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Tenancy in Common -- Equitable Partition -- One Cotenant's Attempt to Devise or Convey a Specific Portion of Common Property

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it would not appear that this would cause them to become "nugatory" under the third subsection. Therefore, it is felt that when the court examines the law on this subject in greater detail it would hold that actions for alienation of affections and criminal conversation do survive.

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Tenancy in Common—Equitable Partition—One Cotenant's Attempt to Devise or Convey a Specific Portion of Common Property

A point decided in the recent North Carolina case of *Taylor v. Taylor*[1] raised the question of the effect of one cotenant's purporting to devise or convey an absolute interest in a specific quantity of the land held in common. The decisions in this area are not numerous, and the ones found seem to apply a particular rule to each differing fact situation. Nevertheless, the cases would appear to be divisible into three logical categories, and it is believed that certain fairly consistent principles lie behind the results of the cases involving this question.

Purported Conveyance or Devise of the Whole of the Common Property

One of the most commonly encountered situations is that in which one cotenant, who owns only an undivided interest in the land, attempts to transfer by deed or will the entire interest in the whole tract held in common. As to the effect of this, all the cases seem to be in accord. The rule here is that the transferor conveys or devises his entire interest in the property, which is his undivided interest in the whole tract described.[2]

Purported Conveyance or Devise by Metes and Bounds of a Specific Portion of the Common Property

Where one cotenant purports to transfer by metes and bounds a specific portion of common property, there are two defects in the transaction. *First,* the tenant attempts to transfer the entire fee in the land described rather than his undivided interest in it. *Second,* the attempted transfer of a specific portion of the undivided tract is in effect a unilateral attempt to partition. Thus the courts do not ipso facto give effect to such an attempted transfer. However, most of the states which have passed on the question find such a transfer to be merely voidable at the election of the grantor's cotenants; and only they can avoid it if, and to the extent that, it prejudices them.[3] This has been called the equitable

[1] 243 N. C. 726, 92 S. E. 2d 136 (1956).

[2] *Devises*: Spitzer v. Branning, 139 Fla. 259, 190 So. 516 (1939); Van Reuth v. Mayor and City Council, 165 Md. 651, 170 Atl. 199 (1934); Lushington v. Sewell, 1 Russ. & M. 174, 39 Eng. Rep. 65 (1830). *Deeds*: Home Owners' Loan Corp. v. Cilley, 125 S. W. 2d 313 (Tex. Civ. App. 1939); Bailey v. Howell, 209 N. C. 712, 716, 184 S. E. 476, 478 (1936) (dictum) (grantee of cotenant takes only cotenant's share and steps into his shoes).

[3] Highland Park Mfg. Co. v. Steele, 235 Fed. 465 (4th Cir. 1916); Lane v.

partition doctrine.[4] If the nonconveying cotenants can get their proper share of the common property from the portion not conveyed, their interests are not prejudiced and the deed by metes and bounds is operative.[5] In a suit for partition brought by a nonconveying cotenant,[6] the New Hampshire court said:

> ". . . Her [the grantor's] deed of the whole of a distinct parcel of the common property is good to the extent of her interest. Her deed is also valid against the plaintiff in partition, unless the land conveyed or some portion of it is equitably required to give him his just share in the whole. Except in such contingency, her deed is a partition of the premises."[7]

The equitable partition rule has on occasion been stated to apply only when the portion of the land conveyed "does not exceed either in extent or value the aliquot share of the tenant in the whole property."[8] Yet in a case in which the value of the part conveyed exceeded the grantor's share, the court did give a species of equitable partition. In *Pickens v. Glassock*,[9] one cotenant had conveyed by metes and bounds, apparently without consideration,[10] one acre of a large tract of common

Malcolm, 141 Ga. 424, 81 S. E. 125 (1914); Potter v. Wallace, 185 Ky. 528, 215 S. W. 838 (1919); Cressey v. Cressey, 215 Mass. 65, 102 N. E. 314 (1913); Lasater v. Ramirez, 212 S. W. 935 (Tex. Comm. App. 1919). See Stark v. Barrett, 15 Cal. 361 (1860) where one cotenant conveyed his interest in a specific portion of the common property. The grantee was allowed to eject a trespasser because the conveyance was good as against everyone but the nonconveying cotenant, and the conveyance was said to be subject to the determination of the nonconveying cotenant's rights.

[4] Although this doctrine is widely recognized, the actual term "equitable partition" seems mainly confined to the Texas opinions cited. However, the phrase will be used throughout this note because it represents a convenient label for this idea.

[5] Zawaba v. Allen, 228 S. W. 664 (Tex. Civ. App. 1921); Gosch v. Vrona, 227 S. W. 219 (Tex. Civ. App. 1920).

[6] California has held that the grantees would be necessary parties defendant in any partition proceedings by virtue of the real party in interest statute. Gates v. Salmon, 35 Cal. 576 (1868). The same result would seem to be required under N. C. GEN. STAT. § 1-70 (1950), requiring that parties be joined as plaintiffs or defendants who are united in interest.

It seems that the transferees would not have to wait for the cotenants to bring an action for partition, but could sue for partition themselves. This is because they have a right to possession of the property transferred to them. Mahoney v. Middleton, 41 Cal. 41 (1871). Also, N. C. GEN. STAT. § 1-57 (1950) seems to authorize the transferee of a specific portion of common property to bring the action, as he is definitely one of the real parties in interest.

[7] Warner v. Eaton, 78 N. H. 515, 516, 102 Atl. 535, 536 (1917).

[8] 86 C. J. S., *Tenancy in Common* § 122 (b) at 536 (1954).

[9] 78 S. W. 2d 257 (Tex. Civ. App. 1934).

[10] The opinions lay no stress on the special equities of the innocent purchaser for value in giving the grantee the right to get on partition the specific parcel conveyed to him when this is not prejudicial to the nonconveying cotenants. See Zinn v. Farmer, 243 S. W. 523, 525 (Tex. Civ. App. 1922) (dictum) (deed "at least susceptible of the construction that it was operative as a gift," *held* sufficient to convey the specific portion described). Although no direct holdings have been found, it is thus believed that the basic operation of the equitable partition doctrine would apply to devises as well as to cases involving deeds. In fact, the North

property to a church. The church leased the mineral rights to the plaintiff who sued in trespass to try title. The equitable partition doctrine was held to be inapplicable to set off to the grantee church the entire acre conveyed because oil had been found on that acre and there was no evidence that the other cotenants could get their equal share out of the remainder of the common property. However, the court did not declare the deed void but said "although such deed purported to convey the whole of the title, it in fact was effective to convey only the one-half undivided interest of the grantor."[11] The court ordered a partition to give the grantee one half of the acre.[12]

Of course a conveyance or devise by only one cotenant of a specific portion of the common property may be a valid partition where the other cotenants acquiesce in or ratify the transaction.[13]

Purported Conveyance or Devise of All the Common Property by Transferring Separate Parcels to Two or More Different Transferees

Only a few cases have been discovered where a cotenant has purported to devise or convey by separate parcels to different transferees all of the common property. In such a transfer, it is obvious that each could not take the full specific portion transferred to him because the nonconveying cotenants would have nothing whatever from which to get

Carolina court cited a deed case in the principal case of *Taylor v. Taylor.* Also in Frederick v. Frederick, 219 Ill. 568, 581, 76 N. E. 856, 861 (1906), the court was considering a devise of a specific portion of common property by metes and bounds by one cotenant and it said: "If one cotenant attempts to convey the whole or any part of any specific portion of the common estate, such conveyance is void at least in so far as it is prejudicial to the interest of the other cotenants. The grantee under such a conveyance may occupy the position of the grantor, but under no circumstances can his rights be any greater." The court declared the devise void because it would prejudice the rights of the cotenants.

The sentiment quoted above, to the effect that the grantee may never have any greater rights than his cotenant-grantor, is often seen in the opinions. Yet it is curious to note that the grantee may have a slight preference in that the usual cotenant never has on partition any sort of equitable claim to a specific portion of the common property.

[11] Pickens v. Glassock, 78 S. W. 2d 257, 259 (Tex. Civ. App. 1934). *But see* Soutter v. Porter, 27 Me. 405 (1847) where the court refused to allow a conveyance by metes and bounds to vest in the grantee the grantor's undivided interest, saying that the court will not permit such a construction of a deed as would convey an estate of a different kind or description from that intended to be conveyed. No cases are found following this theory in other jurisdictions. FREEMAN, COTENANCY § 206 (1882) denounces this case, saying that if a deed may not operate in the manner intended by the parties, the courts will endeavor to construe it in such a way that it shall operate in some other manner.

[12] This case involves unusual facts and may be distinguishable. The remedy of partition of the one acre only is uncommon. Generally partition is a proceeding where the rights of all of the parties in all of the land in the tract are adjusted. Caraway v. Hebert, 182 So. 164 (1938); 68 C. J. S. *Partition* § 55 (b) (2) (1950).

[13] Joyner v. Christian, 113 S. W. 2d 1229 (Tex. Comm. App. 1938); Railroad Comm'n v. Magnolia Petroleum Co., 125 S. W. 2d 398 (Tex. Civ. App. 1939); Berryman v. McDonald, 107 S. W. 944 (Tex. Civ. App. 1908). Acquiescence or ratification is generally found where the nonconveying cotenant either takes the remaining part and lives on it and improves it or merely abides by the sale voluntarily for a period of years.

their portions. Other than the principal case, the only such decision the writer has found is the New Mexico case of *Madrid v. Borrego*.[14] A cotenant with a one-half undivided interest purported to convey half of the tract to grantee *A*. Later, he purported to convey the other half of the land to grantee *B*. The nonconveying cotenant's heirs brought an ejectment action against both *A* and *B*. The trial court refused to grant the ejectment and the plaintiffs appealed. The supreme court reversed and remanded in order to allow more evidence to be taken as to whether a partition by acquiescence had taken place after the first deed had been made. If there had been a partition by acquiescence after the delivery of the first deed, the second deed would be void because the property described would belong to the nonconveying cotenant.[15]

However, the court did discuss the legal situation which would arise if there were not acquiescence by the plaintiff. Although dictum, it would appear to be in the nature of instruction for the trial court if it so found the facts. The court said[16] that each grantee would own a one-half undivided interest in the specific portion attempted to be conveyed to him. The nonconveying plaintiff would in this case continue to own his undivided interest in the whole, now split up into two tracts held as tenancies in common. The court did not speak of possible prejudice to the plaintiff in having his former undivided interest in a large tract divided into undivided interests in two smaller tracts. It is possible that in the particular case all of the land was of the same value uniformly throughout the tract, and that location of any portion on partition would not affect the value of the land to the tenant. The solution offered by this court seems to be an extension, a doubling of the remedy applied in *Pickens v. Glassock*. Yet it is clear that a rigid split of a large tract of common property into two smaller tracts of common property would often be prejudicial to the rights of the nonconveying cotenant. What the court would do in such a case does not appear.

The principal North Carolina case, *Taylor v. Taylor,* concerned the construction of a will in which the testator devised half of the common property to son *A;* the other half of the common property was devised to son *B*. Son *C* was devised another tract, but this devise was void for reasons not material here. The court held that the attempted devises to sons A and B were void for uncertainty.[17] The court quoted as authority a legal encyclopedia to the effect that "where there are two

[14] 54 N. M. 276, 221 P. 2d 1058 (1950). [15] See note 13 *supra*.
[16] Madrid v. Borrego, 54 N. M. 276, 278, 221 P. 2d 1058, 1060 (1950) (dictum).
[17] The court was asked to construe the will, and counsel for both sides failed to argue this specific question in their briefs. The lower court had held these same devises to *A* and *B* to be invalid because the intention of the testator could not be carried out since he thought he was the owner of all of this common property. The North Carolina Supreme Court did not mention this and did not include it in its reasons for declaring the devises void.

tenants in common, each owning an undivided half of land, neither can make a partition that will be binding on the other by assuming to convey either half specifically."[18] It seems that this rule is not clearly applicable to the facts of this case but would apply to the previous category covered where there was a conveyance by metes and bounds of a specific portion less than the whole. Neither does the rule seem to consider the equitable partition doctrine, although the legal encyclopedia quoted states in another section that most courts do recognize it.[19]

The result of this case did not seem to defeat the overall intention of the testator since it threw the testator's interest in this realty into intestacy and resulted in an equal division of realty between sons *A, B,* and *C*. A holding otherwise as to the attempted devise of the property owned in common would have caused *C* to be left out entirely. However, the situation can easily be imagined in which voiding such a mistaken devise and letting the undivided interest pass either by the residuary clause or by intestacy would wreck the entire testamentary scheme. A perfect example would be furnished by this very case had the devise of the individual tract to *C* been valid; he would then have taken the tract devised to him plus whatever share in the common property might come to him by the residuary clause[20] or by intestacy.

It is submitted that the holding of the North Carolina court in the *Taylor* case should be restricted to its facts in subsequent cases insofar as it may indicate that North Carolina would not follow the equitable partition doctrine. It is doubtful whether the court even considered the doctrine, since it did not mention it. Justice was done in this particular case but the rule of law applied there could create a grave injustice in subsequent cases. Certainly the equitable partition doctrine should be invoked at least as to conveyances to purchasers for value. And, there does not seem to be any real reason why it could not apply as well to devises when to follow the doctrine would more nearly carry out the intention of the testator.[21]

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[18] 68 C. J. S., *Partition* § 9 (c) (1950). The only case cited to support this statement was Eaton v. Talmadge, 24 Wis. 217 (1869). The proposition, unsupported by citation of authority, did appear in that case, but it seems to be dictum since the court actually upheld the partition. One cotenant had conveyed a specific portion by metes and bounds, and the other cotenant subsequently conveyed the remainder of the property also by metes and bounds. The court held both conveyances to be valid since the latter conveyance was an acquiescence in the partition effected by the original conveyance.

[19] 86 C. J. S., *Tenancy in Common* § 122 (b) (1954).

[20] See N. C. GEN. STAT. § 31-42.2 (Supp. 1955).

[21] Assuming a case of a deed or devise of halves of a tract to each of two transferees as in the *Madrid* and *Taylor* cases, it is clear that the intent of the testator or grantor might most nearly be approximated with fairness to the non-conveying cotenant by giving each transferee a one-fourth undivided interest in the whole. The problem of the split of the common property discussed in connection with the *Madrid* case would be avoided. But this solution would not be