808), p. 437; Rhode Island Laws (Ed. 1798) 269; Maryland Act of 1785 ch. 72, Sec. 12; Virginia Act of 1786, ch. 60, 12 Hehings Laws 349; New Jersey Acts of Nov. 11, 1789, and Mar. 9, 1707; Stevens v. Enders, 13 N. J. L. 271 (1833); Watson v. Kelty, 16 N. J. L. 517, Rev. L. N. J. (1847) 101; Brevard's Dig. S. Car. Vol. 11, p. 102. acts of 1748 and 1791.

duced this material to something like order but no general system is recognized. In a few jurisdictions the common law writ is still in use,—more frequently the proceedings are commenced by petition or complaint. In many states the courts charged with the settlement of decedent's estates have jurisdiction in partition more or less extensive. In some states courts of law and equity exercise concurrent jurisdiction.

Owing to the absence of law reports in the colonial period the early history of partition by courts of chancery is obscure, as is also the case in other branches of equity jurisprudence. In the early days political opposition to the exercise of the office of chancellor by the provincial governor led to the abandonment of separate courts of chancery in some colonies, while in others where they continued to exist the amount of business transacted was not large; the simplicity of colonial life and the disinclination of the settlers to seek the aid of a distant court retarded the growth of equity which was still burdened with a tedious and costly procedure.[94] A search of the various state archives would, no doubt, yield some cases but the result would hardly warrant the labor; the reorganization of the courts that attended the Revolution broke the continuity of precedent and relegated the earlier records to the domain of the antiquary. The registrar's book of the short lived court of chancery established in Pennsylvania by Governor Sir William Keith shows one case of partition in which one of the defendants proved most obstinate. He would not appear to the subpoena, was attached and remained in jail from June, 1733, to November, 1734, when the complainants obtained a decree *pro confesso.* An order for partition by three commissioners was then made and served on the obstinate one who returned that "he did not care". A writ was issued but nothing further is reported. The prospect of obtaining a conveyance from such a defendant must have been small.[95] Among the Virginia reports of Sir John

[94] Courts of Chancery in the American Colonies, Wilson, 18 Amer. L. Rev. 226 (1884).

[95] Rawle's Equity in Pennsylvania 38, app. 34; 1 Pa. Archives 442.

Randolph there is a suit in chancery for partition in 1730, the reporter representing the plaintiffs. The title was complicated, involving questions of joint tenancy and survivorship. Some of Randolph's contentions were not sustained by the court. The next morning, he goes on to say, counsel met in the secretary's office to direct the clerk in drawing the decree. The defendant's solicitors gave the clerk instructions more favorable to the plaintiff than the opinion of the court warranted; but, adds Randolph, "the decree was drawn and being for my client's advantage I did not gainsay it".[96] A Virginia act of 1786 provided for partition by writ in the manner of the statute of 8 & 9 William III, yet so few were the instances of its use and so completely had proceedings in equity for partition superseded those at law that in 1825 one of the judges of the court of appeals doubted whether a writ of partition had ever been prosecuted in Virginia.[97] "In this", says Professor Minor, "he seems to have been mistaken. At all events, an application to equity for partition is not now, and for more than a century has not been, an application merely to the sound judicial discretion of the court, as in cases of specific performance, but independently of the statutory provisions, it is due *ex debito justitiae*".[98] As soon as law reports appear cases on partition in equity are found in various jurisdictions. In some states the cumulative remedy by bill in equity is reaffirmed or conceded by statute, in others concurrent authority is asserted as part of the ancient jurisdiction of the court, based on its superior ability to do complete justice. To the wide extent of the latter view the strong influence of Mr. Justice Story contributed. In many instances

[96] Thorton v. Buckner, Virginia Colonial Decisions (Ed. 1909), Vol. 1, R. 30.

[97] Wisley v. Findlay, 3 Rand. Va. 361 (1825), cf. act of 1786, ch. 60, 12 Henings Laws 349.

[98] 2 Minor's Institutes (3 Ed.) 478; Straughan v. Wright, 4 Rand. Va. 493 (1826). By statute a court of equity may take cognizance of questions of law affecting legal title. Davis v. Tabbs, 81 Va. 600 (1886). In Georgia, on the other hand, equity would not assume jurisdiction in partition unless the relief at law was inadequate. Boggs v. Chambers, 9 Ga. 1 (1850); Rutherford v. Jones, 14 Ga. 52 (1854).

the leading case of a state rests its judgment on the text of his equity jurisprudence.[99]

American courts have extended the limits of this branch of equity by including personal property within its scope. Partition proceedings for the division of chattels were unknown at common law or in equity,[100] although familiar to continental jurisprudence. The assumption of this power, now enlarged by statutes and judicial decisions, is obscure, but would seem to have first occurred in the Southern colonies in connection with the division of slaves, which in some instances were made real estate by statute for the purpose of descent and distribution but in all other respects were regarded as personal property.[101] In Virginia as early as 1705, slaves were made partible, and by an act of 1727 any person having the right to partition of any slave or slaves was authorized to bring a bill in equity for that purpose.[102] In the frequently cited case of *Smith* v. *Smith* [103] the property involved consisted of slaves and the object of the bill was to obtain specific performance of an award of arbitrators making partition. The court held that it could carry the award into effect by decreeing an allotment of the slaves or, if that could not be done, their sale. The early statutes of the

[99] Dinckle v. Timrod, 1 Dess. S. C. Eq. 109 (1784); Wilkin & Wilkin, 1 Johns. Ch. N. Y. 111 (1814); Larkin v. Mann, 2 Paige Ch. N. Y. 27 (1830); Hewitt's Case, 3 Bland Md. 84 (1831); Hartshorne v. Hartshorne, 2 N. J. Eq. 349 (1840); Thayer v. Lane, Har. Mich. 247 (1841); Railey v. Railey, 5 B. Mon. Ky. 110 (1844); Irwin v. King, 28 N. Car. 219 (1845); Bailey v. Sisson, 1 R. I. 233 (1849); Donnell v. Mateer, 42 N. Car. 94 (1850); Howey v. Goings, 13 Ill. 95 (1851); Spitts v. Wells, 18 Mo. 468 (1853); Patton v. Wagner, 19 Ark. 233 (1857); Whitten v. Whitten, 36 N. H. 326 (1858); Hopper v. Fisher, 2 Head Tenn. 253 (1858); Paddock v. Shields, 57 Miss. 340 (1871); Bradford v. Robinson, 7 Hust. Del. 29 (1884); Nash v. Simpson, 78 Me. 142 (1886); Donnor v. Quartermas, 90 Ala. 164 (1889); Hale v. Jaques, 69 N. H. 411 (1898).

[100] Gudgell v. Mead, 8 Mo. 53 (1843); 6 Pomeroy's Equity Jur. (3d Ed.), Sec. 705; Halsbury's Laws, Vol. 21, p. 836. Mr. Freeman, in his work on cotenancy, states in Sec. 426 that jurisdiction was exercised by the Court of Chancery in England for the partition of chattels but gives no authority.

[101] Virginia Colonial Decisions (Ed. 1909), Vol. 1, R. 82, Vol. 2, B. 372; Walden v. Payne, 2 Wash. Va. 1 (1794); Floyd v. Breckenridge, 4 Bibb, Ky., 14 (1815); Gullett v. Lamberton, 6 Ark. 109 (1845).

[102] Coleman v. Hutchenson, 3 Bibb, Ky. 209 (1813); Virginia Act of 1727 Ch. 11. Sec. 18. 4 Hening's Laws 227.

[103] 4 Randolph, Va. 95 (1826).

state were not referred to but a court of equity was declared to be the proper tribunal for the partition of personal property. In *Pell* v. *Ball*[104] in the court of chancery of South Carolina, the bill was to divide "land and negroes". In affirming a decree ordering a sale, Chancellor Harper said: "Undoubtedly our courts of chancery have assumed jurisdiction in various instances not warranted by the rules and practices of the high court of chancery of South Britain, to which by act of assembly of 1721 they are directed to conform. . . . It exercised, also, jurisdiction in making partition of slaves, for which, of course, it could derive no authority from English law. It is not questioned, but that the jurisdiction has been exercised familiarly and habitually for the greater portion of a century." From slaves the jurisdiction was extended to chattels generally;[105] and, as the assumption of such power was eminently reasonable and practical, there being no remedy at law whatsoever, the doctrine soon spread, and, except in a few instances,[106] is generally recognized throughout the country.[107]

In another respect American law as found in the statutes, or as those statutes have been interpreted, differs from that of England. There, as has been shown, the owners of a moiety of the property are usually entitled to a sale as a matter of right, owners of less than a moiety may obtain a sale but must show cause. In the United States it is generally laid down that, as between a sale and a physical division the courts will favor the latter.[108] The explanation of this is that in England statu-

[104] 1 Rich. S. Car. Eq. 361 (1845).

[105] Kerlev v. Clay, 4 Bibb. Ky. 241 (1815); Crapster v. Griffith, 2 Bland Md. 25 (1829); Irwin v. Kind, 28 N. Car. 219 (1845); Steedman v. Weeks 2 Strob. S. Car. Eq. 145 (1848); Smith v. Dunn, 27 Ala. 315 (1855); Porter v. Stone, 70 Miss. 291 (1892); Neal v. Suber, 56 S. Car. 298 (1899).

[106] Gudgell v. Mead, 8 Mo. 53 (1843), otherwise now by statutes, Caldwell v. Wright, 88 Mo. App. 604 (1901); Rice v. Freeland, 66 Mass. 170 (1853); Simmonds Mfg. Co. v. Power, 49 Pittsburg, L. J. 435 (1902).

[107] Tinney v. Stebbins, 28 Barb. N. Y. 290 (1858); Low v. Holmes, 17 N. J. Eq. 148 (1864); Conover v. Earl, 26 Ia. 167 (1868); Andrews v. Betts, 8 Hun, N. Y. 322 (1876); Swain v. Knapp, 32 Minn. 429 (1884); Godfrey v. White, 60 Mich. 443 (1886); Spaulding v. Warner, 59 Vt. 646 (1887); Robinson v. Dickey, 143 Ind. 205 (1895); Eisner v. Curiel, 20 N. Y. Misc. 245 (1897).

[108] Davis v. Davis, 37 N. Car. 607 (1843); Smith v. Smith, 10 Paige, N.

tory authority to sell came late; at a time when the sympathy previously felt for the co-owner who clung desperately to the inherited land had changed to an equally strong sympathy for those who desired to free their capital from what to them was an unsatisfactory investment. The early American statutes permitting a sale when great prejudice would result from a division were passed at a time when interests were mainly agricultural and neither legislator nor judge would willingly disturb the traditional attitude toward ownership. Legal opinion on this question has moved more slowly than that of property owners. Seventy-five years ago it was shrewdly remarked in argument in the South Carolina case already quoted: "It seldom happens that men will insist on a specific partition of land, as most people are glad, in the abundance of land, to get the proceeds of sale and purchase for themselves." Observation indicates today a great reluctance on the part of co-owners to accept the opinion of the commissioners or other officer charged with the valuation of the property and a general desire to test the value by a public sale. An obstinate litigant may occasionally invoke the old rule, but in uncontested cases, all parties are usually anxious for a sale at auction where they can bid what they think the property is worth or let it go to anyone who thinks it worth more.

A survey of partition at law and in equity leaves on the mind an impression not unlike the feeling aroused by observing an aged man in an executive position, admiration for the veteran's toughness and despair at his pottering methods. Partition is ancient—many titles in the law are parvenus by comparison. For hundreds of years judges have pronounced divisions "firm and stable", the magic formula that secures the title to the allotments. To read the record of a partition suit is to read back through the ages, through the days of the eighteenth century chancellors, Coke, Littleton, and beyond. Marvelous is the

Y. 470 (1843); Richardson v. Mouson, 23 Conn. 94 (1854); Earle v. Turton, 26 Md. 23 (1866); Davidson v. Thompson, 22 N. J. Eq. 83 (1871); Johnson v. Olmsted, 49 Conn. 509 (1882); Royston v. Miller, 76 Fed. 50 (1896); Kennedy v. Condran, 244 Pa. 264 (1914). See Frost v. Frost, 25 Pa. D. R. 487, for an effort to take a short cut in partition rebuked.

continuity of legal forms. Partition would also be modern, greatly encompassed by statutes, as our aged man is presumably wrapped in flannels. Brevity, clarity and consistency in these statutes is seldom sought and still less frequently achieved; in deed there are sometimes several statutory methods of partition differing in unimportant details in a single state. This furthers litigation; most partition cases that get into the reports turn on questions of practice merely. No doubt most of these statutes were passed with the benevolent object of protecting the rights of the parties, but an elaborate and technical procedure defeats its own purpose by laying traps for the unwary and preventing those special arrangements that may, under the circumstances, be highly advantageous to all concerned. Once the court has determined the interests of the parties by its preliminary judgment, there is less danger in permitting a certain amount of flexibility in the subsequent proceedings, subject of course to the court's supervision, than in consigning all cases to the same procrustean treatment. It may be said that if the parties are in agreement it is unlikely they will seek a court for partition. That, in a sense, is true; no co-owners who can make an amicable partition will seek the aid of the court and subject themselves to costs and fees that are too frequently out of proportion to the services rendered. Only the unfortunate are brought into these proceedings by conflicting claims, heavy encumbrances, personal disability, perhaps bad advice. But if partition proceedings were simple, cheap and expeditious, would not suitors be attracted by a title decreed by a court, to the profit of the legal profession? There was a time, now remote, when the king's court was sought because better and speedier justice could be obtained there than outside. It is conceivable that such a period might recur.

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