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# *Partition of Land in the Commonwealth Caribbean*

S.A.A. Cooper\*

**Abstract:** In contrast to England, applications for partition of land are still alive and well in the Caribbean, but for various reasons it can be difficult to obtain legal sources to provide guidance on the proper exercise of the power to partition. This paper assists by identifying principles according to which the jurisdiction could be exercised and assessing their suitability to the Caribbean.

**Keywords:** Caribbean, land, co-ownership, Registrar of Lands

## **I. Partition in England**

Before examining the Caribbean position, it is helpful to outline the development of the English law of partition. The common law developed a writ of partition to provide relief for those who could not comfortably exist with one another as co-owners, allowing one co-owner, against the wishes of the others, to cast off the co-ownership tenure, divide up the land, and confer individual possessory rights to separate allotments. The court's power to order partition was initially restricted to co-owners holding under the type of co-ownership known as 'parcenary', but the value of the partition action in enabling disputing co-owners to exit from a relationship of on-going strife with the other co-owners led to its statutory extension to other types of co-ownership. In 1539, the partition action was made available to joint owners and owners in common of estates of inheritance,<sup>1</sup> and in 1540 it was further extended to add joint owners and owners in common of estates for life and leases.<sup>2</sup> Procedural improvements to the partition action followed in the Partition Act 1697,<sup>3</sup> principally by enabling partition actions to proceed on the application of a co-owner even where it had not been possible to secure the appearance of all the other co-owners.<sup>4</sup>

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1 Partition Act 1539 (31 Henry 8, c.1).

2 Partition Act 1540 (32 Henry 8, c.32).

3 Partition Act 1697 (8 & 9 William 3, c.31).

4 It also contained provisions relating to the award of costs; precluding a plea of abatement in a partition suit; regulating execution of the judgment; regulating the partition of leasehold land.

Concurrently with the common law courts' power to order partition, the Chancery also assumed the power to decree a partition during the sixteenth century. Because procedures in equity were regarded as the more convenient,<sup>5</sup> and as the judicial powers in equity were more extensive,<sup>6</sup> they came to be favoured by litigants and the common law partition action withered in England.<sup>7</sup>

In time, even partition in equity came to be acknowledged as an unsatisfactory solution to co-owner disputes. Various problems had always ranged about the procedure and the remedy. The degree of conflict and intransigence attending a proposed division of a co-owned parcel of land could not be underestimated and partition would not necessarily bring acrimonious disputes to an end if there were party walls, boundary disputes, shared facilities, rights of way, and so on, to provide a fruitful source of continued contention. The nature of the land itself could lead to absurd and inconvenient results, illustrated by cases where a single house had to be physically divided.<sup>8</sup> And where a small estate was partitioned among a large number of persons, some of whom could not be found, the expenses could be out of all proportion to the value of the estate. For these reasons, among others, partition as a judicial remedy fell into disuse in England, where it was supplanted by securing a sale of the entire co-owned parcel.

Two developments in the demise of partition need to be recorded. First, in a partition action, the court was given power to order sale of the entire parcel<sup>9</sup> by the Partition Act 1868. Under the statute, the court had a discretion to order sale in a partition action and, in some circumstances, a duty to do so. Secondly, partition was effectively eliminated in England when the 1925 property legislation restructured co-ownership tenure to give effect to a policy against fragmentation of holdings.<sup>10</sup> All surviving forms of co-ownership could thereafter

5 E.g. it was said of the commission in equity, 'the valuation of these proportions is much more considered; the interests of all parties is better attended to; and it is a work carried on for the common benefit of both': *Calmady v Calmady* (1795) 2 Ves Jun 568 at 571; 30 ER 780 at 781 *per* Lord Loughborough LC. It might also be added that, in equity, discovery was available in aid of establishing title and the equitable remedy of mutual conveyances provided a permanent record of title.

6 Including, e.g., the power to order owelty and accounts between the co-owners, and broader powers as to costs.

7 The obsolete writ of partition was abolished by the Real Property Limitation Act 1833, s. 36.

8 *Turner v Morgan* (1803) 8 Ves 143; 32 ER 307.

9 Partition Act 1868, ss. 3, 4, 5, as amended by the Partition Act 1876.

10 The policy against fragmentation of holdings had begun earlier and for present purposes the vesting of land in the personal representative should be recognized as an important reform step which tended to reduce the incidence of co-ownership on succession and the consequent need for partition: see Land Transfer Act 1897, s. 1.

take effect only behind a trust,<sup>11</sup> and the trustees were empowered to sell the co-owned parcel without the need for a court order; the Partition Acts, having become redundant, were repealed.<sup>12</sup> It is still possible to achieve a partition, as trustees holding for beneficial co-owners may partition by consent<sup>13</sup> and if either the trustees refuse or any consent to partition is withheld, then the court can step in;<sup>14</sup> but it can now be said that where a partition cannot be agreed, an English court is unlikely to impose a partition, but rather a sale of the whole land is to be expected, the co-owners taking their respective shares in the proceeds of sale.<sup>15</sup>

## II. Partition Jurisdiction in the Caribbean

Many British colonies possess a heritage of common law, imperial legislation from the Westminster Parliament, and local legislation based closely on English statutory models. From these sources, almost all the Commonwealth Caribbean countries have received their rules concerning co-ownership of land and the remedy of compulsory partition on the order of a court.

### *i. The Forms of Co-ownership Susceptible to Partition*

Before examining the partition powers available in the Caribbean, a preliminary survey of the forms of co-ownership is required in order to determine the nature of interests that are susceptible to partition. For those Caribbean islands which were settled by the British colonists during the seventeenth and eighteenth centuries,<sup>16</sup> common law<sup>17</sup> declares that they introduced the common law of England and so much of the statute law of England as was applicable to their situation

11 Law of Property Act 1925, ss. 34, 35, 36, 205(1)(xxix) (repealed). The position remained essentially the same when the co-ownership trust for sale was replaced by the trust of land with a power to sell: Trusts of Land and Appointment of Trustees Act 1996, s. 4.

12 The Partition Acts 1868 and 1876 were repealed by the Law of Property Act 1925, Schedule VII.

13 Trusts of Land and Appointment of Trustees Act 1996, s. 7.

14 *Ibid.* s. 14.

15 The English court has power to make any order it sees fit relating to the exercise of the trustees' functions, which is most commonly some variant of the basic order for sale, but is capable of accommodating an order for partition. In practice, partition has been remarkable for its absence from orders under the Trusts of Land and Appointment of Trustees Act 1996, s. 14, although see *Rodway v Landy* [2001] 2 WLR 1775. For an assessment of partition orders under the Law of Property Act 1925, s. 30, the forerunner of s. 14, see R. Cock, 'Co-Ownership: Back to the Partition Acts?' [1982] Conv 415.

16 Anguilla, Antigua, Montserrat, Virgin Islands, Barbados, Cayman Islands are usually regarded as settled colonies. The position of Turks & Caicos Islands remains unclear. See K.W. Patchett, 'Reception of Law in the West Indies' (1973) 3 *Jamaican Law Journal* 17.

17 *Cooper v Stuart* (1889) 14 App Cas 286.

and the condition of the infant colony.<sup>18</sup> There should be no hesitation in acknowledging that by this method the settlers introduced the four varieties of common law co-ownership: tenancy in common, joint tenancy, parcenary and tenancy by the entirety. But not all forms have been preserved in all jurisdictions. Many small jurisdictions (including Anguilla, Antigua, Barbados, Belize, British Virgin Islands, Cayman Islands, Montserrat, St Lucia, Turks & Caicos Islands) have enacted<sup>19</sup> the model land registration statute recommended in the 1960s by the UK Foreign Office's Land Tenure Adviser.<sup>20</sup> This statute not only establishes the registration system but also takes steps to prescribe the content of the registrable rights,<sup>21</sup> including those held in co-ownership.

The first and second common law forms of co-ownership, being ownership in common and joint ownership, remain available as forms of co-ownership in these jurisdictions as they are both explicitly recognized in the registered land statute.<sup>22</sup> Parcenary, the third common law form of co-ownership, is defunct in these jurisdictions. There is no statutory provision for proprietors to be registered as co-owners in parcenary. Even for the overriding interests in land, which enjoy validity without entry on the land register, parcenary is probably unavailable, due to the repeal of the only method of establishing parcenary. It arose only when land passed to two or more successors by intestate inheritance under the common law or customary rules of heirship, and in each of the jurisdictions, local statute<sup>23</sup> has repealed the heirship rules and provided for statutory entitlements upon intestate succession without imposing parcenary.

The fourth and final form of co-ownership recognized by common law, namely tenancy by the entirety, has also ceased to exist in these jurisdictions. It was formerly a type of joint tenancy arising where the

18 The lack of clarity over the status of Belize led to enactment of a provision specifying 1 January 1899 as the cut-off date for reception of English statutes: Imperial Laws (Extension) Ordinance 1898.

19 Registered Land Act, cap. R30 (2000 Revision) (Anguilla); Registered Land Law, cap. 229 (BVI); Registered Land Law (2004 Revision) (Cayman Islands); Registered Land Ordinance 1978 (Montserrat); Registered Land Ordinance, cap. 72 (TCI); Registered Land Act, cap. 374 (Antigua); Registered Land Act, cap. 194 (2000 Revision) (Belize); Land Registration Act 1984 (Law 12 of 1984) (St Lucia); Land Registration Ordinance, cap. 229 (Barbados).

20 For an account of the model statute, see S. Rowton Simpson, 'Land Law and Registration' (CUP: Cambridge, 1976).

21 Except in St Lucia, where the statute is superimposed on the ancient French law of immovables and therefore deals only with registration of property rights and not their substantive content.

22 E.g. Registered Land Law (2004 Revision) (Cayman Islands), s. 99.

23 E.g. Intestates' Estates and Property Charges Law, cap. 166, s. 3 (Jamaica), which was extended to the Cayman Islands in 1937. See also Intestates' Estates Act, cap. 130 (Anguilla); Intestates' Estates Act, cap. 225 (Antigua); Administration of Estates Act, cap. 197 (2000 Revision) (Belize); Succession Act, cap. 249 (Barbados); Intestates' Estates Law, cap. 35 (BVI); Intestates' Estates Act, cap. 36 (Montserrat); Intestates' Estates and Property Charges Ordinance, cap. 79 (TCI).

transferees were husband and wife, but was abolished<sup>24</sup> when the common law regime for marital property was jettisoned by the enactment of local statutes derived from the English Married Women's Property Act 1882.<sup>25</sup>

## *ii. The Court's Power to Partition*

If the British settlers brought with them the various forms of co-ownership, then the common law and equitable entitlement to partition, and the statutory extensions and improvements to partition, must be regarded as vital supplements to the resolution of disputes arising out of those modes of co-ownership. On this basis, it is submitted that the English Partition Acts of 1539 and 1540 must have been introduced to those jurisdictions, along with the Partition Act 1697 for colonies settled after that date, and also the jurisdiction to partition in equity. In support, it should be noted that Canadian courts have held that the Acts of 1539 and 1540 apply in the provinces of Alberta and Saskatchewan.<sup>26</sup> The statutory abolition in England of the writ of partition employed by these statutes came too late to form part of the received law at the date of settlement, and the repeal of the statutes in England<sup>27</sup> does not affect their continuing validity as received law in the colonies.<sup>28</sup> Subsequent to settlement, the Caribbean colonies (but not Belize<sup>29</sup>) enacted domestic Partition Laws, modelled closely on the English Partition Act 1868, designed to allow the court power to substitute a sale of the entire parcel in place of partition.<sup>30</sup> This put them in a similar position to many of the US states, where the

24 The implied repeal of tenancy by the entireties by the Married Women's Property Act is acknowledged in *Thornley v Thornley* [1893] 2 Ch 229; *Registrar-General of New South Wales v Wood* (1926) 39 CLR 46.

25 E.g. Married Women's Property Law of 1887 (Jamaica), extended to the Cayman Islands in 1941. See also Married Women's Property Act, cap. M55 (Anguilla); Married Women's Property Act, cap. 267 (Antigua); Married Women's Property Act, cap. 176 (2000 Revision) (Belize); Married Women Act, cap. 219 (Barbados); Married Women's Property Law, cap. 238 (BVI); Married Women's Property Act, cap. 302 (Montserrat); Married Women's Property Ordinance, cap. 81 (TCI).

26 *Grunert v Grunert* (1960) 32 WWR (NS) 509; *Bay v Bay* (1984) 38 SR 101. See W.R. Pepler, 'Partition—A Survey of the Law in Alberta' (1977) 15 *Alberta Law Review* 1; Law Reform Commission of Saskatchewan, *Proposals for a New Partition and Sales Act* (2001) para. 1(a).

27 Law of Property (Amendment) Act 1924, s. 10, Schedule 10.

28 See *Re Al Sabah* [2005] UKPC 1 in respect of the repealed English Bankruptcy Act 1914.

29 There exists no power to partition other than that of the land registrar: *Tilvan King v Linda Aguilar* (Action 449 of 2004, Supreme Court of Belize, 21 October 2008).

30 E.g. the Partition Law of 1873 (Jamaica), which was extended to the Cayman Islands and re-enacted in the Cayman Islands as the Partition Law 1963. See also Partition Act, cap. 305 (Antigua), Partition Act, cap. 236 (Barbados), Partition Law, cap. 202 (BVI), Partition Act, cap. 253 (Montserrat).

nineteenth-century English statutes had already been pre-empted at an earlier date,<sup>31</sup> and tended to reduce the incidence of partitioning.

### *iii. Reinvigoration of Partition in the Caribbean*

The most radical reform of the 1925 English legislation was to force all co-ownership tenure behind a trust in order to preserve a small number of representatives as the focal point for management of the land. But the 1925 legislation has not permeated the Caribbean. Most of the countries in the region have no equivalent,<sup>32</sup> despite having some of the tenure and title problems associated with fragmentation of family estate holdings which the 1925 legislation was designed to remedy. In particular, the solution of vesting land in trustees has not been adopted (with the exception of Belize<sup>33</sup> and one limited rule in St Lucia<sup>34</sup>). The problem of internal disputes between co-owners was therefore not addressed in the Caribbean jurisdictions by any other more sophisticated or modern legal device; the ancient and cumbersome remedy of court partition, supplemented by the court's power of sale, endured as the elementary response to intractable disputes between co-owners. This state of affairs still prevails in the larger Caribbean jurisdictions of Jamaica and Trinidad, where the expense of court proceedings tends to deter partition claims. In the smaller Caribbean jurisdictions, however, the advent of one legislative reform has given partition claims a new vitality.

Between the late 1960s and early 1980s, each of the smaller jurisdictions enacted the model registered land statute mentioned earlier, which imposes a regime of compulsory registration of title, the administration of the system being entrusted to a Registrar of Lands who is given certain dispute resolution powers, including the power to order partition. Given that an application to the registrar avoids the need for court litigation and has all the conveniences associated with tribunals—less expense, less delay, lower formality, relaxed evidential rules, greater adjudicator familiarity with technical material such as survey data—the statutory power of the registrars has stimulated a renewed interest in partition claims.

The statutory provisions which set up the registrar's jurisdiction are as follows:

102.(1) An application for the partition of the land owned in common may be made in the prescribed form to the Registrar by—

31 See, e.g., W.H. Lloyd, 'Partition' (1919) 67 *University of Pennsylvania Law Review* 162 at 188–9; E. Washburn, *A Treatise on the American Law of Real Property*, 3rd edn (Little Brown & Co: Boston, 1868) 506, 592.

32 See K.W. Patchett, 'English Law in the West Indies' (1963) 12 ICLQ 922 at 946 onwards.

33 Registered Land Act, cap. 194 (2000 Revision), s. 102(2).

34 Land Registration Act 1984 (Law 12 of 1984), s. 62(2), imposes a trust for sale on the first four named when land is transferred to or devolves upon four or more persons. See W.F. Cenac, *Coutume de Paris to 1988: The Evolution of Land Law in St Lucia* (Voice Press: Castries, 1988) chapter XIV.

- (a) any one or more of the proprietors; or
  - (b) any person in whose favour an order has been made for the sale of an undivided share in the land in execution of a decree,
- and subject to this and any other law by or under which minimum areas or frontages are prescribed or the consent of any authority to a partition is required, the Registrar shall effect the partition of the land in accordance with any agreement of the proprietors, or, in the absence of agreement, in such manner as the Registrar may order.
- (2) Partition shall be completed by closing the register of the parcel partitioned and opening registers in respect of the new parcels created by the partition and filing the agreement or order.

The immediately following section then declares that if the land sought to be partitioned is incapable of partition or the partition would adversely affect the proper use of the land, then the registrar must, on the request of a party, order sale of the land or shares therein or make other suitable order. There is also a provision in section 104 for cases where, upon a proposed partition, the parcel allotted to a particular co-owner would be below a minimum statutory area. In such cases, the registrar may add the share in question to one or more other co-owners' allotments, and order the benefiting co-owners to buy out the expropriated co-owner.

The section numbers and text of the above extract are taken from the Cayman Islands Registered Land Law (2004 Revision), but the text is the same in the other jurisdictions,<sup>35</sup> except that the statutory provisions of Barbados<sup>36</sup> and Belize<sup>37</sup> differ slightly.

### III. Scope of the Registrar's Powers of Partition

Although the opening rule on partition in section 102<sup>38</sup> confers the right to apply for a partition, the immediately following rule in section 103<sup>39</sup> overrides the partition rule and subordinates it in certain circumstances to a compulsory sale. Where the land is 'incapable of partition or the partition would adversely affect the proper use of the land'<sup>40</sup> then, on a demand for sale of the land or a share being made the applicant or a registered proprietor, and in default of agreement

35 Registered Land Act, cap. R30 (2000 Revision), s. 103 (Anguilla); Registered Land Act, cap. 374, s. 103 (Antigua); Registered Land Law, cap. 229, s. 103 (BVI); Registered Land Ordinance 1978, s. 103 (Montserrat); Registered Land Ordinance, cap. 72, s. 103 (TCI); Land Registration Act 1984 (Law 12 of 1984), s. 64 (St Lucia).

36 The application is made to the court rather than the land registrar: Land Registration Ordinance, cap. 229, s. 107 (Barbados).

37 Co-ownership necessarily exists under a statutory trust for sale and it is the trustees for sale who make the application to the registrar for partition: Registered Land Act, cap. 194 (2000 Revision), s. 107 (Belize).

38 Registered Land Law (2004 Revision) (Cayman Islands), s. 102. To avoid needless repetition, from this point on the Cayman Islands statute will be relied on as indicative of the provisions in all the jurisdictions possessing the model land registration statute.

39 E.g. Registered Land Law (2004 Revision) (Cayman Islands), s. 103(1).

40 *Ibid.*

between the proprietors, the registrar must value the land and the shares of the proprietors and then select one of three courses: (a) order the sale of the land, (b) order the separation and sale of the shares, or (c) make such other order for the disposal of the application as he or she sees fit.<sup>41</sup>

In any partition application, therefore, the preliminary question, before considering the possible mode of partitioning the land, is whether a sale should take place instead. Only if the registrar's power of sale under section 103 cannot be exercised, must the registrar return to the question of partition. The registrar's power of partition may be divided into two conceptually-distinct powers which depend on whether the partition is made with or without the unanimous agreement of the co-owners.

### *i. Voluntary Partition by Agreement*

An application to the registrar for partition can be made where all co-owning proprietors agree to the proposed partition. In this case, the registrar must simply effect the partition in accordance with the agreement.<sup>42</sup> If the unanimous consent of all the proprietors is not forthcoming, then partition cannot proceed under this head and the usual course is to seek a compulsory partition under the following head.

### *ii. Compulsory Partition by the Registrar*

In the absence of agreement, a compulsory partition application can be brought by any proprietor or any creditor possessing a court order for the sale of one co-owner's share.<sup>43</sup> The registrar then effects partition of the land in such manner as he or she sees fit. The registrar's jurisdiction is hedged about by limitations, beyond which it would be necessary for the co-owners to make agreement among themselves or apply to the court for partition or sale.<sup>44</sup>

The model land registration statute gives no guidance to the registrars on how the partition is to be made. There are no modern English textbooks giving any account of how partitions ought to be effected,<sup>45</sup> as the partition jurisdiction has long been redundant in England, and for the same reason there is no modern case law. There is an urgent need for guidance on all aspects of the decision-making process in partition claims before the registrar. The later parts of this paper will

<sup>41</sup> *Ibid.*

<sup>42</sup> E.g. *ibid.* at s. 102(1).

<sup>43</sup> *Ibid.*

<sup>44</sup> If, e.g., one of the proprietors is an unrepresented minor or mentally incapable, then an application to court will be required.

<sup>45</sup> It appears that the only book attempting to undertake any full description of discretionary factors was C.B. Allnatt, *A Practical Treatise on the Law of Partition* (Butterworth & Son: London, 1820) 84–91, which became the leading work for the United States as C.B. Allnatt, *A Practical Treatise on the Law of Partition* (Littell: Philadelphia, 1834) 34–7.

address that deficiency, examining the discretionary factors that ought to be applied, but before that the ground must be prepared by surveying the remedial options that are available to the registrar.

## IV. Division and Supplementary Terms

### *i. New Distribution of Proprietary Entitlements*

Where an application for partition is successful, the registrar implements the partition by closing the register of the parcel partitioned and opening new registers in respect of the allotments created by the partition.<sup>46</sup> It might appear from these provisions that the registrar's order is limited to demarcating a new boundary for the physical division of the land. But it is submitted that the registrar's power must be taken as broader than that. In England, relief on partitioning by the Chancery and Exchequer courts<sup>47</sup> extended to much more than creating a new internal boundary to demarcate the limits of possession; it was accepted that practical partition may require further matters to be addressed, especially where the nature of the land did not lend itself to simple division. In the smaller Caribbean jurisdictions, the same conclusion can be reached either by reliance on the principle that express statutory powers implicitly carry all the supplementary powers which are reasonably necessary to implement the partition,<sup>48</sup> or by regarding these powers as an integral part of the partition itself. The second of those possible interpretations is supported by the following judicial comment, made in response to an argument that partition commissioners could not create a new right of way: 'Making such an easement *is a part of the partition*. It is not like laying out money on the property.'<sup>49</sup>

In order to make the most convenient partition, or to secure equality in the allotments, it is submitted that the registrar's powers on partition should be interpreted to extend to those formerly recognized by the English courts in partition, which could include the creation of new proprietary interests. A typical example was a new right of way over one co-owner's allotment in favour of another co-owner's allotment in order to provide a convenient access to a building that would otherwise be unavailable.<sup>50</sup> Other examples include the creation of a

46 E.g. Registered Land Law (2004 Revision), s. 102(2) (Cayman Islands).

47 Such as *Watson v Duke of Northumberland* (1805) 11 Ves 153; 32 ER 1046 (Lord Chancellor's court) and *Story v Johnson* (1835) 1 Y & C Ex. 538; 160 ER 220 (Court of Exchequer in Equity). The same may not have been true at common law, for it appears that the terms of the judicial writ to the sheriff were limited to the allocation of possession by metes and bounds: see G. Booth, *The Nature and Practice of Real Actions*, 2nd edn (W. Clarke: London, 1811) 246.

48 E.g. Interpretation Law (1995 Revision), s. 38 (Cayman Islands).

49 *Lister v Lister* (1839) 3 Y & C (Ex.) 540 at 543; 160 ER 816 at 817 *per* Alderson B in argument (emphasis added).

50 *Burley v Moore* (1827) 5 LJ Ch 120; *Lister v Lister* (1839) 3 Y & C (Ex.) 540; 160 ER 816.

new easement of drainage into an existing drain which traversed the allotment of another co-owner; and, where one co-owner was allotted a water-mill, the creation of a right of access over the other allotment in order to clean and repair the mill-race.<sup>51</sup> Easements are typical of new proprietary interests that can be created as part of the partition remedy but they are not the only possibility.<sup>52</sup> In one English case where the land included a quarry, the court accepted that the partition order could include a provision that the quarry be allocated to one co-owner while reserving to the other two co-owners the right to extract stone from the quarry to maintain the stone houses on their allotted lands, subject to paying compensation for the stone taken.<sup>53</sup> Another case recognized the possibility of giving one co-owner an allotment while the other co-owner retained the right to work mines and extract the minerals beneath it.<sup>54</sup> It is submitted that the same powers should be regarded as within the registrar's statutory mandate.

In cases where a business is run from a portion of the land before partition, difficulties may arise if both co-owners wish to continue to operate competing businesses from their respective allotments after partition. If the portion of land from which the business was originally run is allotted to one co-owner, the ability of the other co-owner to set up and run a competing business from the other allotment could have a significant impact on the respective values of the allotments. The court had the power to make orders on partition which restrained one allottee from directly competing with the established business run from the other allotment, and the court has given special directions to partition commissioners requiring them to impose such a restraint.<sup>55</sup> However, it must be questioned whether the partition commissioners would have had the power to do so as an inherent part of their partition powers in the absence of the court's mandate, and the same doubt over the availability of this power must apply to partitions by the land registrar.

## ***ii. Personal Obligations and Owelty Awards***

The registrar is given no express power to supplement the partition by imposing personal obligations on a co-owner. The courts of equity, in contrast, could supplement the partition order with a monetary award against the recipient of a more valuable allotment, compelling him to pay a sum to the recipient of the less valuable allotment in order to achieve equality in the overall result. This sum was known as 'owelty'. The English cases reveal that the power to order owelty was frequently exercised and developed a sophisticated body of principles

51 *Lister v Lister* (1839) 3 Y & C (Ex.) 540; 160 ER 816.

52 *Charlesworth v Gartsed* (1863) 3 New Reports 54.

53 *Watson v Duke of Northumberland* (1805) 11 Ves 153; 32 ER 1046.

54 *Darvill v Roper* (1855) 3 Drew 294; 61 ER 915 (an agreed partition, but the principle is capable of application to court-ordered partition).

55 *Warner v Baynes* (1750) Amb 589; 27 ER 384. See also *Burley v Moore* (1827) 5 LJ Ch 120.

to adjust the financial position of the parties, to take account of improvements to the land and expenditure on it, to compensate for one co-owner's mismanagement of the land or a co-owner's sole occupation of the land or improper exclusion of another co-owner, and to redistribute past income receipts. It is crucial to ascertain whether this supplementary power is available to the registrar. In order to answer this question, it is necessary to examine whether or not the supplementary powers exercised by the court were regarded as an inherent part of the partition power and therefore automatically available wherever partition is available. For the reasons given in the following paragraph, it is submitted that this was not the case.

Although the court's powers to make monetary awards were frequently exercised in partition cases, they were additional to partition and not an integral component of the partition power. They were not properly regarded as an element of the partition jurisdiction but only as an element of the accounting jurisdiction recognized in equity. That monetary awards are not an inherent component of partition jurisdiction is made clear by the fact that equity courts alone had the ability to make monetary awards; partition commissioners could not make an owelty award unless specifically authorized to do so by special directions of the equity court.<sup>56</sup> The common law courts never assumed any power to order financial adjustments and could not even order a basic owelty award.<sup>57</sup>

Owelty therefore cannot be regarded as an integral constituent of partition jurisdiction, and it follows that the registrar's statutory power of partition does not implicitly carry with it the additional power to make a monetary award. The registrar's power must be understood as limited merely to dividing the land between the parties: it is not permissible to order some alternative division yielding unequal land shares coupled with a monetary award to achieve equality, even if this solution would be far preferable from the perspective of efficient land use and management. Similarly, the registrar has no power to make an allotment to a co-owner subject to the burden of a new personal covenant to erect new fences or walls or other improvements, as these require the payment of money<sup>58</sup> (although there has

56 *Mole v Mansfield* (1845) 15 Sim 41; 60 ER 531; *Peers v Needham* (1854) 19 Beav 316; 52 ER 371.

57 F.D. White and O.D. Tudor, *A Selection of Leading Cases in Equity* (Maxwell: London, 1849) 352, citing J. Story, *Commentaries on Equity Jurisprudence*, 2nd edn (Maxwell: London, 1839) 534. In *Countess of Warwick v The Lord Barklye* (1559–1649) Noy 68; 74 ER 1035, it was reported that 'in a writ of partition no damages shall be recovered, nor an enquiry for them'. See also *Lorimer v Lorimer* (1820) 5 Madd. 363; 56 ER 934.

58 This type of liability has been imposed by the partition commissioners in English cases but only when acting under the authority of special directions from an exchequer court administering equity: *Lister v Lister* (1839) 3 Y & C (Ex.) 540; 160 ER 816.

been a judicial statement that an allotment may be made subject to the burden of a covenant to maintain an existing boundary feature<sup>59</sup>).

## V. Judicial Guidance on Decision Making in Partition

The model land registration statute of the smaller Caribbean jurisdictions imposes on the land registrar a mandatory requirement to make partition of the land upon application, but the manner of division is to be determined in the registrar's discretion. In the absence of local statutory rules or guidance from local cases, the first source on the legal factors to be taken into account in reaching a legal decision is invariably the common law of England. As noted above, partition actions in England are now essentially moribund and there are no recent cases to assist on the point. Reliance has to be placed on older cases. But most of the reported judgments in old English partition cases are of limited value as the court itself did not decide how the land should be partitioned, a matter which requires some explanation of procedure.

In England, the traditional process in courts of common law was begun by the plaintiff issuing a writ of partition. If the plaintiff successfully made out the entitlement to have a partition, then the court issued a judicial writ to the sheriff to make partition, ordering the sheriff together with 12 men to go to the lands and make an equal and fair partition and allot each party their just and fair share, and then make a written return of the inquisition to the court indicating the allotments made. On the motion of a party, the court would then make final judgment on the return. In equity, the procedural stages were broadly similar (at least until the late nineteenth century when the decision how to partition the land began to be carried out by a judge in chambers). Traditionally, the plaintiff brought a bill for partition; if successful in making out the entitlement to have a partition, the court would make a decree that partition should be made and that a commission should issue, directing named commissioners to enter and survey the estate, make a fair division and allotments to the parties, and return a certificate of the proceedings to the court. A party seeking a particular form of division might apply to the court for special directions to be issued to the commissioners. The return certificate from the commissioners was confirmed on further consideration by the court. In order to carry out the allotments, the parties would then execute conveyances to one another, the deeds being settled by a Master.

In consequence, the reported English cases in which partition orders were sought simply record the grounds for the court's decision on whether or not the applicant was entitled to demand a partition;

59 *Lister v Lister* (1839) 3 Y & C (Ex.) 540 at 543; 160 ER 816 at 817 *per* Alderson B in argument.

they give no principles or illustrations of how to make partitions and weigh up the pros and cons of different proposed allotments, as that task was delegated to the jury or commissioners. Sometimes, however, an objection was made against the partition report issued by the commissioners or jury, and the party aggrieved would oppose the confirmation or seek to quash the certificate and suppress the return. It is this type of proceeding which provides the only source of the limited judicial guidance on how partition is to be effected.

## **VI. Factors to be Considered in Making the Registrar's Decision**

There is no written hierarchy of rules or exhaustive list of items stipulated by law to determine how the land registrar must exercise his or her discretion in making a partition. The discretion is not one which is constrained by detailed legal rules. There is not necessarily a single right answer in any given case; normally there will be a myriad of possible partition orders, each of which would be perfectly appropriate and sustainable in law. Assuming that the court will exercise its supervisory jurisdiction over the registrar in the same way as it formerly did over the partition commissioners, the registrar will be given a substantial latitude to arrive at an equal partition and the court will only interfere in strong cases, bearing in mind that there are likely to be innumerable acceptable ways to partition. The court will not quash the registrar's decision merely because the court can imagine a better method of partitioning the land, but only if the registrar ignored relevant matters, took irrelevant matters into account, reached a manifestly perverse decision, or acted beyond the terms of the statutory partition power.

Although the court will not lightly interfere with the registrar's decision making, there are some English partition cases in which the courts have given guidance on relevant factors for the partitioning authority to take into account. These are categorized and explained below. All of the cases examined below are older English cases in which the partition was being carried out by partition commissioners pursuant to an order of the court, and it is assumed that the legal principles should apply equally where the partitioning authority is the land registrar. The following thematic subheadings explain the guidance on individual factors which can be distilled from the English cases.

### ***i. Equality of Value in Allotments***

The first and overriding principle is that the partition order must allot the property among the co-owners so that each allotment is in proportion to the size of the co-owner's respective share.<sup>60</sup> The proportionality of the allotments is to be determined by the value of the land

60 *Agar v Fairfax* (1811) 17 Ves 533; 34 ER 206.

allotted and not the acreage.<sup>61</sup> Unlike the flexible factors discussed below, it appears that the principle of division according to equal value is a rigid rule which must be satisfied in all cases. It is the primary principle against which the court would assess the validity of the partition.

There are of course difficulties in identifying the basis for valuation. The allotments may have different values to different individuals—particularly to the co-owners themselves. One co-owner might have a special motive for wanting a particular portion, such as business reasons, or having adjacent property which would benefit from it, or some sentimental attachment. Any of these might increase the value to him or her of an allotment containing that particular portion. In order to resolve these concerns, it has been said that the correct legal approach to valuation is to consider a hypothetical auction of each proposed allotment at which the co-owners are not permitted to bid.<sup>62</sup> In other words, the personal value to each current co-owner must be disregarded in calculating the values.

One old English case<sup>63</sup> demonstrates the application of this principle. A parcel was held in three undivided shares: one third by Story, one third by Jones, and one third by Johnson and Gardner. The partition commissioners divided the land into three allotments of different acreages. On one of the allotments there was a popular inn. At a hypothetical auction at which the co-owners were not permitted to bid, each of the three allotments would have achieved the same price. On this basis, the division into the proposed allotments was regarded by the court as proper, even though Johnson would have been prepared to bid a much higher price for the allotment on which the inn stood.

Unlike partition proceedings in court, the land registrar has no power to order payments to be made between the co-owners. In court proceedings, the court may direct payments to be made between the co-owners in order to rectify all kinds of inequity, such as one co-owner's sole occupation of the co-owned land, their receipt of the rents and profits, their mismanagement of the land, their improvement of the land, and so on. The land registrar, in contrast, has no statutory power to take advantage of the opportunity presented by a partition application so as to adjust the financial position between the parties. The registrar's function is merely to divide and allocate the land according to the co-owners' shares. One of the consequences of the limited function of the registrar is that the registrar should not try to balance the financial position of the parties by adjusting the allotments. For example, consider the position where A and B are the two co-owners of the land and, over the years, A has spent substantial

61 *Calmadly v Calmadly* (1795) 2 Ves Jun 568; 30 ER 780.

62 *Story v Johnson* (1835) 1 Y & C Ex. 538; 160 ER 220.

63 *Ibid.*

sums on making improvements to a portion of the land, such as draining swamp and filling with aggregate. On a partition application, the registrar must divide and allocate strictly according to value. It is likely that the fact of occupation and improvement of the improved portion should be a factor suggesting the allocation of that portion to A.<sup>64</sup> However, if (for some good reason) the registrar determined that the improved portion should be allocated to B instead, then the registrar must still give A and B allotments of equal value: the registrar must not attempt to achieve 'fairness' between the parties by adjusting the division so that A receives an allotment of greater value in order to reflect their lost expenditure in improving the land. The registrar's function is merely to divide the land according to current value, any attempt to redress inequities being left solely to the courts.

### *ii. Creation of Subsidiary Rights*

It was argued above,<sup>65</sup> in reliance on an analogy with the inherent powers of the court,<sup>66</sup> that the registrar has power to make supplementary terms in a partition which go beyond merely dividing possession of the land between the proprietors. This would make a significant enhancement to the registrar's range of possible options for division of the property. For example, consider a plot of land to be partitioned which comprises land suitable only for pasture and crops, and which has a single pond on it. If the land were to be divided so that the pond fell entirely within one allotment, this might lead to an unacceptable disparity in value of the allotments. One solution could be found in redrawing the boundary between the proposed allotments so as to divide the pond and give part to each co-owner. However, as explained above, a partition order by the registrar need not be limited to merely drawing a new boundary line across the parcel, but may also involve supplementary terms which allocate new proprietary interests, such as the creation of new easements of access and so on. As an alternative, therefore, the registrar could make a superior partition by giving the ownership of the pond to one while granting the other an easement of access to the pond for drawing water, watering cattle and so on. All manner of new easements can be created in the

64 This factor might fall within subheading iii below entitled 'Interests of the Co-owners'. In *Heath v Bostock* (1835) 5 LJ (Ex. in Eq.) 20, it was held that the fact of expenditure on a portion of the land by a co-owner's husband did not justify the court making special directions to the partition commissioners requiring them to allot that portion to that co-owner. Nevertheless, the fact of expenditure is still capable of being a relevant consideration in reaching the decision even if it did not justify the court's special directions.

65 See above, Part IV, Division and Supplementary Terms, subheading i. New Distribution of Proprietary Entitlements.

66 Demonstrated in *Burley v Moore* (1827) 5 LJ Ch 120; *Lister v Lister* (1839) 3 Y & C (Ex.) 540; 160 ER 816; *Charlesworth v Gartsed* (1863) 3 New Reports 54; *Watson v Duke of Northumberland* (1805) 11 Ves 153; 32 ER 1046; *Darvill v Roper* (1855) 3 Drew 294; 61 ER 915.

partition order to achieve equality in the value of allotments and ensure that the efficient use of one allotment is not impeded through lack of facilities over another.

### *iii. Interests of the Co-owners*

When making the allotments the registrar is bound to consider what would be in the best interests of all the parties.<sup>67</sup> It is not enough to make allotments which, although they are of proportionate value, are made without regard to the interests of the co-owners. In order to be in a position to do so, the registrar must take submissions from the co-owners about their particular interests and circumstances. Where the co-owners' interests do not conflict with one another, the position is simple: 'It is the duty of [the partitioning authority] in making a partition to allot the property in such a way as that, if any one of the tenants in common desires for good and sufficient reasons to have a particular portion of the property allotted to him, [the partitioning authority] shall make the allotment of that portion to him accordingly, provided it is a matter of indifference to the other tenants in common.'<sup>68</sup>

Where two or more co-owners can produce good reasons for seeking a particular portion of the land, the position is of course more complex, but the strength of their competing claims should be appraised. Where the value placed on the particular portion of the land in dispute would be much higher to one particular allottee, then it would be perverse not to give it to that allottee. An example is supplied by *Story v Johnson*,<sup>69</sup> mentioned above. One of the co-owners was, immediately before partition, managing an inn on the parcel. He also owned adjacent land in his own name on which he had erected buildings, including a hostel and lodgings that supported the inn. The allotments proposed by the partition commissioners would have been of equal value to any other person, but the allotment comprising the inn was clearly of specially-enhanced value to Johnson. Because of this, the court found that the partition commissioners should have given Johnson the allotment with the inn. This principle does not, however, detract in any way from the principle mentioned earlier that the allotments to the co-owners must still be of equal value in the hands of strangers. The two-step process was stated clearly in the case: 'The proper mode is to consider what would be the value, if the estate were put up to auction, and the parties interested were not allowed to buy. That being done, the commissioners ought to look to

67 *Canning v Canning* (1854) 2 Drew 434; 61 ER 788; *Calmady v Calmady* (1795) 2 Ves Jun 568; 30 ER 780.

68 *Wright v Vernon* (1860) 1 Dr & Sm 231 at 234; 62 ER 367 at 368 *per* Sir Richard Kindersley.

69 *Story v Johnson* (1835) 1 Y & C Ex. 538; 160 ER 220 and (1837) 2 Y & C (Ex.) 586; 160 ER 529.

the circumstances of the parties.<sup>70</sup> This remains an accurate description of the proper approach for the registrar to take.

#### ***iv. Adjacent Land***

As stated above, the registrar must take into account the interests of the co-owners. The decision in *Story v Johnson*,<sup>71</sup> noted above, demonstrates that one of the relevant factors is the fact that a co-owner has land of his or her own which is situated adjacent to a portion of the land to be partitioned. In that case the adjacent land supported the commercial activity on the land to be partitioned, but this factor has also been confirmed in other English cases where there was no commercial activity: it is widely recognized that a co-owner who possesses land lying adjacent to the land to be partitioned has an interest in taking an allotment of the adjacent land, whether used for commercial or domestic purposes, and this factor must be taken into consideration on a partition.<sup>72</sup>

#### ***v. Sharing Physical Features***

Where different parts of the land to be partitioned have different types of terrain, physical features, characteristics, developments, situations, and so on, this may have a bearing on the decision how to make the division into allotments. A suitable starting point for the division would be to consider the desirability of giving each allotment a part of each physical feature. If, for example, the land to be partitioned were part agricultural and part swamp land, then a division could be made which gave each allotment half of the agricultural land and half of the swamp land, provided the allotments were of equal value.

This is, however, only a starting point for consideration of the division into allotments and may easily be rejected upon consideration of other factors. The English courts have stated that there is no legal rule requiring that each allotment must receive a part of each physical feature:<sup>73</sup> it is not necessary that 'an aliquot share of each species of property be allotted to each of the parties',<sup>74</sup> and in fact such an approach could impair the use of the allotments. The problem

70 *Ibid.* (1835) 1 Y & C (Ex.) 538 at 544; 160 ER 220 at 222.

71 *Ibid.* (1835) 1 Y & C (Ex.) 538; 160 ER 220 and (1837) 2 Y & C (Ex.) 586; 160 ER 529.

72 *Canning v Canning* (1854) 2 Drew 434; 61 ER 788; *Porter v Lopes* (1877) 7 Ch Div 358; *Watson v Duke of Northumberland* (1805) 11 Ves Jun 153; 32 ER 1046 *per* Lord Eldon LC; *Turner v Morgan* (1803) 8 Ves 143; 32 ER 307.

73 *Earl of Clarendon v Hornby* (1718) 1 P Wms 445; 24 ER 465, recommending that the partition commissioners allocate the entire principal mansion to one co-owner; *Story v Johnson* (1837) 2 Y & C (Ex.) 586; 160 ER 529, accepting allocation of entire inn to one co-owner; *Watson v Duke of Northumberland* (1805) 11 Ves Jun 153; 32 ER 1046, stating that the partition commissioners could potentially allocate an entire limestone quarry on the land to one co-owner. The same principle applied to partitions at common law: see *Moor v Onslow* (1598) Cro Eliz 760; 78 ER 991 (Common Pleas).

74 *Peers v Needham* (1854) 19 Beav 316; 52 ER 371 *per* Sir John Romilly MR.

of dividing physical features is particularly clear when the land includes buildings. In some cases, there may be no option but to order the division of a building. Taking the example of a single house held by two tenants in common, instead of a partition, the sensible solution would be for one to buy out the other's share, or to seek a sale, perhaps with one or both bidding at auction. But if they persisted in partition without requesting sale, the house would have to be divided. It is an entirely unsatisfactory solution—internal walls may have to be put up and services may have to be allocated to one alone, as happened in old English cases.<sup>75</sup> Because of the inability of the registrar to order sale on his or her own motion, the registrar would be required to make the partition, and the only route to avoid this may be a solicitous inquiry to determine if the proposed division would be inconsistent with planning laws or building regulations.

#### ***vi. Depreciation in Value***

As noted above, there is no legal rule requiring that each allotment must include a part of the building, and in most cases (certainly where a building is occupied as a single family or business unit) any suggestion of dividing on this basis should be rejected as it would diminish the value of the property. An illustration is found in an English case<sup>76</sup> where two co-owners, A and B, had undivided interests in land comprising a mansion and large estate. A's share was two-thirds, B's share one-third. B's application for one-third of the mansion was dismissed. B's claim to proportionate entitlement, taken to its extreme, might imply that every tenanted worker's cottage on the estate would also have to be divided into thirds for allotment. The depreciation this would cause to the overall value of the land was a compelling reason not to divide the land in this way. The judge commented: 'Though [B] must have a third part in value of this estate, yet there is no colour of reason that any part thereof should be lessened in value in order that he may have a third part of it.'<sup>77</sup> The court therefore declared that A should take the whole mansion and B took a correspondingly greater allowance from the estate. These reasons doubtlessly apply to the division of any physical feature of the land.

#### ***vii. Contention and Ransom***

One of the dangers in dividing up property is that the former co-owners who will occupy the resultant allotments may be unable to live amicably as neighbours. Where partition cannot be replaced by a sale, then the best solution may be to minimize the degree of interaction and cooperation necessary for their daily co-existence. Ideally this would mean a boundary line between the allotments, with clear and simple instructions about responsibility for maintaining the boundary

<sup>75</sup> *Turner v Morgan* (1803) 8 Ves 143; 32 ER 307.

<sup>76</sup> *Earl of Clarendon v Hornby* (1718) 1 P Wms 445; 24 ER 465.

<sup>77</sup> *Ibid.* (1718) 1 P Wms 445 at 447; 24 ER 465 at 466 *per* Parker LC.

fence, and no other directions which involve sharing any other facilities. Supplementary terms in the partition order which involve sharing any facilities may create endless sources of conflict: these might involve one allottee having access rights, easements or *profits à prendre* over the land of the other allottee, rights to use shared facilities, party walls, repair obligations, rights to repair coupled with a duty to compensate for any damage caused, and so on. These arrangements are all liable to contribute to on-going strife and, unless they are strongly justified on other grounds, should therefore be avoided where relations between the co-owners might deteriorate, particularly where the parties are living in close proximity and sharing facilities. The most extreme example is the partition of individual houses seen in the old English cases, which was ordered only as the last resort when sale was not possible. The same principle is illustrated by the case mentioned earlier<sup>78</sup> involving the partition of a mansion and estate, where the court recognized that to divide up the house would 'occasion perpetual contention'<sup>79</sup> between the allottees and so refused to order partition in that manner.

Where the proposed division is likely to cause friction between parties, the result might also affect the values of both allotments. A purchaser might be found who is willing to pay a good sum to take on the divided one-third of a mansion, knowing that it will be necessary to keep on positive terms with the immediate neighbour in order to forestall disputes over access, party structures, noise, and so on. On the other hand, the exclusivity, prestige, privacy and independence that come with ownership of the entirety might well command a premium, so that a purchaser of the entirety of the mansion might be willing to pay more than treble the sum offered by the purchaser of the one-third. This simple illustration suggests that a partition order which requires shared facilities and so forth might lead to depreciation of the value of the land partitioned.

When this occurs, another factor comes into play. The danger associated with a partition order involving shared facilities is that one party will attempt to extract some leverage from the nuisance value of his or her claim in forcing a buy-out. The outcome of a partition which divides up facilities and introduces sharing may be that the neighbouring parties will find it impossible to reach a satisfactory *modus vivendi*, and one party will simply end up negotiating to buy out the other. This will often be the ideal solution, and one that should have been agreed by the parties long before they sought partition. In one case, the court even threatened the parties with an entirely unsatisfactory division of a single house for the purpose of encouraging them to agree a sale or buy-out.<sup>80</sup> However, there is a risk that one

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.* (1718) 1 P Wms 445 at 447; 24 ER 465 at 466 *per* Parker LC.

<sup>80</sup> *Turner v Morgan* (1803) 8 Ves 143; 32 ER 307.

party will seek a particular division in the partition order as a ploy to strengthen his hand for a future buy-out.

Developing the case example above, if the mansion were divided as B requested, this is likely to be unsatisfactory to A because of both the depreciation caused to the value of the house and the need to share parts of the house between the two protagonists. Assuming B has alternative accommodation, B's predominant reason for seeking a one-third share of the mansion may be purely to strengthen his bargaining position for a future buy-out. A would have a strong motivation to buy out B's share, and B would effectively force the sale to A at a ransom value. The courts have indicated that a division having this effect should not be ordered at the request of a party where this factor motivates their claim.<sup>81</sup>

### *viii. Family Circumstances*

It is clear that the decision-maker may take into account the relevant personal and family circumstances of the co-owners. One English case from 1854<sup>82</sup> involved the partitioning between co-heiresses of land which comprised a manor house and estate. The court said that the partition commissioners could take into consideration the circumstance that one of the co-heiresses was the eldest daughter and could consider that to be a ground, all other things being equal, for allotting the manor house to her. The court also required the partition commissioners to take account of the facts that the eldest daughter was married and that her husband had taken her family name; that he had no other mansion; and that they proposed to keep the manor house as their family mansion. Matters of lineage and dynastic succession to family land therefore appear to be relevant to the allotment. In a later case, the court took into consideration the fact that the applicants wished to live in the mansion and had ancestral attachments to it.<sup>83</sup> While the specific considerations of the family name and the status as first-born daughter are no longer likely to be found compelling given modern conceptions of land and family wealth, it is submitted that cases nevertheless stand for the more general proposition that family circumstances and family associations with the land can be appropriate factors to take into account in determining partition applications.

### *ix. Largest Share*

There are some tentative indications in the case law that the partitioning authority may accord greater weight to the views of the co-owner

81 *Earl of Clarendon v Hornby* (1718) 1 P Wms 445; 24 ER 465; *Story v Johnson* (1835) 1 Y & C (Ex.) 538; 160 ER 220.

82 *Canning v Canning* (1854) 2 Drew 434; 61 ER 788. See also *Lister v Lister* (1839) 3 Y & C (Ex.) 540; 160 ER 816, in which the court refused to interfere with a decision by partition commissioners to allocate the principal mansion to the eldest son and heir.

83 *Porter v Lopes* (1877) 7 Ch Div 358.

having the largest share. In *Earl of Clarendon v Hornby*,<sup>84</sup> for example, the court allotted the mansion to the owner of the two-thirds share rather than the owner of the one-third share. This factor appears to be a weak one and easily displaced by other good reasons for making a different division and allotment. In *Story v Johnson*,<sup>85</sup> for example, the land was occupied in two parcels, the first parcel held by Story, Jones and Johnson equally and the second parcel held by Story, Jones and Gardner equally. Nevertheless, when Story and Johnson argued over the portion of the land comprising the inn, the court preferred Johnson over Story. Even though Johnson's share was the smaller, the reasons for allocating the inn to him were much stronger. The case is therefore an example of the ease with which the 'larger share' argument will yield to more compelling circumstances working in favour of the holder of a smaller share.

#### ***x. Obligations to Third Parties***

Where a co-owner has made an agreement to dispose of part of the land to some third party before partition, an issue may arise over whether the contractual obligation owed to the third party has any influence over the partition of the land. The answer is provided by an English case.<sup>86</sup> Three co-owners held land which included a portion comprising a water meadow. One of the co-owners (Mrs English) entered an agreement to sell the water meadow to a purchaser, even though she was not exclusively entitled to the water meadow as it was part of the estate held in undivided shares. The purchaser took possession of the water meadow and carried out improvements. A partition suit was commenced; the partition commissioners did not allot the water meadow to Mrs English, leaving her unable to fulfil her contractual obligations. The purchaser applied to the court for directions compelling the partition commissioners to allot the water meadow to Mrs English so that she could then make a formal transfer of it to the purchaser. One of the other co-owners also sought the same outcome in order to clear up the title, but the final co-owner objected to the proposed direction. The court decided that Mrs English's obligation to the purchaser was an insufficient basis for overturning the decision of the partition commissioners and giving the proposed directions.

The case supports the proposition that on a partition the court will not necessarily overturn a partition which prevents a purchaser of an undivided share from acquiring that portion of the land which he or she agreed to buy and has occupied. Nevertheless, the cases do not go as far as saying that the partition must positively ignore this matter; it

<sup>84</sup> *Earl of Clarendon v Hornby* (1718) 1 P Wms 445; 24 ER 465.

<sup>85</sup> *Story v Johnson* (1835) 1 Y & C (Ex.) 538; 160 ER 220.

<sup>86</sup> *Wright v Vernon* (1860) 1 Dr & Sm 231; 62 ER 367. See also *Cooper v Fisher* (1841) 10 LJ (Ch) 221.

is a matter which may be taken into account, and indeed the partitioning authority probably should pay regard to it as a relevant matter in arriving at the partition order.

### *xi. Drawing Lots*

In some cases, there may be extreme difficulty in identifying any reason at all for allocating an allotment to one co-owner rather than another. Where the land is physically undifferentiated throughout, and each proposed allotment would have similar characteristics, similar forms of access and so on, then it may be simple to make the division into the necessary allotments, but difficult to establish a rational basis on which each should be allotted to a particular co-owner. The conundrum is how to allocate in these circumstances. The solution recognized by English law, at least in the late nineteenth century,<sup>87</sup> was to leave the decision to chance by allowing lots to be drawn: 'If the [partition commissioners] can find no reason weighing one way or the other, then they are reduced to the alternative of drawing lots, because there is nothing else to guide them. But it appears to me that the drawing of lots is the last resort, and ought only to be adopted when they do not find anything to guide their discretion one way or the other.'<sup>88</sup> In an age of relentless judicial review of decision making based on natural justice and human rights, it seems surprising at first glance that lottery could ever be proposed as a basis for distribution, but in the rarest of cases where no other basis for allocation of similar allotments can be discerned, the drawing of lots continues to present an intriguing possible solution.

## **VII. Conclusions**

### *i. Partition by Courts and Registrars*

Whether co-ownership is solicited by willing purchasers or inflicted on unsuspecting beneficiaries under a will or intestacy, some mechanism to escape the ties of perpetual contention between co-owners<sup>89</sup> must be allowed in any system of law which seeks efficient resource exploitation. Apart from simple abandonment, the obvious methods for doing so compulsorily against the wishes of the other co-owners must be disposal or division of the parcel. In the common law world, the courts generally possess powers to order partition or sale; in the

87 *Canning v Canning* (1854) 2 Drew 434; 61 ER 788; *Ames v Comyns* (1867) 17 *Law Times Reports* 163; *Manners v Charlesworth* (1833) 1 My & K 330; 39 ER 706.

88 *Canning v Canning* (1854) 2 Drew 434 at 437; 61 ER 788 at 789 *per* Sir Richard Kindersley V-C.

89 Explicitly acknowledged in the preamble to the Partition Acts 1539 and 1697 and comprising the 'anticommons' problem in economic theory: M.A. Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111 *Harvard Law Review* 621.

smaller Caribbean jurisdictions, this is supplemented by the registrar's power to partition.

The court's extensive statutory power ensures that applications in that forum possess certain jurisdictional advantages over applications to the land registrar for partition. For instance, the court has wider powers to order a sale of the land in lieu of partition and divide the proceeds; it can give a partition judgment where a party cannot be found and served;<sup>90</sup> it can partition where one of the parties is under a disability;<sup>91</sup> it can partition leasehold land;<sup>92</sup> it can partition on the application of a joint tenant<sup>93</sup> (an important right when a joint proprietor cannot sever without the consent of all other joint proprietors, as is the case under the model land registration statute<sup>94</sup>); and the court has power to order 'equitable accounting',<sup>95</sup> effectively compelling a co-owner to make monetary payments to other co-owners to reflect such circumstances as improvements having been made to the property, improper exclusion of a co-owner from the property, receipt of rents, improper management of the property, and so on.<sup>96</sup> Nevertheless, the registrar's powers are frequently invoked, presumably for reasons of practical convenience, and constitute an important feature of the land tenure system.

The registrar's power of partition is sufficient in many cases. 'Economic principles'<sup>97</sup> may even justify a registrar's order for a sale or buy-out within the parameters set by the statute: namely, whenever partition would adversely affect proper exploitation of the parcel<sup>98</sup> or would fragment it into allotments too small for economic use.<sup>99</sup> Preserving the parcel intact by means of sale or buy-out maximizes value in these circumstances;<sup>100</sup> but fragmentation does not always decrease efficient exploitation of land, and may end up enhancing the marketability of the land,<sup>101</sup> particularly in impoverished areas where smaller plots are sought by those without access to mortgage funding. When the limited jurisdiction to order sale or buy-out is unavailable, the

90 E.g. Partition Law (1997 Revision), s. 8 (Cayman Islands).

91 *Bull v Bull* (1868) 18 LT 870 (court giving decree where infant held an interest).

92 Partition Act 1540 (32 Henry 8, c.32).

93 Partition Act 1539 (31 Henry 8, c.1) and Partition Act 1540 (32 Henry 8, c.32).

94 E.g. under Registered Land Law (2004 Revision), s. 100 (Cayman Islands): applied in the decision of the Grand Court in *Mums Incorporated v Cayman Capital Trust Co* [1988–89] CILR 485.

95 *Lorimar v Lorimar* (1820) 5 Madd. 363; 56 ER 934.

96 E.g. *Swan v Swan* (1820) 8 Price 518; 146 ER 1281; *Leigh v Dickson* (1884) LR 15 QB 60 at 67.

97 So labelled by S.R. Simpson, *Land Law and Registration* (CUP: Cambridge, 1976) 244, who was responsible in large part for generating and championing the FCO model land registration statute.

98 E.g. Registered Land Law (2004 Revision), s. 103(1) (Cayman Islands).

99 E.g. *ibid.* at s. 104.

100 C. Reid, 'Partitions in Kind: A Preference Without Favour' (1985–6) 7 *Cardozo Law Review* 855 at 880.

101 T.J. Miceli and C.F. Sirmans, 'Partition of Real Estate; Or, Breaking Up is (Not) Hard to Do' (2000) 29 *Journal of Legal Studies* 783.

right to partition prevails, and its broad availability as a primary remedy in preference to sale has recently been commended on the ground that it preserves the property in the hands of the co-owners who may attach a special subjective value to the land that they cannot realize in monetary terms at a public auction.<sup>102</sup>

## *ii. The English Factors: Transplantation and Viability*

The factors to be considered by the land registrars when exercising the partition jurisdiction are not identified in the statute. This paper has identified the limited case law in England on partitioning by other authorities and has extracted principles from those judgments which give special directions to partition commissioners or review their reports. Those cases were decided in a different period and in a foreign land, so their acceptance across the Atlantic cannot be assured, but it is submitted that the eighteenth- and nineteenth-century English cases are entirely suitable for transplantation. The differences in physical geography and development should create no problem, for the common law has shown itself sufficiently versatile to accommodate lands of all descriptions: vacant ground,<sup>103</sup> a house,<sup>104</sup> a city tavern and its vaults,<sup>105</sup> public baths,<sup>106</sup> agricultural land,<sup>107</sup> pasture and craggy terrain,<sup>108</sup> open moorland,<sup>109</sup> and great country estates.<sup>110</sup>

The context of the land market might supply a criterion for reconsidering the suitability of the English cases. In the remoter areas of the Caribbean islands, there may be next to no land market, leading to the practical impossibility of a sale of the entirety. The limited availability of mortgage finance, often linked to the land's marketability, may also impact on the possibility of a buy-out by one co-owner, or on the necessary development works required in order to exploit one or more of the divided allotments. But these are problems that have been encountered in England, where the partition cases span the centuries and have had to contend with periods of economic depression and practically unmarketable properties. It is suggested that the cases create a framework for dealing with universal issues, and considerations of time and place are no impediment to their application in the Caribbean.

102 P. Craig-Taylor, 'Through a Coloured Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting' (2000) 78 *Washington University Law Quarterly* 737; F. Rivers, 'Inequity in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity' (2007–8) 17 *Temple Political and Civil Rights Law Review* 1; Miceli and Sirmans, above n. 101.

103 *Morris v Timmins* (1838) 1 Beav 411; 48 ER 999.

104 *Turner v Morgan* (1803) 8 Ves 143; 32 ER 307.

105 *Peers v Needham* (1854) 19 Beav 316; 52 ER 371.

106 *Warner v Baynes* (1750) Amb 589; 27 ER 384.

107 *Swan v Swan* (1820) 8 Price 518; 146 ER 1281.

108 *Parker v Gerard* (1754) Amb 236; 27 ER 157.

109 *Agar v Fairfax* (1811) 17 Ves 533; 34 ER 157.

110 *Earl of Clarendon v Hornby* (1718) 1 P Wms 445; 24 ER 465.

A more important consideration when considering the aptness of the English cases to Caribbean conditions might be the suitability of the values which underlie the principles found in the English cases. This paper has attempted to identify, relying on the limited judicial sources, the factors to be applied in partition cases. Several strands can be detected which run through these factors. First, there are the factors which collectively demonstrate the existence of principles about certainty and predictability of outcome in partition cases. The factors discussed above under the heading of 'Equality of value in allotments' reveal that the overarching policy of the law is to establish an objective basis for dividing the land by market value according to the proportionate interests of the co-owners. Without such a policy, partition actions would suffer from unpredictability in the final distribution of value between the co-owners, which, coupled with the typically high stakes for disputants in land cases, would lead to a greater incentive to litigate and discouragement to accept any settlement offers.<sup>111</sup> To avoid the wasted cost created by that environment, the case law shows an absolute preference for objective measurement in the valuing of allotments. This promotes the efficient settlement of co-owner disputes through agreed partition without the expense of referral to the court.

Secondly, there are the factors which collectively demonstrate the existence of principles about maintaining land value on partition. The land must be divided in a manner that impairs its value the least. This is borne out by the factors labelled above as 'Depreciation in value' and 'Sharing physical features and buildings', which reveal that the court will not divide the land in a manner that lessens the value of the allotments. Even if one co-owner, on the basis of some broad concept of fairness in division, seeks a proportionate share of each of the different facilities or types of terrain, this will not be permitted if it would diminish the value of the other co-owner's allotment. It appears that the law is concerned to promote economic efficiency by making allotments which do not conflict with the ideal of maximizing value.

The same policy is also seen in the factor labelled 'Creation of subsidiary rights'. Maintaining the land value is revealed by the apportionment of use rights in the land through the creation of new easements and profits where to do so would enhance the total value of the allotments. There are, however, limits on the extent to which the consequent sharing of facilities should be permitted, which were revealed by the factor labelled as 'Contention and ransom'. It was recommended that where an alternative division could maintain the combined value of allotments without the need for cooperation, then the better approach is to avoid the sharing of facilities which might engender friction between the neighbouring allottees. This would

111 The point is accepted in the law and economics literature, e.g. W.M. Landes, 'An Economic Analysis of the Courts' (1971) 14 *Journal of Law and Economics* 61.

have the added advantage of removing the opportunity for relying on the nuisance value in later buy-out negotiations.<sup>112</sup> A partition which fails to acknowledge this might lead to future expense in resolving disputes, or the impaired exploitation of one or more of the allotments, reducing their market value.<sup>113</sup>

Thirdly, once a suitable division of the land has been proposed, there are factors which collectively demonstrate the existence of principles for determining which co-owner should receive which particular allotment. The factors labelled as 'Interests of the co-owners' and 'Adjacent land' demonstrate that the court will allocate the land to the co-owner who subjectively values it most highly, whether on account of reasons of commerce, sentiment or otherwise. The explanation for this is a simple matter of economics: if the co-owner valuing it most highly did not receive the land under the partition order, the stage would be set for that co-owner to open post-judgment bidding for the allotment, leading to the potential wasted cost of litigation, and an exceedingly inefficient process for resolving the co-owners' dispute.<sup>114</sup> English law therefore achieves a remarkable dual approach to value: the division of land must occur by reference to objective market value, yet the incommensurable personal value to the co-owner is the basis for allocating the allotments among the co-owners.

Further factors concerning the allocation of particular allotments to recipients were deduced from the case law, but these appeared to be recognized as weak factors. They included the factors discussed under the headings 'Family circumstances', 'Largest share', 'Obligations to third parties' and 'Drawing lots'. At best, they seem to function as a sort of default basis for allocation, to be applied only where the economic factors are unable to yield a result. The specific factors considered under the heading 'Family circumstances' must be regarded as a product of the cultural background of the English decisions in the Victorian era, as dynastic preferences based on primogeniture simply cannot be accepted as significant in the twenty-first century Caribbean without examining norms of local tenure. But if those English cases are taken as manifestations of a broader principle that family circumstances are relevant to the making of the allotments, then the principle has continued relevance as reflecting the greater subjective value that particular family members will attach to an allotment.

In conclusion, it is submitted that the principles from the English cases embody fundamental economic values: namely, promoting the

112 See R.A. Epstein, 'Holdouts, Externalities and the Single Owner' (1993) 36 *Journal of Law and Economics* 553.

113 Once again, the circumstances fall within the 'anticommons' problem: M.A. Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111 *Harvard Law Review* 621 at 668.

114 See R. Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1.

efficient distribution and exploitation of land as a resource. The economic basis for partition is one which transcends national boundaries and is not dictated by conditions unique to England. Of course an economic analysis cannot provide the final word on legal policy, but it can be employed to establish the proposition that a particular rule increases efficiency in the allocation of resources and should therefore be adopted unless to do so would impair some more important social value.<sup>115</sup> In the Caribbean jurisdictions, the principles extracted from the English case law constitute an excellent starting point for a rational structure to determine partition applications. Being rooted in economic values, their transplantation must accommodate any specific local cultural departure from the conceptualization of land merely as a temporary and convertible form of wealth, but it has already been shown that the English formula is able to take account of this when making the allotment by respecting the subjective value in the eyes of the co-owners. It is submitted that the case law factors are therefore a suitable model for Caribbean registrars to apply in overcoming the stalemate occasioned by antagonistic co-owners.

115 See R.A. Posner, 'The Economic Approach to Law' (1974-5) 53 *Texas Law Review* 757 at 765.