

A House Divided: Access to Partition and Sale under the Laws of Ontario and Manitoba

J O H N I R V I N E *

I. INTRODUCTION

This paper¹ examines some important questions concerning the law of partition, and of “sale in lieu of partition”, a substitute remedy which in most common law jurisdictions made its appearance in the law at a relatively late date. The writer has no ambition to cover the subject comprehensively. Rather, it is hoped that further essays in this journal will appear presently, to address issues deliberately set aside in this article. In particular, the all-important question of how judges use their discretion in this context is a topic which both deserves and needs close and separate treatment; so that all this article attempts on that topic, is to show how, again at a surprisingly recent date, the whole phenomenon of judicial discretion, with all its potential for flexible and sensible decision-making, finally entered the picture.

My present aim is to draw attention to an interesting anomaly. Historically, Manitoba has often “borrowed” legislation from Ontario, its older and more populous neighbour, often with minimal adaptation. It did so in 1878, when it passed its first *Partition Act*,² essentially copying the then-current Ontario Act³ almost word-for-word. While minor differences and amendments have crept in over the ensuing 133 years, and Manitoba’s Act has been subsumed into the eclectic or amorphous *Law of Property Act*,⁴ the statutory provisions in both provinces, especially the core provisions which will be examined in this paper, remain recognizably and obviously the “same package”. Yet when we come to examine the functioning of these essentially identical provisions, as interpreted by

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¹ The second essay in a trio of interrelated offerings destined for the *Journal*. The first, found earlier in this issue and entitled “Unsettled Estates: Manitoba’s Forgotten Statute and the *Chupryk Case*”, addressed aspects of the province’s law regarding consecutive interests in real property. In this sequel, we consider the rules governing the partition and sale of concurrent interests, and its shape in the aftermath of the *Perpetuities and Accumulations Act*, SM 1982, c 3-4, e 43.

² SM 1878, c 6.

³ *Partition and Sale Act*, SO 1869 (32 Vict), c 33.

⁴ CCSM c L90.

the courts of each province, we find a dramatic contrast. Manitoba has rejected, in one fell swoop and at a recent date, the rather painfully developed but now-settled position of the Ontario case-law, and has struck out on its own path. I propose to examine how and why this schism has developed, and to consider whether Manitoba's initiative in this context is a salutary one, or just a recipe for confusion.

I fear that the very selectivity of the text, examining some topics while virtually ignoring others, may give it a distressingly rambling or even random appearance, but by way of reassurance I would point out that its ground-plan is relentlessly chronological. If at times it seems to stall and linger awhile over some contentious or abstruse issue, it will soon resume its progress towards the confused picture (as I see it) presented by the law of Manitoba today.

Partition and sale are devices or remedies whereby the law brings to an end hitherto shared entitlements to real estate, whether this is done consensually or by legal compulsion. As every student of the law quickly learns, the common law has from the beginning offered a diversity of ways in which land may be shared by two or more people. They may share it "spatially" by enjoying it simultaneously, "cheek by jowl", and the ancient authors tell us that by Edward I's time, four recognized methods of such co-ownership were familiar to lawyers – coparcenary, joint tenancy, tenancy in common, and tenancy by the entireties. By that time in history, another method of sharing, which we may call "temporal", had become firmly established through the doctrine of estates; this method allowed title to be divided between a present occupant (such as a life tenant), and a title owner who could only anticipate physical enjoyment of the property at some future time (the remainderman or reversioner).⁵ A couple of centuries were to pass before a third mode of sharing emerged – "juridical" sharing between persons holding title in the eyes of the common law, and those whose title was recognized by equity. This happened first through the medieval "use", and later through the development of the trust.

I shall have little to say in this short paper about the trust, but intend to show, rather, how in relatively recent times a measure of confusion has entered into the law governing the other two kinds of sharing – that is, the law of spatial co-ownership, and the law governing temporally consecutive estates. This confusion, as I have already ponderously hinted, has come about in spite of – or perhaps because of – the virtually identical but infelicitously worded legislation of Ontario and Manitoba respectively and while it has so far done little or no practical harm, as far as I can see, I propose to draw attention to it before legal discourse in relation to co-ownership (on the one hand) and the doctrine of

⁵ Of course, the life tenant's interest, or the remainderman's, or both, might at the same time be spatially shared by two or more people in any of the above ways; and this has been by no means unusual.

estates (on the other) becomes so homogenized as to stultify legal argument or generate anomalies.

The partition of land has historically meant the drawing of an imaginary boundary-line between different segments of a piece of real estate, so that land previously shared “promiscuously” by two or more people is allocated between them “severally”, with the result that they share no longer; each acquires his or her small but exclusive fiefdom. Partition is not generally regarded as a particularly difficult subject in our law schools, nor in the standard text-books on real property. More time is spent in the classroom on explaining what partition is not – that it is totally different from the far less drastic phenomenon⁶ of “severance”. The general feeling is that problems of partition are generally laid to rest by the wording of the governing provincial statute, or by the comforting nimbus of judicial discretion which envelops the partition remedy. Whatever truth there may be in the latter belief, it shall be one theme of this paper that any faith in the clarity of Manitoba’s statutory provisions is sadly misplaced.

By way of a comfortable introduction, and to set the scene for future discussion in this and perhaps other papers, I shall first attempt a concise overview of the history of partition, eventually narrowing down the focus to scrutinize the “modern” statutory framework in Ontario and Manitoba.

I. THE EARLY HISTORY OF PARTITION

The ancient common law certainly recognized the possibility of partition, and for centuries exercised an exclusive jurisdiction over it. But it was a very narrow jurisdiction indeed, for it applied only to coparceners.⁷ Coparceners might, of course, agree consensually to partition the shared lands between themselves, and if the agreement held – even a parol agreement might do the trick and was enforceable⁸ – coparceners need have no recourse to the courts to achieve that end. But if one co-parcener resisted entering into such an agreement, or declined to comply with it, she might be judicially compelled to submit to partition by her

⁶ For severance, the conversion of a joint tenancy to a tenancy in common, is not, like partition, to be considered a remedy. Courts may recognize its occurrence, but do not order it at any party’s request.

⁷ Coparceners were persons who collectively found themselves standing in the position of heir to an undivided piece of land. This might result from the absence of a male heir to inherit a fee simple or fee tail under the old rules of male primogeniture, or from custom-based local rules of inheritance, notably gavelkind. They are, suffice it to say, extinct in Canada, if indeed any ever existed here. As to the narrowness of the common law, see JH Thomas, ed, *Coke’s First Institute*, 3 vols, (London: S. Brooke, 1818) [*Coke on Littleton*] at Co Litt Lib 1 175a.

⁸ Even before the *Statute of Frauds*, 1670, says Holdsworth, *A History of English Law*, vol 3, (London: Methuen & Co, 1942) at 233, citing *Eden v Harris* (1576), 3 Dyer 350b: which case, however, is very debatable on other points, notably the supposedly continuing application of survivorship between co-parceners.

fellow-parceners, who could invoke the writ *de partitione facienda*⁹ to that end. To explain the matter in other words, coparceners, uniquely at common law, had a right to partition, good against all objections.

But that is as far as the common law went. The writ *de partitione* was not available to joint tenants or tenants in common who found their role as concurrent owners irksome and who could not secure or enforce a mutual agreement to partition the land. Arguments resisting the extension of the common law remedy were entirely spurious,¹⁰ and policy certainly militated against forcing unwilling owners (or any of them) to cohabit, so to speak, without any prospect of legal relief.¹¹ And so it was that finally, in the reign of Henry VIII, two statutes were passed to address the situation and extend the writ *de partitione facienda* to joint tenants and tenants in common. This salutary change was first made by “An Acte for Joynt Tenaunts and Tenaunts in Comon”¹² but the reform so effected was immediately perceived to be incomplete, for the constraints and resentments of unwanted co-ownership were not confined to joint tenants or tenants in common who shared a fee simple absolute. They might be equally vexing to co-owners of a life estate, or of a leasehold interest. So the following year, another short statute was passed, almost as anarchic in its spelling as its predecessor had been, to correct this oversight. That was the statute “*Joinctenaunts for Lif or Yeres*”.¹³

The 1540 Act made it possible for joint tenants or tenants in common to bring a writ of partition and thereby secure a court-ordered division of the affected lands as between themselves and for the duration of their estate or interests; it being expressly provided that the partition not be “prejudicall or hurtfull to anny personne or persons their heirs or successors other than suche whiche be parties unto the said partition...”.

The Henrician statutes were to have a long life, not least in England’s overseas colonies where, as we shall see, they endured in many instances long after they were superseded in England by more modern legislation. It must be noted

⁹ [Syn. *particione*] This writ, recorded in a number of 13th century registers, is sometimes expressed as “*de participatione facienda*”. As noted by Lord Porter in *Patel v Premabhai*, [1954] AC 41, (JCPD); this is a “clerical error”, though one of some antiquity, having been perpetrated by the editors of the *Statutes at Large*, Vol. 2 (1786) in their (deplorably cavalier) version of the 1539 Act [post]. The authors of the Henrician original, whatever violence it may do to modern ideas of English orthography, are guiltless of distorting the Latin, *pace* Lord Porter’s assertion to that effect.

¹⁰ See Joseph Story’s *magisterial Commentaries on Equity Jurisprudence*, vol 1 (Boston: Hilliard, Gray & Co, 1836) c 14 at para 602.

¹¹ See Blackstone’s *Commentaries on the Laws of England*, vol 2 (London: A Strahan, 1809), 185. “Thus, by the civil law, *nemo invitus compellitur ad communionem*,” he very sensibly observes.

¹² 1539 (UK), 31 Hen VIII, c 1.

¹³ 1540 (UK), 32 Hen VIII, c 32.

that the jurisdiction conferred by the Acts was a mandatory one, decreeing that on presentation of the writ *de partitione*, co-owners (per the 1539 Act) “shall and maye be coacted and compelled... to make particion betwene them... in like manner and forme as coparceners by the comen laws of this Realme have byne and are compellable to doe...”. No discretion to deny partition, in other words, was vested in the Courts by the statutes, just as none had been so vested in suits between coparceners at common law.¹⁴ Such a discretion really did not emerge for another three centuries, by force of later statutes.

Another critical point to note is that the procedures attending the writ *de partitione facienda* were cumbrous, slow and frustratingly hedged about with qualifications. This is no place to investigate the ancient procedures, though they involved, after the common law court had given judgment upon the initiating writ, the direction of another writ to the sheriff, commanding him to make the partition by the oath of an “inquest” of twelve lawful men of the county, chosen from the neighbourhood of the affected lands.¹⁵

In this context as in so many others, the delays, inflexibilities and complications of the common law, coupled (it may be) with the prospect of enhanced business in Chancery, provoked the intervention of equity. As early as 1598, in *Speke v Walrond*,¹⁶ a plaintiff who could not hope for immediate partition at law, because one of his co-tenants was still a minor and a ward, was “holpen in equity”. And it is clear that in a short span of time, the Lord Chancellor’s court assumed a lively jurisdiction in partition, not only challenging the hitherto exclusive jurisdiction of the common law courts in such matters, but threatening to oust it entirely. Legislative efforts were made to alleviate some of the deficiencies of the common law,¹⁷ but by the 18th century, the common law writ had been almost entirely superseded by bills in Chancery. In every instance, this supplanting of the common law seems to have been justified by reference to the law’s endless delays and inconvenience.¹⁸ Though there are some eighteenth-century records of common law writs for partition, equity’s more expeditious and flexible procedures, and its more imaginative and efficient remedies, seem ultimately to have condemned the common law writ to obsolescence. It was finally

¹⁴ Britton II, 72 (c.1291-2)

¹⁵ *Coke on Littleton*, *supra* note 7, Co Litt Lib 1 168b.

¹⁶ (1598), 21 ER 153.

¹⁷ See *An Act for the Easier Obtaining of Partitions*, 1697 (UK) 8-9 William III, c 31, the preamble to which succinctly but mordantly attests to the delays of the common law. It was (oddly) declared expressly to be in force for just seven years, but was later made perpetual by 3 & 4 Ann, c 18, s 2.

¹⁸ See *Manaton v Squire* (1677), 22 ER 1036 [Lord Nottingham, LC]; and *Calmady v Calmady* (1795), 2 Ves Jun 568, 30 ER 780 [Lord Loughborough, LC], where more than a century later, the Court of Chancery is still defending its supposed usurpation of jurisdiction in partition suits. The resentment felt by common law practitioners to this development was unusually vehement and protracted: see John Fonblanque and Henry Ballow, *A Treatise of Equity*, 5th ed (London, 1820), at 18 and 19; and Story, *supra* note 10, at ch 14, paras 646-7.

abolished by the *Real Property Limitation Act*,¹⁹ amid a momentous general abolition of ancient writs and actions. From that point on, as Lord Halsbury puts it, “equity acquired technically, as before it had practically, exclusive jurisdiction in partition.”²⁰

It might be supposed that this is where modern courts acquired that discretion which they universally claim nowadays in partition matters. But that is not the case. Equity’s assumption of jurisdiction over partition was founded upon the convenience and expediency of litigants, and in various respects it filled the public need admirably.²¹ But the courts of equity were aware that the common law writ had regarded partition, almost²² without exception, as a matter of right, not subject to judicial discretion; and that it was this right to partition which had been extended by King Henry’s statutes to joint tenants and tenants in common. So a matter of right, firmly founded on those ancient statutes, it remained; and no general discretion to deny partition was acquired by the courts, anywhere in the common law world, until well into the 19th century.

II. THE WINDS OF CHANGE: EARLY CANADIAN LEGISLATION AND THE ADVENT OF “SALE IN LIEU OF PARTITION,” BOTH IN ENGLAND AND IN CANADA.

Not content with reliance on English law, however firmly “received”, several Canadian provinces enacted their own partition legislation at an early date. Nova Scotia, for example, had done so as early as 1767²³ and Upper Canada was not far behind with *Partition Acts* in 1832²⁴ and 1834.²⁵ Both these latter statutes, we should note, were more than three decades ahead of the field in introducing the option of sale in lieu of partition, where the latter was inexpedient or impracticable: a change not made in England until the *Partition Act* of 1868.²⁶

¹⁹ 1833 (UK), 3-4 William IV, c 36.

²⁰ Lord MacKay of Clashfern, ed, *Halsbury’s Laws of England*, 4th ed, vol 16(2) (Bath, England: Simon Hetherington LLB, 2003) at para 467.

²¹ Not least in regard to the practicalities of partition, in cases where a fair and equitable distribution of the land, as between its co-owners, could not be realistically achieved, due to the character of the real property itself. See, for example, the phenomenon of “owelty of partition”, as touched upon briefly below – a device unknown in the common law courts.

²² The exceptions were quaint; relating to titles of honour and to castles and other such places of military importance: *Coke on Littleton*, *supra* note 7, Co Litt Lib 2 164b.

²³ *An Act for the Partition of Lands*, SNS 1867 (7-8 Geo III) c 2.

²⁴ *An Act to Provide for Partition*, SUC 1832 (2 William IV) c 35.

²⁵ *Real Property Amendment Act*, SUC 1834 (4 William IV) c 1.

²⁶ (UK) 31 & 32 Vict, ch 40. It should be noted that the Act was a supplement to the existing statutes, rather than a replacement of it – the 1539 and 1540 statutes thus remained the core of partition law.

Jurisdictions less precocious than Upper Canada managed as best they could until reception of the English statute of 1868, alleviating the injustice of “lop-sided” physical partitions by the old equity device of ordering pecuniary make-up payments, or sometimes rental arrangements, called “owelty”. Manitoba was not in the vanguard of change. Having taken over, ready-made, the common law and equity rules on partition, it can confidently be assumed to have “received” also the picturesque old statutes of 1539 and 1540, whether by ancient common law doctrine of *Calvin’s Case*,²⁷ or by force of express provincial legislation proclaiming the validity of old English statutes passed before the province entered Confederation. That was the case in Manitoba²⁸, in Saskatchewan and in Alberta²⁹. In Alberta, indeed, the statutes of 1539 and 1540 were still the basis of all partition jurisdiction until 1979 and remain so to this day in Saskatchewan! And in all such provinces, we can be sure that the English *Partition Act* of 1868, antedating as it did their official attainment of provincehood, was gratefully received into the local law as soon as it had received assent in February 1868.

As it happened, Manitoba, once it achieved its own legislature, was not slow in replacing this ramshackle state of affairs. Even though the inhabitants of the Red River settlement do not seem to have lost much sleep or indulged in any litigious disputation about partition or sale in those days, Manitoba introduced its own modernized legislation on these questions which appeared as the *Partition Act*, 1878.³⁰ Largely “borrowed” from the then current Ontario version of the *Partition Act*,³¹ the essentials of the 1878 Act, and much of its detailed wording, have come down to the present day; and its lineaments are clearly discernible under the light patina of subsequent amendments over the last 133 years. It now appears as sections 18-26 of Manitoba’s *Law of Property Act*.³² That comes about because in 1939, the previously free-standing *Partition Act* of Manitoba was subsumed under that eclectic rag-bag of a statute by the *Law of Property Amendment Act* of that year.³³

²⁷ (1609), 77 ER 377, and the jurisprudence deriving from it. On reception generally, see Jean E Côté, “The Introduction of English Law into Alberta”, (1964) 3:2 Alta LR 262; and by the same author, “The Reception of English Law” (1977) 15 Alta LR 29.

²⁸ e.g. *The Queen’s Bench Act*, SM 1874, c 12, s 1.

²⁹ e.g. *North-West Territories Act*, SC 1870, c 25, s 3. These two provinces were originally part of the North West Territories, and were parceled out from it as the Dominion expanded in population. SM 1878 (41 Vict), c 6.

³⁰ *Partition and Sale Act*, SO 1869, c 33.

³¹ *Supra* note 4.

³² SM 1939, c.50. Whether its absorption into this larger and more diffuse piece of legislation, and its resultant “anonymity”, has contributed to the subsequent judicial confusion as to its function is a good but unanswerable question.

It is not surprising then that, to this day, the partition legislation of Ontario and Manitoba shares in large measure a common format. In particular, both jurisdictions have specific sections describing respectively who has *locus standi* to seek or (rather infelicitously) “petition for” partition, and who, *per contra*, may be compelled to make or suffer partition. The wording of these provisions has been occasionally and lightly modified in both jurisdictions over the years, and it may be helpful to compare the current texts before proceeding. The following provisions are taken from Manitoba’s *Law of Property Act*:³⁴ and Ontario’s *Partition Act*.³⁵ The reader will be asked to refer back to these provisions repeatedly in the discussion that follows.

Manitoba	Ontario
<p>Who may be compelled to make partition or sale</p> <p>19(1) All joint tenants, tenants in common, mortgagees and other creditors having any lien or charge on, and all persons interested in, to, or out of any land in Manitoba, may be compelled to make or suffer partition or sale of the land or any part thereof.</p>	<p>Who may be compelled to make partition or sale</p> <p>2. All joint tenants, tenants in common, and coparceners, all doweresses, and parties entitled to dower, tenants by the curtesy, mortgagees or other creditors having liens on, and all parties interested in, to or out of, any land in Ontario, may be compelled to make or suffer partition or sale of the land, or any part thereof, whether the estate is legal and equitable or equitable only.</p>
<p>Who may take proceedings for partition</p> <p>20(1) Any person interested in land in Manitoba, or the guardian of the estate of an infant entitled to the immediate possession of any estate therein, may bring action for the partition of the land or for the sale thereof under the directions of the court if the sale is considered by the court to be more advantageous to the parties interested.</p>	<p>Who may bring action or make application for partition</p> <p>3(1) Any person interested in land in Ontario, or the guardian of a minor entitled to the immediate possession of an estate therein, may bring an action or make an application for the partition of such land or for the sale thereof under the directions of the court if such sale is considered by the court to be more advantageous to the parties interested.</p>

³⁴ CCSM, c L90, as of June 2011.

³⁵ RSO 1990, c P4, as of that same date.

In both provinces, as is obvious from this little chart, there is an “active” provision (who can seek partition and sale) and a “passive one” (who may be compelled to undergo that process). In this paper, I am not going to say much about the latter aspect of things, interesting though it is. But I feel that it is important to point out that in spite of the apparent congruency of language used in the active and passive provisions of the statutes,³⁶ they are in fact quite different in their scope. I shall argue below, and the Ontario courts have with growing consistency held, that only a narrowly defined class of interest-holders may bring action to secure partition or sale. But the class of persons against whom such an action may lie, or who may find their interests affected, injuriously or otherwise, by such partition or sale; the people, in other words, who may collaterally have their interests in land converted into money, or re-allocated in some way by the partition/sale process; is much broader, and this is in fact reflected, very properly, in the wording of s 19(1) of the Manitoba statute and s 2 of the Ontario statute *supra*. The illusion of perfect reciprocity between the active and passive provisions of both statutes is just that – an illusion. If one simply but incautiously puts them together, disregarding their difference of function, one may erroneously allow the class of persons who can seek partition to become as inflated as the class of those who may be compelled to “suffer” it, and this in turn will result in partition or sale being made available to all sorts of persons who were never intended to have access to these remedies.

It will be obvious, though, that whatever the dangers their drafting presents, these two “pairs” of sections, in Ontario and Manitoba, lie at the core of their respective statutes, and define and encapsulate the courts’ jurisdiction in these provinces. It will be necessary to return to them presently in examining the case-law which they have provoked. But first, a brief digression seems to be called for.

III. THE SLOW DAWNING OF DISCRETION AND THE QUESTION OF ONUS

It will be obvious that the two “pairs” of sections isolated above not only define the jurisdiction of the courts, but affirm its essentially permissive character, as involving some measure of discretion. Thus in s 19(1) (Manitoba) and s 2 (Ontario), the persons listed “may be compelled to make or suffer partition...”. This reflects an important change in the law. In Ontario, as late as 1869, the *Partition Act* of that year had been expressed in mandatory language.³⁷ The

³⁶ “All persons (Man) [all parties, Ont] interested in, to, or out of any land” in the passive provisions of the respective statutes: “Any person interested in land” in their active provisions.” The inexact correspondence of the passive and active texts was commented on by Judge Kingsmill in the early Ontario case of *Rody v Rody*, *infra* note 85.

³⁷ *Supra* note 30.

defendant (or otherwise opposing) parties “shall and may be compelled to make, or suffer partition or sale,” it said. But by 1877, the words “shall and” had been erased, and the reading now declared that the affected parties “may be compelled”,³⁸ language of an incontrovertibly permissive and non-mandatory character. But s 28 of that same revised statute was in the old “shall and may” language. In short, the 1877 statute was internally self-contradictory. Not until 1913 was a new Act,³⁹ introduced, and the repugnancy eliminated. Ever since 1913, the Ontario *Partition Acts* have consistently stated that the Court “may” order partition. And while for decades there were contrary views expressed by some distinguished Ontario judges⁴⁰, professing that they had no discretion to deny partition or sale when petitioned for such remedies, the whole matter was finally put to rest by an elaborate and careful judgment of the Ontario Court of Appeal in *Re Hutcheson and Hutcheson* in 1950⁴¹. The Court’s discretion in matters of partition and sale was finally and emphatically confirmed, and has been a lively source and focus of disputation and litigation ever since.

In Manitoba, too, this issue of discretion was long in doubt. Manitoba’s first “home-grown” *Partition Act*, in 1878⁴² used the old “shall and may” language, like its Ontario original and counterpart, and was certainly mandatory in character. And it is curious to note how the legislative and judicial history of this issue “tracks” the experience in Ontario. Just as the “shall and may” language of Ontario quietly shifted to the permissive “may” in the *Revised Statutes of 1877*, and just as the Ontario judiciary long clung to their posture of “no discretion” nonetheless, so in Manitoba we find McPherson C.J.K.B. in *Szmardo v Szmardo*⁴³ still refusing to acknowledge that he has any discretion to refuse partition, even though nine years previously, (during the “migration” of the province’s partition statute into the *Law of Property Act*),⁴⁴ the “shall and may” formula had been covertly transmuted into “may”. “Partition”, said the learned Chief Justice, “is a matter of right” to which one might fairly add the caveat “Provided that he who seeks it has *locus standi* to do so.” That standing was not established on the facts in the later case of *Wimmer v Wimmer*,⁴⁵ but the “discretion” point was touched upon. Major J at first instance seemed inclined to follow *Szmardo*, and the Court

³⁸ RSO 1877, c 101, s 4.

³⁹ RSO 1914, c 114.

⁴⁰ See *Byall v Byall*, [1942] 3 DLR 594 (Ont H Ct J); *Morrison v Morrison* (1917) 39 OLR 163, 34 DLR 677 at 686 (Ont SC, AD); *Dickson v Dickson* [1948] OWRN 325 (Ont H Ct J).

⁴¹ [1950] OR 265, [1950] 2 DLR 751 (Ont CA).

⁴² *Supra* note 29.

⁴³ [1940] 47 Man R 397, [1940] 1 DLR 222 (Man KB).

⁴⁴ As mentioned *supra* note 31.

⁴⁵ 35 Man R 232, [1947] 1 WWR 734 (affirmed 55 Man R 232 at 240, [1947] 2 WWR 249).

of Appeal found it unnecessary to decide the point. Not until *Fritz v Fritz* (1949)⁴⁶ did a divided Court of Appeal make it clear that the Manitoba statute now conferred a statutory discretion to deny to a petitioner (otherwise qualified to petition for it)⁴⁷ an order for partition or sale. A few years later, in *Klemkowich v Klemkowich* (1955)⁴⁸ Freedman J (as he then was) expressed this view as being beyond debate, noting only that “the principles in accordance with which that discretion should be exercised have not been adumbrated with finality.”

And so it was, that after many travails, both in Ontario and Manitoba, it came to be universally accepted that the jurisdiction to grant partition or sale in these provinces is discretionary. No case decided in Manitoba since then has disputed this, but mysteries remain. On whom does the burden of persuasion lie, when partition or sale is sought? And what considerations, conventions or rules, if any, exist to guide the judge in the exercise of his or her discretion?

As to the latter question, I propose as indicated earlier to say very little, though I have reason to hope that in the near future, another article will appear in this journal, examining the pattern of decision-making in relation to partition and sale decisions, and reflecting upon the considerations of policy and justice which should inform them, especially in the critically important context of family law. For now, I would just observe that in the leading case of *Winspear Higgins Stevenson Inc. v Friesen*,⁴⁹ a very strong Manitoba Court of Appeal declined resolutely to fetter its discretion by the pronouncement of any rigid rules. That posture, still maintained, is one of the few constants in this area of the law.

But again, what of the burden of persuasion? Here again, obscurity descends upon us. While continually reiterating the mantra that it is always a matter of discretion anyway, and that the relief sought will not be granted where to do so would be oppressive or vexatious, or where the applicant does not come to court with “clean hands”, there is only a tendency to say that otherwise, partition or sale should be ordered “if there is a *prima facie* right to it”. This unhelpful proposition seems to have originated in a reference, in the Ontario case of *Szuba v Szuba*,⁵⁰ to the august authority of Willes J in *Lee v Bude & Torrington Junction Railway Co.*;⁵¹ a case which had nothing to do with the partition and sale of realty, and was decided at a time when in England as elsewhere orders of partition were not

⁴⁶ 57 Man R 510, [1950] 2 DLR 104.

⁴⁷ There had been cases in which the rights of the petitioner were not such as to justify his status as such, and where it was accordingly determined that his claim to partition was not “as of right”: *Kluss v Kluss* (1948), 55 Man R 460, was a case of this kind, but did not address, as *Fritz* was to do, the vexed issue of whether the statutory jurisdiction inherently invested the judge with discretion to grant or deny partition or sale on the general merits of the case.

⁴⁸ 63 Man R 28, 14 WWR 418.

⁴⁹ (1978) 5 RPR 81, [1978] 5 WWR 337.

⁵⁰ (1950), [1951] 1 DLR 387 at 389, [1950] OWN 669.

⁵¹ (1871), (1870-1871) LR 6 CP 576.

matters of discretion anyway, under the governing statute. Under the influence of Willes J's very generalized dictum, Manitoba courts have seemingly created this doctrine that in the absence of oppression, vexation or "dirty hands", an applicant is entitled to the order he seeks "if he has a *prima facie* right to it": see *Shwabiuk v Shwabiuk*;⁵² *Klemkovich v Klemkovich*;⁵³ *Fetterly v Fetterly*;⁵⁴ *Leippi v Leippi*⁵⁵ and *Winspear Higgins Stevenson v Friesen*.⁵⁶ No doubt the list might be further extended, and an equal or greater litany of Ontario cases cited to the same effect.⁵⁷ But however numerous and weighty the authorities, we may reflect that they rest upon a frail basis, and seem (with respect) question-begging and obscure. The question they beg is precisely this – who has a *prima facie* right to partition or sale? Unless we can answer that, there is surely an element of circularity in the analysis: "the burden of persuasion is on him who would resist the claim of the remedy to someone who has a *prima facie* right to it."

When we look at the cases which seek to apply this gnomic and unsatisfying precept we find that in truth the "*prima facie* right" seems to be co-extensive and synonymous with the right or *locus standi* to make the application; that is, there is no-one who is within the category of persons indicated by s 20(1) of Manitoba's *Law of Property Act*⁵⁸ who is not thereby invested with a "*prima facie* right" to that which he seeks. To assert the proposition in yet another way, the advantages in terms of the burden of persuasion will be accorded automatically to anyone who has status under the Act to take proceedings for partition or sale. It will be for the defendant to put his or her best foot forward, if partition or sale in lieu thereof is to be averted.

IV. TAKING STOCK: THE LEGAL LANDSCAPE CIRCA 1880

If we now return to the point at which our historical account was interrupted by the foregoing digression, we find ourselves in the year 1880, or thereabouts. Both Ontario and Manitoba have their own, recently overhauled or recently enacted partition statutes, apparently "Canadian made" and very similar in their wording; small wonder, for the Manitoba *Partition Act* is largely and avowedly copied from its Ontario counterpart. Both statutes confer jurisdiction to order either partition, or sale in lieu thereof, with subsequent division of the proceeds.

⁵² (1965), 51 DLR (2d) 361, 51 WWR 549 (Man CA).

⁵³ *Supra* note 48.

⁵⁴ (1965), 54 DLR (2d) 435, 54 WWR 218, (Man QB) Wilson J.

⁵⁵ [1977] 2 WWR 497, 30 RFL 342, (Man CA).

⁵⁶ *Supra* note 49.

⁵⁷ Such a list, indeed, is provided for us by Wilson J in *Fetterly v Fetterly*, *supra* note 54 at 221.

⁵⁸ *Supra* note 4 at 20(1).

Both adopt the strategy of defining the incidence of these remedies by setting out, in separate, crucial sections, who may petition for partition or sale; and who may be compelled to undergo or “suffer” those processes, whether they like it or not. While it is true that the Ontario law has (very recently) made these avenues of redress discretionary, while Manitoba has yet to make that change, the critical provisions are almost as like as two peas in a pod; both ascribing *locus standi* for seeking partition to “any party interested” in the affected land, and decreeing that “all parties interested in, to or out of” that land may be compelled to undergo partition. A number of inquiries and observations suggest themselves.

First, where does this format, and its curious language, both in the Ontario and Manitoba statutes and their successors, come from? In Manitoba, at the time of which we are now speaking, the answer is easy enough. The “any person interested” phraseology is right there in the *Partition Act*, 1878⁵⁹ the province’s very first “locally-produced” legislation on the subject. This phrasing (in s 5) is drawn directly from the then-current provision in Ontario,⁶⁰ re-enacting with minor semantic corrections the *Partition Act* of 1869.⁶¹ But that is not the end of the matter. If we go back into the Ontario legislation *prior* to 1869, the track becomes fainter and muddier. The *Partition Act* of 1859⁶² says that partition may be sought by “Any joint tenant, tenant in common, or co-parcener”, and later observes that upon an intestacy “Any one or more persons entitled to a share or interest in ... land and the immediate possession thereof” may seek such partition or sale.” Whatever problems of interpretation this rambling provision may suggest, there is nothing in it to dictate that the sole owner of an undivided estate in land may seek partition; and certainly nothing to encourage belief that a remainderperson or anyone else lacking immediate possessory rights might do so. The 1859 provision is modelled in turn on s 2 of the 1857 *Rights of Primogeniture Amendment Act*⁶³ which is equally “difficult”.

Alas, the difficulty does not end there. In the Ontario case of *Murcar v Bolton*⁶⁴ discussed later in this paper, Armour J (as he then was), in his dissenting judgment, declares *à propos* of nothing in particular that the 1857 Act of Upper Canada,⁶⁵ which as noted above was shortly to be incorporated in the *Partition Act* in the Consolidated Statutes of 1859,⁶⁶ was “largely transcribed” from the

⁵⁹ *Supra* note 30.

⁶⁰ *Supra* note 36 at s 8.

⁶¹ SO 1869, c 33, s 6.

⁶² SC 1859 (22 Vict), c 86, s 6.

⁶³ SC 1857 20 Vict c 65.

⁶⁴ (1884), 5 OR 164 [*Murcar*].

⁶⁵ SC 1857 (20 Vict) c 65.

⁶⁶ CSC 1859 (22 Vict), c 86.

Partition Act of the State of New York;⁶⁷ and that the decision of the Court of Appeals of New York in *Blakeley v Calder*⁶⁸ may cast further light on its meaning. If this American statute indeed represents the true *Urschrift* or inspiration of the later Ontario partition statutes (and by extension, those of Manitoba too), it deserves, surely, the closest attention. But I regret to report that examination of the New York revised statute discloses no evidence of anything that could be called “transcription”, nor any congruencies of language which suggest anything more than coincidental (and not particularly intimate) similarities of expression. Nor does *Blakeley* (casually mentioned again in the much later Manitoban case of *Chupryk v Haykouski*)⁶⁹ help our understanding much. Rather than protract this digression further, and endanger the cogency of the main argument, I have adopted instead the strategy favoured in American law journals, and consigned the whole issue to an enormous footnote.⁷⁰

Another general observation which might well have been made in or around 1880, would be along these lines: with respect to partition or sale, Ontario and Manitoba now have almost identical statutes, and each province offers a judicial power of ordering sale of the real estate, if a sufficiently interested party asks for such a measure to be directed. That, contemporaries might have said, makes two co-existing statutes on the books in our respective provinces, enabling such forced

⁶⁷ 2 RS, title 3, pp 315 ff.

⁶⁸ 15 NY 623, 1 EP Smith 617, (1857) [*Blakeley*]

⁶⁹ (1980), 110 DLR (3d) 108, 3 Man R (2d) 216, [1980] 4 WWR 534 [*Chupryk*].

⁷⁰ Volume II of the Revised Statutes of New York represents part of a more general programme of codification, ambitious in scope, enacted by that state during the years 1827-8. Title 3, addressing “The Partition of Lands owned by Several Persons”, is lengthy, elaborate and meticulous. It may very well have been used as a source of ideas for Ontario’s statute of 1857, but it was nothing more – certainly it was not “transcribed”, and the key provision (s 1), governing “Who may apply” [for partition] and to what courts, is explicit in confining that entitlement (a) to joint tenants or tenants in common; and (b) to persons who as such are “in possession of any lands, tenements or hereditaments”. There is no use of the Ontario (or Manitoba) phraseology which speaks of applications by “any person interested” in the land, and nothing to encourage so expansive an interpretation. Recorded cases upon the statute, such as *Brownell v Brownell*, 19 Wend 367, (1838 SCNY), show partition being refused, in deference to the statute, to persons who cannot show a right to immediate possession. As for the case of *Blakeley v Calder*, *supra* note 68, on which Armour J seems to rely in *Murcar* to support his position, it may be noted that [i] he relies solely upon the opinion on this issue of Denio CJ, who found himself in a minority on this particular point; [ii] Denio CJ’s thesis was founded upon a heterodox theory of possession, which would accord possessory rights to any vested remainderperson; and [iii] the entire discussion was *obiter*, the whole Court of Appeals concurring in a *ratio decidendi* which declared that if an order of sale had been made, at the suit of a remainderperson, then whether that order was supportable in law or not, its very existence would give a good title to the purchaser at such a sale, who could not, therefore, properly refuse to complete his purchase. All in all, *Blakeley* represents a frail support for the dissenting opinion of Armour J in *Murcar*, and none for the Manitoba Court of Appeal’s judgment in *Chupryk v Haykouski*, extensively discussed hereafter. In short the “New York connection” is a classic red herring.

sales on the application of people sharing the real estate. Two? Yes, for long before any Canadian partition statute was ever enacted, there had been *Settled Estates* legislation to be taken into account. A strange little procession of these statutes under a variety of titles and gradually expanding in scope, may be traced in the English statute book from the early 1800s onwards, and all had the same basic function. They were designed to enable the holders for the time being of limited interests in land (almost invariably life tenants) to deal with the fee simple title to the land (which *ex hypothesi* they lacked) in such a way as to “bind the remainderman”, and “saddle” him with the results of such transaction – which might, for example, be a lease of the land for a term of years, or an outright sale of the fee simple title. In cases where these *Settled Estates* Acts applied, the remainderman might find himself “stuck”, after the life tenant’s death, with whatever was left of a lease granted to a third party by the lamented life tenant; or, in a more extreme case, made to content himself with money in lieu of the landholding he had hoped for, in consequence of the life tenant having sold the land with the permission of the Court under the *Settled Estates Act*.

The powers of sale and other powers of disposition conferred by *Settled Estates* Acts – some of which still exist in Canada – were always made available to the current life tenant, and no-one else: and it would (usually subject to judicial approval) avail him against his remainderperson or reversioner. In other words, they were designed to operate between and affect the rights of persons “sharing” the land by way of temporally consecutive estates – not, like *Partition Act* powers of sale as traditionally understood, between persons simultaneously sharing, spatially, a single estate.

A lawyer of the 1880’s would have well understood this divergence of functions between *Partition Statutes* and *Settled Estates* enactments: and might lightly dismiss any suggestion that any confusion of their functions, or any usurpation, by the *Partition Act* powers of sale, of the functions of *Settled Estates Act*, was seriously in prospect.

Yet it is my contention in this paper that this confusion or “slippage” of functions is precisely what threatened to happen in Ontario in the late Victorian period, and ultimately has happened, more recently, here in Manitoba;⁷¹ and the consequences are with us still.

The reason for this confusion is not just that lawyers have at various times “taken their eyes off the ball”, or exploited judicial inattention for their clients’ ends. Rather it lies in the extraordinarily broad language used in the key provisions of both the Ontario statutes and Manitoba’s (right from the original

⁷¹ The “take-off” point for this faux pas, as I see it, is the judgment of the Manitoba Court of Appeal in *Chupryk v Haykouski*, and the story is more fully recounted in my earlier note in this journal, “Unsettled Estates: Manitoba’s Forgotten Statute” etc.

1878 version). Just look again, if you will, at the key words of the current (2011) Ontario and Manitoba statutes, as set out above in section II.

Taking, for the sake of argument, ss 19(1) and 20(1) of Manitoba's current partition-and-sale provisions, as there set out; and taking their language at face value – especially those “all” or “any persons interested” phrases, is it unduly fanciful, or at all cynical, to suggest that informally expressed they should be construed as “Anyone with any interest whatever in land, great or small, undivided or partial, in possession or in remainder, and whether or not amounting to a freehold estate in the land, may seek partition or sale and, subject to the discretion of the Court, succeed in that application against anyone else who may claim any “interest” in that land as defined just as compendiously”?

If that is the law, then those who advocate it should realize that no-one (except a sole holder of a fully vested fee simple absolute in possession) can ever claim to enjoy any interest in land in Manitoba that is not subject to partition or conversion into money at any time, at the suit of any other person who can point to his or her entitlement to some other interest, however trivial, in that same property. In the last analysis, under such a regime, only the discretion of the judiciary keeps the sword of Damocles suspended in the air. Can it really be that this was the intention of the Ontario and Manitoba legislatures? Yet this is the inescapable result of adopting what I shall call the “plain meaning” perspective upon the extremely expansive wording of the “entitlement to sue” provisions of the partition and sale statutes of both provinces.

Against that (to some, alarming) approach, one might argue for what I shall call the “essentialist or historical” perspective. Instead of taking the stark language of the statute at face value, this approach construes it in light of the historical background against which the statutes were composed, and accords to certain of its words – the word “partition” in particular – a specific and technical meaning which, it is inferred, has so long been associated with that expression as to become part of its essential or “core” meaning. On this view, the remedy of partition means not, as the uninitiated might suppose, just a spatial division or parcelling out of land between two or more people. It means a remedy sought by one person, presently sharing possession of an interest in that land with another, who is the defendant. On this view, in its most uncompromising formulation, partition (or sale in lieu thereof) can only be sought by one who is presently in occupation of the realty, or is at least entitled to such immediate possession of it, as a joint tenant or tenant in common with the person who now opposes him.

A less dogmatic version of this approach would not insist that the claimant be a joint tenant or tenant in common, but would insist at least that the claimant show an immediate possessory right, in some capacity.

V. SO WHAT IS THE LAW?

Before expressing any concluded opinion as to which of these two (or three?) divergent perspectives is correct, it might be wise to ask ourselves a few hard questions.

Can the wording of the Manitoba and Ontario statutes now under scrutiny possibly be taken to “mean just about what it says”? If it does, it represents a dramatic departure, first, from the position generally prevailing, to this day, in the rest of Canada; and secondly, from the law as anciently developed in England, and universally applied in the common law world in the days before these statutes were enacted. Both these assertions on my part may seem to call for explanation and justification, which I shall now attempt.

As to the former proposition, I shall simply cite the summary given by Professor Bora Laskin (as he then was) in the 1964 edition of his text “Cases and Notes in Land Law”:

It has been held that an applicant for partition under the general run of legislation in the common law provinces must have an estate in possession or have the immediate right to its possession; hence a registered judgment creditor of a joint tenant has no standing to seek partition (see *Morrow v Eakin* [1953] 2 DLR 593, 8 WWR (NS) 548 (BC)), nor has a claimant of a legacy charged on land (see *Re Fidler and Seaman*, [1948] 2 DLR 771, [1948] OWN 454), nor has a widow who is entitled to dower out of the land held in co-tenancy (see *Morrison v Morrison* (1917), 39 OLR 163, 34 DLR 677 (App Div)), nor has a mortgagee of a co-tenant who is still in possession (see *Mulligan v Hendershott* (1896), 17 PR 227 (Ont)) In so far as partition legislation in Canada may be invoked only by persons in possession or entitled to immediate possession, neither reversioners nor remaindermen who are co-owners of such interests may seek partition either against an existing tenant for life, in any event because there is no co-tenancy with a life tenant (see *Murcar v Bolton* (1884), 5 OR 164) or as against each other (see *Morrison v Morrison*, *supra*), even though there is no intention to disturb an existing life tenant (see *Bunting v Servos* [1931] OR 409, [1931] 4 DLR 167 (CA))⁷²

As to my second assertion, that the traditional stance of the whole law, prior to these statutes, is seemingly challenged by the language of the modern Ontario and Manitoba statutes, I must say a little more.

Whatever may have been its other shortcomings, the old writ *de partitione facienda* was admirably clear as to its function and range of application. As Sir Edward Coke put it “It is to be observed that the words of the writ *de partitione facienda* be “*quod cum eadem A et B insimul et pro indiviso teneant tres acras &*”;⁷³ this meant, he explained, that to claim partition, one must be (a) a tenant in

⁷² Bora Laskin (as he then was), *Cases and Notes in Land Law*, rev ed (Toronto: University of Toronto Press, 1964) at 402 [emphasis added]. We shall look at some of the cases cited *inter alia* later. The phrases emphasized by me show the acuteness with which the learned author deliberately accommodates and reserves comment on the Manitoba and Ontario positions.

⁷³ Coke on *Littleton*, *supra* note 7, Co Litt Lib 2 167.

possession of a freehold estate, and (b) be sharing that estate simultaneously (“*insimul*”) with the other co-owner or co-owners. It is clear that this understanding, familiar to Littleton in 1481, had by Coke’s day been challenged, unsuccessfully but with sufficient frequency to generate and define a recognized plea of “*non tenet insimul*”, when, for example, a sole estate holder, or the holder(s) of an estate not yet in possession, sought an order of partition. As we shall see later, this plea – and the very conception of partition which it embodies – seem in some way to have faded from the collective memory of the profession in subsequent centuries and in some jurisdictions, and this had given rise – and still gives rise – to doctrinal confusion when disputants who are not currently in possession, and/or are not sharing such possession simultaneously, seek to invoke the statutory remedies of partition or sale. The reasons for this error – if it be such – probably relate (a) to the universal decline or de-formalization of the strict arts of pleading; (b) the often imprecise, even nebulous language of “modern” partition statutes; and (c) a felt need to challenge the ancient limits of the partition concept, in light of the protracted absence of what we would nowadays call “Settled Estates” or “Settled Land” legislation, adequate to deal with the dissatisfaction of consecutive (as distinct from concurrent) estate holders.

So we see that in England, as late as 1869, tenants in common of a reversionary interest, not yet in possession, were told by Lord Romilly MR that they lacked status to seek partition or sale.⁷⁴ As Mr. Jessel (as he then was) put it in argument, “At law only a tenant in possession of the freehold could sue out a writ of partition; and equity follows the law in this respect.” And this was emphatically endorsed on appeal,⁷⁵ where Lord Hatherley LC reminded the profession of “the ordinary rule that the Court will not allow a partition suit to be maintained by a reversioner. This rule is not merely technical, but is founded on good sense in not allowing the reversioner to disturb the existing state of things.”⁷⁶

Other cases, illustrative of the “old” law’s insistence that a petitioner for partition or sale be able to show an interest “in possession”, might easily be cited. In the English case of *Dodd v Cattell*,⁷⁷ the reversioner upon a lease with nearly 1000 years left to run should not have been surprised that Warrington J declined

⁷⁴ *Evans v Bagshaw*, (1869) LR 8 Eq 469.

⁷⁵ *Evans v Bagshaw*, (1870) LR Ch App 340.

⁷⁶ *Ibid* at 341. As Mr W R Pepler points out in his valuable article “Partition – A Survey of the Law in Alberta” (1977) 15 Alta LR 1 at 4. Meredith CJCP was to make the same point some years later in *Morrison v Morrison* (1917), 39 OLR 163 at 173, 34 DLR 677 at 684, (Ont CA), explaining “Partition is a remedy only available to those who need it.” “In other words”, Pepler explains at 4, “those in possession.” Yet in Canada, there are cases, as we shall see presently, where in supposed reliance on provincial statutes, this rule has been challenged (see *Murcar v Bolton*, *supra* note 64): or flatly disregarded (see *Chupryk v Haykowski*, *supra* note 69, and *Aho v Kelley* (1998), 57 BCLR (3d) 369, 24 ETR (2d) 156, (BCSC).

⁷⁷ [1914] 2 Ch 1.

her invitation to order partition or sale.⁷⁸ Mortgagees of shares however, have on occasion been acknowledged to have a right to seek partition or sale, provided that they first acquire, by foreclosure or otherwise, the right to immediate possession of the land.⁷⁹ Similarly, in some jurisdictions it has been held that judgment creditors may seek partition if, and only if, their efforts to realize upon the judgment debt have reached the point where possession of the debtor's share has been gained.⁸⁰ Other potentially contentious fact-situations might easily be imagined. But all discussion in this area is potentially confounded by a number of variables – as to the question of whether the plaintiffs' right to immediate possession is an indispensable prerequisite, the Canadian Law is almost⁸¹ uniform. But as to whether the claimant must also be a co-owner, in the sense of sharing "insimul" the estate to be divided or sold, the picture is confused by differences between the statutes of various jurisdictions. And often too, as in cases advanced by persons seeking orders of sale to realize upon their as yet inchoate dower rights, the answer may of course be determined not by the partition legislation of the province, but rather by the particular directions of its dower or homestead legislation.⁸²

Returning once more to the wording of the Ontario and Manitoba statutes, it must be acknowledged once again that their expansive and imprecise wording; and in particular their failure to define who is a "person interested in land"⁸³ have created that dichotomy of views, or antithesis of perspective, as to how the statutes of these two provinces should properly be construed and applied. Those conflicting perspectives, the "plain meaning" approach, and the "essentialist" approach, must now be examined in the context of the reported case-law over the years.

VI. CONFRONTING THE CASE-LAW

It may perhaps be thought remarkable that so stark a difference of perspectives, on so fundamental an issue, would for decades remain unresolved and indeed unaddressed by the courts of Canada's most populous province. Yet really we should not be surprised, for, then as now, the great majority of partition

⁷⁸ Though he also refused her application because she was neither joint-tenant, tenant-in-common, nor coparcener.

⁷⁹ *Fall v Elkins* (1861), 9 WR 861.

⁸⁰ *Re Craig* (1929), 1 DLR 142 (Ont SC).

⁸¹ The most blatant contradiction of it lies, unfortunately, in the leading Manitoba case of *Chupryk v Haykouski*, extensively discussed later in this paper.

⁸² A particularly valuable analysis of who may demand partition generally, which illustrates all these variables in play (and just about every imaginable fact-situation) is to be found in Pepler, *supra* note 76, at pp 4-8 inclusive.

⁸³ *Supra* note 34 at s 20(1), and note 35 at s 3(1).

suits are, one suspects, straightforward conflicts between concurrent owners of a fee simple in possession; and one may readily believe that in most other cases, a peaceable solution by agreement may be arrived at, and costly litigation avoided, which might have put in issue and perhaps resolved the more challenging legal difficulties.

In the event, it must be admitted that the debate in Ontario, once litigants and judges had attuned themselves to the outwardly astonishing breadth of the “new generation” of partition legislation from 1869 onwards, got off to rather a bad start. Widows whose dower rights were as yet unassigned, but who were impatient to realize upon their rights, sought to circumvent the delays of the dower legislation⁸⁴ by application for partition, (or more frankly, for sale in lieu of partition) under the then current Ontario *Partition Act*.⁸⁵ Even now, reading the case-law of that era, the discomfiture of the Ontario judiciary, seeking to reconcile these statutes, can be clearly sensed. The issue clearly provoked real differences of opinion. The quality of the reports and, one fears, of the judgments they purport to reflect, is variable. In *Rody v Rody*,⁸⁶ we are treated to a meticulous and learned analysis⁸⁷ of the problem, and a doweress whose dower had not yet been assigned was denied partition on the twin grounds, apparently, that she was (a) not in any sense a concurrent owner; and (b) that her “interest” was not in possession. In 1883, we encounter *Lalor v Lalor*,⁸⁸ a case so inadequately reported that the divination of its facts is itself a challenge, and the legitimacy of its ratio (and its headnote too) accordingly a matter of speculation. Again, it was an action by a doweress who was also a life tenant in the share of a child who had predeceased her. Proudfoot J declared that whatever rights she had as a doweress, she was certainly entitled as a life tenant to seek partition. So the headnote baldly states “A tenant for life is entitled to a partition.” But all the internal indicators, such as they are, suggest that she was only a tenant in-common of the life estate, not a sole owner thereof. *Gaskell v Gaskell*,⁸⁹ the only case cited in support of the judgment, was a case of that kind, and as such frankly uncontroversial, since co-holders of a life tenancy, as we have seen, had been entitled to seek partition for the duration of that estate ever since King Henry VIII’s statute of 1540.⁹⁰ I labour the point

⁸⁴ Notably the *Dower Procedure Act*, SO 32 Vict c 7, incorporated into RSO 1877 c 55.

⁸⁵ *Supra* note 36.

⁸⁶ (1881), 1 CLT 546.

⁸⁷ By Judge Kingsmill of Bruce County, who sets an example in scholarship which later judges at more elevated levels would have done well to follow.

⁸⁸ (1883), 9 PR 455, (Ont HC).

⁸⁹ (1836), 58 ER 735, 6 Sim 643 (Ch).

⁹⁰ *Supra* note 13. The view here taken, I am pleased to see, is shared by Dupont J in the later Ontario case of *Morris v Howe* (1982) 38 OR (2d) 480, 138 DLR (3d) 113 (Ont HC), discussed *post*.

because of the unqualified and to my mind inflated effect accorded to this case by the Manitoba Court of Appeal in *Chupryk v Haykowski*, which will be discussed shortly.

Devereux v Kearns,⁹¹ a decision of Ferguson J, is said by its headnote-writer to have “overruled” *Rody*, and to have held that a doweress, though her dower still be unassigned, was entitled, under the statute, to seek partition, since she was a “party interested in the land” within the meaning of section 8, giving the statute its “fair and obvious meaning”. The language of Ferguson J in relation to the *Rody* decision is language of politely deferential disagreement, to be sure. But the real mystery of the case is how Ferguson J escapes the clear implications of the then-recent judgment of his own Divisional Court in *Murcar v Bolton*,⁹² to the effect that remaindermen cannot seek partition against a sitting life tenant. As it was, the case of *Fisken v Ife* in 1897,⁹³ as discussed below, must surely be regarded, in retrospect, as having implicitly overruled *Devereux v Kearns*.⁹⁴

While the differences of judicial opinion as to the scope of the statutory partition remedy were obvious just “below the surface” in these dower cases, they really come into the open most starkly in the still-important case of *Murcar v Bolton*,⁹⁵ which divided a Divisional Court of the Ontario Court of Queen’s Bench in 1884.

Murcar, which was the first appellate ruling of the Ontario courts germane to the ambit or scope of the statutory jurisdiction in partition, only made its appearance in 1884, and disclosed sharp differences of opinion in a strong Divisional Court of the Queen’s Bench Division. The facts were simple enough. A Crown grant had conferred upon Flora Bolton, the defendant, a simple and undivided life estate, with remainder to the defendants, her five children, in fee simple. Eight years later, with Mrs. Bolton quietly in possession of her life estate, the children (tenants-in-common of the remainder) were seeking an order of partition or sale, to dispossess her. A County Court judge, relying on the version of the Ontario *Partition Act* then in force,⁹⁶ ordered the sale; and the widowed mother of the petitioners appealed.

The majority judgment (by Hagarty CJ, Cameron J concurring) was short and lucid. They allowed the appeal, assuring Mrs. Bolton that she could remain in her house, and that her children would not be allowed to unseat her. With thinly disguised outrage, the judges observed that “no such proceedings would have been

⁹¹ (1886), 11 PR 452, (Ont HC).

⁹² (1884), 5 OR 164, [1884] OJ No 211 (available on QL) (Ont HC) [*Murcar*].

⁹³ (1897), 28 OR 595, (Ont Div Ct).

⁹⁴ Which, incidentally, had already provoked an embarrassing and ill-concealed difference of opinion in the Divisional Court ten years earlier in *Fram v Fram* (1887), 12 PR 185 (Ont CA).

⁹⁵ *Supra* note 93.

⁹⁶ *Supra* note 35.

entertained for a moment in England, since there it had long been axiomatic that “only persons entitled to an estate in possession could maintain a suit therefor.”⁹⁷ Nothing in the Ontario statutes, they said, should be considered as altering that position, for “of what is there to make partition? There is no common interest or possession between [the mother] and those in remainder.”⁹⁸ Acceding to the arguments of the children in this case would have left each and every holder of a life estate or other limited interest exposed to the threat of being ousted at any time by remaindermen. The court held that despite the unguarded language of the statute, it should be read as extending the remedy of partition or sale only to those enjoying (or entitled to enjoy) immediate possession of the land.

We are brought directly to meet the proposition that the Legislature have in a manner (to say the least of it) most indirect and inferential only, declared that an estate for life specially granted to an individual may be lawfully sold on the application of parties with whom she has no common estate or interest whatever, her possession and personal interest of it destroyed, and money presented to her in lieu thereof.⁹⁹

The children’s claim, thus understood, was entirely unsupportable. Yet Armour J, in dissent, would have supported it and affirmed the order below. In a long and intermittently interesting judgment, his Lordship relates the statutory history of partition and sale in Ontario and concludes (not without some ingenuity) that since 1857, the “persons interested” sufficiently to advance a partition suit need not show an immediate right to possession, but would include anyone with a vested remainder or reversion. He would thus have affirmed the order for sale made below, in deference to what he considered the plain meaning and intent of the currently prevailing Act.

In fairness to Armour J’s view, it must be conceded that the breadth of s 8 of the (then) statute does, on its plain meaning, seem adequate to embrace the claim of a remainderperson. To say that “Any party interested in land” does not include a remainderperson is startling to those who spend their professional lives explaining to students that a non-contingent remainder, “vested in interest”, is indeed a present right to the future possession of the land.

That said, the majority ruling in *Murcar* has never, to the best of my knowledge, been challenged by any later Ontario court. In 1897, the case of *Fisken v Ife*¹⁰⁰ gave the Queen’s Bench (represented, interestingly, by Armour CJ) an opportunity to deal with the converse of *Murcar*. This time, instead of the remaindermen seeking partition or sale against the life tenant, this case involved a life tenant (with a fractional share in the remainder) seeking partition or sale

⁹⁷ *Murcar*, *supra* note 92, at para 50.

⁹⁸ *Ibid* at para 84.

⁹⁹ *Ibid* at para 107.

¹⁰⁰ *Supra* note 93.

against the remainderpersons. Armour CJ, as he now was, refused, and a strong Divisional Court (Boyd C, Ferguson and Meredith JJ) affirmed his ruling.

Chancellor Boyd, for the Court, gave the plaintiff tenant-for life (technically, a tenant *pur autre vie*), very short shrift. The governing statute, he explained,¹⁰¹ was not intended to give *locus standi* to life tenants in possession to seek physical partition or sale of the land as a whole over the objection of reversioners. The case was just a converse of that in *Murcar v Bolton*, and as such, hopeless of success.

This answer, consistent with the *Murcar* ruling, amounts to this – that only co-owners presently sharing possession a such can seek partition; not successive estate holders, whether it be a life tenant seeking partition against a reversioner or remainderperson (*Fisken*) or *vice versa* (*Murcar*).

It is no doubt because of its tantalizing brevity – or at least, that of its only available report – that the little case of *Re Asseltine*¹⁰² seems to have escaped comment, judicial or otherwise, in later years. Like *Murcar*, this case involved a group of persons (nephews and nieces of their adversary) who were collectively entitled to a half-interest in remainder, and now sought an order of sale against their aunt as life tenant.¹⁰³ The case was advanced upon alternative bases: (a) under the recently enacted *Settled Estates Act* of Ontario, 1895¹⁰⁴ and (b) under the then-current version of the *Partition Act* of that Province.¹⁰⁵ Ferguson J rejected both arguments: the former because the powers of disposition conferred by the *Settled Estates Act* were explicitly given only to life tenants, not remaindermen; the latter because only persons in possession could advance their claims (per *Murcar*) under the *Partition Act*. The case is worthy of remark, and I think admirable, in that both statutes were put forward, with no attempt to conflate them, and the requirements of each duly considered. Such precautions, and the very awareness of the settled estates legislation, had been conspicuous by their absence in the *Murcar* and *Fisken* cases.

The next case in the sequence was really that of the Appellate Division of the Ontario Supreme Court in *Morrison v Morrison*, in 1917.¹⁰⁶ In this case, Mrs. Morrison, a widow, entitled as such to claim a life estate in her late husband's lands by way of dower, was seeking partition of those lands as against his other heirs-at-law (the dead man's brother, sisters and other close relatives). But at the time of her application, she had not yet made her election as between her rights

¹⁰¹ Now the *Partition Act*, RSO 1887, c 104.

¹⁰² (1902), 1 OWR 178.

¹⁰³ An even more speculative claim of the same type was advanced two years later, and dismissed with equal brevity by Falconbridge CJ, in *Rajotte v Wilson* (1904), 3 OWR 737.

¹⁰⁴ SO 1895, c 20. It was re-enacted as RSO 1897, c 71.

¹⁰⁵ RSO 1897, c 123.

¹⁰⁶ (1917) 34 DLR 677, 39 OLR 163 (Ont SC, App Div) [*Morrison*].

under the *Dower Act* and the general intestacy statute.¹⁰⁷ As such, she had no immediate right to possession and for that very reason alone, said the Court, had no right to compel partition under the *Partition Act*. The observations of Meredith CJ later in his careful judgment that Armour J had been wrong in his dissenting suggestion in *Murcar* that a remainderman still out of possession might compel partition are entirely consistent with that answer.

The quite separate question, of whether only concurrent owners sharing a single estate, might seek partition (and not sole owners in consecutive-estate situations), did not arise in *Morrison*: for until such time as she made her election to be a life tenant under the *Dower Act*, or alternatively to be a tenant in common in fee simple with her present antagonists, no partition suit could be advanced by her in either of those capacities. Until then, the personal representative alone was entitled to possession, and no one had standing to seek partition.

For a few years after *Morrison*, all seemed settled in Ontario; but dissension reared its head again in *Bunting v Servos* in 1931,¹⁰⁸ when a rare 5-judge Appellate Court was called upon to decide whether the parties, a brother and sister who were remaindermen of a farm property, might have partition as to that remainder, even though their mother, the life tenant in possession, objected. The brother sought such a remedy; the sister objected that, lacking any immediate right to possession, the Court lacked statutory jurisdiction to entertain the suit, quite apart from the life tenant's opposition to it. The Court split 3:2 in affirming the order of the court below, and refusing an order for partition. Latchford CJ, Masten and Fish JJA all asserted that *Morrison* had correctly settled the issue, and that only persons entitled to possession of their shares in land could be entitled to partition. That disposed of the plaintiff's case. In dissent, however, Riddell and Orde JJA, clearly unpersuaded by the authority of *Murcar*, *Fisken* and their congeners, sought to distinguish them on the grounds that in the case at bar, the life tenant was at no risk of being turned out of possession or interfered with in any way. They added that the plain wording of the *Partition Act* was sufficient to grant standing to a "person interested in land" without any insistence that he be in possession. This is the clearest example in the books of Ontario judges taking the "plain meaning" approach to the statutory test. But it did not prevail, and partition was denied.¹⁰⁹

¹⁰⁷ *The Dower Act*, RSO 1914, c 70, and the *Devolution of Estates Act*, RSO 1914, c 119, respectively.

¹⁰⁸ [1931] OR 409, [1931] 4 DLR 167, (Ont CA).

¹⁰⁹ Some have felt, and feel still, that the majority ruling in *Bunting* is needlessly dogmatic, given that the life tenant did not face the prospect of disturbance in the enjoyment of her interest. That is the view of Dr. Heather Conway in her valuable work *Co-Ownership of Land: Partition Actions and Remedies* [London: Butterworths, 2000] esp. at 4: 25 (p. 51): she points out that *Aho v Kelley*, *supra* note 76, is of the same mind. Both Doctor Conway and the *Aho* case, however, are moved to their views not only by dissatisfaction with the rigidity of the orthodox position, but by

After *Bunting*, the dust was for some years allowed to settle on the law of Ontario, so far as this aspect of the law of partition was concerned. What is perhaps surprising is that quietude prevailed still in Manitoba, which, though equipped with virtually indistinguishable legislation (the present *Law of Property Act*, s 20(1) and its legislative precursors back to the original *Partition Act* of 1878) had produced not one single judicial reference to the issue through the entire *sturm und drang* of the Ontario debate. Then, in 1980, the moment finally came. In the celebrated case of *Chupryk v Haykowski*,¹¹⁰ the Manitoba Court of Appeal had its opportunity to weigh in upon the issues we have discussed.

The facts in *Chupryk*, and indeed its outcome, have a certain poignancy to them. Old Michael Chupryk was 87 and in poor health by the time the Court of Appeal delivered its judgment: and he had been embroiled in litigation for the previous six years. He was a widower, the courts having decided, not without some difficulty, that he was entitled under the *Dower Act* and his late wife's will to a life estate in the urban double lot which the couple had occupied, plus a one-third share in the remainder, the other two-thirds of that remainder being vested in Mrs. Haykowski (Mr. Chupryk's god-daughter and Mrs. Chupryk's first husband's niece). Mrs. Haykowski's son John was executor and trustee, but during the course of earlier litigation it was decided that he should be removed, and replaced by the Public Trustee. As a Parthian shot, on the eve of his removal, John Haykowski, properly or not,¹¹¹ divested himself of the common law title, and both Michael Chupryk and Mrs. Haykowski thus became common law holders of their respective interests.

The property itself was not an opulent one. It consisted of a double lot on Stella Avenue, half of which was largely occupied by a decrepit duplex building, formerly let to tenants, but now officially uninhabitable (though Mrs. Haykowski and her son had occupied it without paying rent for a while), and subject to outstanding work orders. At the rear of the other half of the property was a small stucco house where old Michael still lived. The value of the entire holding had been estimated in 1973 at about \$13 000, and was self-evidently a wasting asset.

Mr. Chupryk, however, had decided to show some initiative, and to raise the money needed – about \$4,500, he thought – to repair and refurbish the duplex and its rental units, and restore its income-producing capacity. To achieve this end, he proposed to mortgage the property as a whole: that is, the fee simple. But how? Mrs. Haykowski, the only other person with an interest in the property, was not in agreement with Mr. Chupryk's plan, and wanted the whole property,

the ruling of the Manitoba Court of Appeal in *Chupryk*, which I shall presently show to be heretical.

¹¹⁰ *Supra* note 69.

¹¹¹ The Court of Appeal took a dim view of his behaviour as trustee, but were perplexed as to what they might do to correct its consequences; which in the end proved ruinous for Mr. Chupryk.

duplex, little house and all, sold, with subsequent division of the proceeds. That was the substance of the present phase of litigation. By what mechanism, if any, could the life tenant Mr. Chupryk secure a mortgage for the fee simple over the objections of his remainderperson?

If the trust had been still in existence, an easy avenue would have been available to resolve the issue; for by what was then¹¹² s 60(1) of the *Trustee Act*,¹¹³ the Court of Queen's Bench had general powers to confer on any trustee the authority to make any mortgage or other disposition expedient for the good of the property. Indeed, by s 60(3) the appropriate application might be made by "any person beneficially interested" - but only if the property was "vested in trustees".

Where did that leave Mr. Chupryk, now that the trust had been erased? Could he still, somehow, gain access to the section 60 powers? In a judgment of great resourcefulness, Kroft J, at first instance thought he could. The termination of the trust had, in his view, been improper. So, though his Lordship didn't quite express it this way, he took the position that "equity looketh on that as undone which ought not to have been done", and deemed the shattered trust to be re-constituted, with the Public Trustee in charge of it. He proceeded to deem the Public Trustee to have made the appropriate application to authorize the desired mortgage; and declared that it was just and equitable to do so. Mrs. Haykowski appealed.

Her appeal was doubly successful. Mr. Chupryk was denied the approval he needed to secure the mortgage, and a sale of the entire property was ordered, under the "partition" sections of the *Law of Property Act*, at the behest of Mrs. Haykowski, with the result, one must surmise, that old Michael Chupryk was deprived of his modest home and almost certainly his independence. O'Sullivan, JA, one must suppose in some ghastly spirit of consolation, noted that "In the circumstances, Mr. Chupryk may have a claim against the executor for accounting on the footing of wilful default."¹¹⁴ But the outcome was tragic for this elderly man, whose only error had lain in making known and putting in issue his intent to improve the property.

His failure to secure approval for the mortgage is a matter collateral to the purpose of this article, and can be quickly explained. Kroft J's ingenuity in resurrecting the trust did not find favour in the Court of Appeal.¹¹⁵ So the *Trustee Act* powers must be considered to have passed irretrievably out of Mr. Chupryk's reach. Further, Kroft J's belief that as a judge in equity he might possess inherent

¹¹² Now CCSM, c T160, s 58(1) as of December 2nd, 2011.

¹¹³ RSM 1970, c T160.

¹¹⁴ *Supra* note 69 at para 53.

¹¹⁵ Like the splendid but alas, apocryphal Lord Mildew, in *Travers v Travers* (unrep) cited by A.P. Herbert, *Codd's Last Case* (London: Methuen & Co Ltd, 1952) at 80: "There is too much of this damned deeming."

or residual powers to authorize such transactions as were here proposed received short shrift in the Court of Appeal. The Court did look at the possibilities of the old English *Settled Estates* legislation, but found (quite correctly) that no such legislation as would assist Mr. Chupryk in getting his mortgage had ever passed into Manitoba law. In the course of their reasons on this issue, they made, I would submit, albeit by way of *obiter dictum*, an egregious mis-statement of the general law of settled estates in Manitoba, an episode which I have already discussed at length in this volume.

So the long and the short of it is that Mr. Chupryk was denied his mortgage. But look at what happens next; Mrs. Haykowski is granted an order for the sale of the property, and this is done, as noted above, on the purported authority of the *Law of Property Act*, ss 19-23 – the “partition and sale” provisions of the statute. So we have here an instance of sale (in lieu of partition) being granted at the suit of a remainderperson over the resistance of a life tenant. The issue is complicated by the Court’s assertion that, by this stage in the litigation,¹¹⁶ old Mr. Chupryk had apparently abandoned his opposition to selling the property. Whether this represented a true acquiescence, or merely a symptom of litigation fatigue or a fatalistic surrender to the inevitable, it is hard to say. If indeed the parties agreed that sale was the best solution, might it not have been achieved consensually?

It may be worthy of note, too, that Mr. Chupryk’s share in the remainder was neither here nor there: nor did the Court treat it as in any way significant. This was a case of a remainderman seeking sale (in lieu of partition) against a life tenant, and would have been decided in just the same way if it had been a sole remainderperson (and by definition not a person in possession) seeking such liquidation of the life tenant’s interest.

Manifestly, such a claim to an order of sale flew directly in the face of the Ontario cases we have considered: cases which dealt with an essentially identical statutory provision, and had consistently denied such relief or remedy to remaindermen¹¹⁷ (as had the English law, for that matter).

It remained to be seen, of course, how the Ontario courts would respond or react to this offering from Manitoba. In *Garnet v McGoran*,¹¹⁸ Maloney J gives no suggestion that anything in the partition law of Ontario has changed since *Bunting*, or indeed since *Morrison* in 1917. Mr. and Mrs. McGoran, joint tenants of what appears to have been the family home, had run into trouble. Mr.

¹¹⁶ Mr. Chupryk and Mrs. Haykowski, and their indefatigable counsel, had over the previous six years been twice before the Court of Appeal and even after the present proceedings two determined efforts were made to take matters further. The Court of Appeal denied leave to go to the Supreme Court of Canada: (1980) 110 DLR (3d) 108n [Freedman CJM]; but the Supreme Court thereafter granted such leave: (1980) 33 NR 622.

¹¹⁷ Such a claim obviously defies the authority of *Murcar*, among others. And in allowing it, the Manitoba Court of Appeal was quite explicit in rejecting that line of authority.

¹¹⁸ (1980), 32 OR (2d) 514, 18 RPR 208 (Ont SC).

McGoran, unbeknown to his wife, had mortgaged his half share to Garnet, and gone into default. Garnet was now seeking to enforce judgment against the affected half-share, and now sought partition and sale. Mrs. McGoran understandably objected and sought various relief, including rejection of the mortgagee's application for partition. Maloney J agreed with her and emphatically rejected Mr. Garnet's claim, founding himself explicitly on his Court of Appeal's ruling in *Morrison v Morrison*,¹¹⁹ and its insistence that only a person "entitled to immediate possession of an estate" in land could be allowed to seek its partition. Mr. Garnet would have to overcome various hurdles, several of them vigorously erected by Mrs. McGoran in still-pending proceedings, before he could assert the kind of possession that could give him *locus standi* to seek partition. *Chupryk*, which might be thought to militate against this position, was neither discussed nor even mentioned.

Two years later, though, the case of *Morris v Howe*¹²⁰ came before Dupont J in the Ontario High Court. Mrs. Morris, the applicant, was tenant for life of the family farm under her late husband's will, the remainder being devised to his sister. Now the life tenant sought partition and sale because she found the upkeep of the property expensive and tiresome. The remainderperson objected that the dead man had wanted the property to remain in the family, just as she looked forward to leaving the property to her own children. There was no "co-ownership" element in the case at all; just a life tenant in possession seeking to sell the property and partition the proceeds over the objections of the remainderperson. That, of course, flew directly in the face of *Fisken v Ife*,¹²¹ eighty-five years before; and Dupont J was quite firm in rejecting the application, even though *Chupryk v Haykowski* had been pressed upon him. His reasoning was lucid but nuanced:

I do not think that where, as here, land is subject to consecutive interests of a sole life tenant and a remainderman, this Court can or ought to grant the life tenant an order the effect of which will be to defeat the remainderman's interest in the lands without his consent and against his reasonable opposition. I find that the respondent's opposition to sale of the lands is reasonable, having regard to all the circumstances. I leave open for

¹¹⁹ Also, the older case of *Mulligan v Hendershott*, (1896), 17 PR 227, 1896 CarswellOnt 60 (WL Can) citing the still more venerable judgment in *Train v Smith* (14th April 1875), unreported, (Spragge C). Maloney J's judgment in *Garnet* was tersely affirmed on appeal: (1981), 32 OR (2d) 514, 122 DLR (3d) 192, (Ont SC), though Krever J's judgment expressly declined to express an opinion on the applicability of *Mulligan v Hendershott* to the case at bar (para 12). *Garnet v McGoran* is applied in the later cases of *Toronto Dominion Bank v Morison*, (1984) 47 OR (2d) 524 (Ont Co Ct) and *Royal Bank v Mayhew*, (1995) Carswell Ont 3664 (WL Can), (Ont Gen Div) McDermid J.

¹²⁰ (1982), 38 OR (2d) 480, 138 DLR (3d) 113 [*Morris*].

¹²¹ *Supra* note 93.

future consideration factual situations where it can be concluded that such opposition is not reasonable.¹²²

If that means that Dupont J believed that he had jurisdiction under the *Partition Act* to grant partition or sale at the behest of a sole life tenant against a sole remainderperson, and that only the “reasonable opposition” of the latter would preclude the exercise of his discretion to that end, I would respectfully disagree. The binding authority of *Fisken v Ife* would seem to run contrary to the use of the *Partition Act* to compel sales as between consecutive owners *simpliciter*, though the *Settled Estates* legislation in Ontario¹²³ might legitimately be used for that purpose. Dupont J’s tentative language may have been used to soften the impact of his clear rejection of the Manitoba Court of Appeal’s analysis in *Chupryk*. In truth, the whole tenor of the rest of his Lordship’s judgment is to the effect that the *Partition Act* simply has no application between consecutive estateholders. Thus we find him saying: “I do not think I can give the applicant the order she seeks. In my view a sole tenant for life cannot apply under the *Partition Act* for sale of the estate ... *Fisken v Ife*.”¹²⁴ And again: “To the extent that [*Chupryk*] may be seen as authority for the propositions that a life tenant may obtain sale of land over the opposition of a remainderman, or that one of several remaindermen may obtain partition (and hence possibly sale) of the lands before the remainder has fallen into possession and without the consent of a prior life tenant, *Lalor* and *Bunting v Servos* establish that the law of this province is to the contrary.”¹²⁵ The succinct pronouncement of the headnote writer seems just: “There was no authority under the *Partition Act*, RSO 1980 c 369 to order partition at the suit of a sole life tenant against the reasonable opposition of the remainderman. The Act applied only to concurrent, not to consecutive interests.”¹²⁶

In *Morris v Howe*, then, we see *Chupryk* confronted and finally rejected by the Ontario High Court. True, Dupont J offered his comforting opinion that the conflict between the law of Manitoba and Ontario “may be more apparent than real,”¹²⁷ given that “The essential fact in *Chupryk* was that all the parties interested in the land desired sale.”¹²⁸ That premise, which may as I have indicated be taken *cum grano salis*, does not really disguise the jurisprudential rift which has opened up between the two provinces.

¹²² *Supra* note 120 at para 21.

¹²³ As to which, see my “Unsettled Estates” paper earlier in this volume.

¹²⁴ *Supra* note 120 at para 11.

¹²⁵ *Ibid* at para 20.

¹²⁶ *Ibid* at 480.

¹²⁷ *Ibid* at para 20.

¹²⁸ *Ibid*.

VII. CONCLUSIONS

Morris puts beyond debate several propositions which were already apparent from the foregoing discussion, namely: "That the provisions of ss 19-26 of Manitoba's *Law of Property Act* are "essentially identical" to those of [Ontario's] *Partition Act*".¹²⁹ Despite this, the Ontario *Partition Act* applies only as between the holders of concurrent interests, as distinct from consecutive ones, whereas in Manitoba, *Chupryk* flatly denies this.¹³⁰ In Ontario, abundant authority shows that only a claimant in physical possession of the land, or the immediate right to such possession, may seek partition or sale in lieu thereof. *Chupryk v Haykowski* flatly rejects that view in Manitoba.

It is idle of course, to enquire which of these approaches is "right". It depends upon whether one prefers a "plain meaning" interpretation of the shared language of the respective statutes (which might well support the Manitoba view) or a more historically-sensitive, contextual or "essentialist" construction (which would favour the Ontario position). I would merely note that

- a) The Manitoba doctrine in *Chupryk* seems to have been adopted in ignorance or disregard of the existence in Manitoba of "Settled Estates" legislation (admittedly of a rather recondite kind) which might, had it been acknowledged, have deterred the Court from "stretching" the function accorded to the partition legislation.
- b) To allow, as *Chupryk* does, that partition or sale may be effected between consecutive owners, creates difficult conundrums of valuation.
- c) The result of *Chupryk* will be that in Manitoba only a sole fee simple owner in possession of land will be immune from the efforts of other interest-holders (however small, and however distantly suspended in futurity their interests may be) to unseat them. Only the Court's discretion stands between them and the liquidation of their tenure.¹³¹

There will be some whose response to the situation outlined in this paper will be "so what? If an unrestricted right to seek partition or sale is made available under the *Law of Property Act*, and simply renders redundant the powers of sale previously available under other statutes, what harm can there be in that;

¹²⁹ Morris, *supra* note 120, at 484.

¹³⁰ Per O'Sullivan JA: "I agree with my brother Matas that the *Law of Property Act*... covers successive interests, as well as concurrent interests, in land." *Supra* note 69 at 554.

¹³¹ There are limits to the utility of *reductiones ad absurdum*, but the English case of *Dodd v Cattell*, *supra* note 77, gives food for thought. O'Sullivan JA's reflection in *Chupryk*, *ibid*, that "In the vast majority of cases, application of the provisions of our *Law of Property Act* can do justice as between owners of successive interests, since they will have money in lieu of money's worth" seems question-begging and provocative. The questions it raises will be revived and discussed in my third note in this series to appear in a forthcoming number of this journal.

especially if the courts in Manitoba are always alert to use their discretion to prevent potential hardship?" To that I would respond firstly, that so radical a change in the scope of the partition/sale remedy, brought about almost in a somnambulist fashion by judges seemingly unaware of the broader statutory picture, does not necessarily conduce to clarity of analysis in the law of real property. It may be worth reflecting that the relationships between consecutive estate-holders (e.g. life tenant and remainderman) and that between contemporaneous co-owners (joint tenants and tenants-in common) have always been governed by a quite different dynamic. As between life tenant and remainderman, there exists a fiduciary duty owed by the former to the latter: the classic Manitoba instance being *Mayo v Leitovski*.¹³² It is not obvious that the life tenant's fiduciary duty can easily be reconciled with a supposedly co-existing right to seek partition of the land, or its sale, over the protestations of the remainderman. It is true that such sale may be authorized by the court under the aegis of other statutes,¹³³ but only under certain conditions and not merely for the satisfaction of the personal caprice or cupidity of the life tenant.

As for the converse situation (that actually involved in *Chupryk*), it is inconsistent with our law's usual reluctance to disturb an occupant in possession, or to tolerate the liquidation of the possessory interest of a sitting life tenant, by recognition of a remainderman's power to compel sale. If the remainderman actually sought partition, upon what principles, one wonders, could a court authorize the demarcation of appropriate lines of division? Even assuming a piece of land that is featureless and of even quality, how would one fairly express in spatial terms the temporal division between a life tenant's temporary possession of the land, here and now; and the remainderman's prospect of securing at some uncertain future date, the remainder of the fee simple? Crudely put, how could one express this temporal division in acres or hectares, even with the assistance of skilled actuaries? Is this really an exercise the courts would wish to undertake?¹³⁴

If, as in Ontario, partition and sale remedies may be invoked only by joint tenants or tenants in common in possession, most of those conceptual brain-teasers disappear. As between such co-owners, there is no fiduciary relationship.¹³⁵ The sizes of the parties' respective shares are known or readily ascertainable; and the aim and end of the law is simply to give each party his strict dues, with due

¹³² [1928] 1 WWR 700, 1928 CarswellMan 21 (WL Can).

¹³³ e.g. the *Settled Estates Act, 1856*, (UK) 19 & 20 Vict c 120, s 11.

¹³⁴ In *Winspear Higgins Stevenson Inc v Friesen*, [1978] 5 WWR 337, 5 RPR 81, (Man CA), we see O'Sullivan JA recoiling at the prospect of even making a fair monetary evaluation of a wife's inchoate dower rights in the context of a sale in lieu of partition between co-owners: a task several degrees simpler than the puzzle here presented.

¹³⁵ See *Kennedy v De Trafford*, [1897] AC 180, (UK HL) and *Re Nunes and District Registrar (Winnipeg)* (1971), 21 DLR (3d) 97, [1971] 5 WWR 427.

regard to the statutory, common law and equitable rules governing the settlement of accounts between them.¹³⁶

It is difficult to avoid the conclusion that in *Chupryk* the Manitoba Court of Appeal unwittingly wandered off course and thereby introduced into our law a needless element of complexity, absent from the law of Ontario. Perhaps in doing so, they were seduced by misapprehension of the state of Manitoba's law of settled estates. But that tale has already been told. It now remains to be examined how, just two short years after *Chupryk*, the law of real property, as it relates to consecutive estates was properly revolutionized by the advent of the *Perpetuities and Accumulations Act* in 1983: a statute which may be seen as making almost redundant the earlier legislation on settled estates, while creating, at the same time, perplexities for those who administer Manitoba's land titles system. To these and other issues I hope to return presently in another short article.

¹³⁶ As helpfully explained in *Osachuk v Osachuk*, (1971), 18 DLR (3d) 413, [1971] 2 WWR 481, (Man CA).