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R. S. 101.

P. L. 1853, p. 34  
 " 1855, p. 503.  
 " 1858, p. 104,  
 12', 478.  
 " 1861, p. 19.  
 318, 434.  
 " 1863, p. 482.  
 " 1864, p. 672.  
 " 1865, p. 909.  
 " 1866, p. 418.  
 " 1875, p. 94.  
 " 1876, p. 39.

## An act for the more easy partition of lands held by coparceners, joint tenants and tenants in common.

Revision—Approved March 27, 1874.

## I. Appointment of commissioners by a justice or judge.

1. That any person being a coparcener, joint tenant, or tenant in common, (a) in any tracts of land within this state, may apply to any justice

Application for partition.

R. S. 101, § 1.

(a) Not necessary for the applicant to show that he is a tenant in common of the fee, or even of the freehold. *Diamond v. Lore*, 2 Vr. 220. If he be tenant in common of an estate for years with another, seized in fee, the orphans court has jurisdiction, and no *certiorari* will lie to review its proceedings. *Ibid.* A deed in the nature of a mortgage, given by a tenant in common leaves in him an estate which entitles him to apply. *Kline v. McGuckin*, 9 C. E. Gr. 411. The legislature intended to apply the more easy partition of lands by commissioners to all such estates, as were then subject to partition at common law and under the statute

of 31 Hen. VIII, c. 1, and as between all such persons or tenants, as were compellable to make partition by writ under the 32 Hen. VIII, c. 8, and subject to the same restrictions. Under the statutes of 31 and 32 Hen. VIII, partition could be compelled between those who held as joint-tenants or tenants in common, of estates of inheritance in their own right, or in right of their wives, and those who held as tenants in common or as joint-tenants for life, or years; or where one had an estate for life or years, and another of freehold, or inheritance, or a tenancy by the curtesy. *Stevens v. Enders*, 1 Gr. 271. Persons in remainder,

of the supreme court, (a) or judge of any circuit court or court of common pleas of the county wherein such lands may lie, for a partition of such tract or tracts of land; whereupon the said justice or judge shall ascertain the number of equal shares or parts in which such tract or tracts were, or at the time of such application, are held by the original coparceners, joint tenants, or tenants in common, and shall nominate three persons not interested in the said land, (b) as commissioners, to make partition of such tract or tracts into as many parts or shares as the same was originally held; (c) and the said justice or judge shall thereupon order an advertisement to be inserted in one of the public newspapers of this state, and in such other public newspapers or places as the said justice or judge shall direct, for four weeks successively, at least once in each week, to the following or like effect, he or they making such alterations or additions as the nature of the case may require:

Nomination of commissioners.

Notice.

By \_\_\_\_\_, justice of the supreme court of New Jersey, or judge of the circuit court or the court of common pleas of the county of \_\_\_\_\_:

Notice is hereby given, that on application to me by \_\_\_\_\_, of \_\_\_\_\_, who claims an undivided \_\_\_\_\_ part of all that tract of land (giving a description of the tract or tracts intended to be divided), I have nominated A. B., C. D. and E. F., commissioners to divide the said tract (or tracts) of land into \_\_\_\_\_ equal shares or parts; and unless proper objections are stated to me at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_ next, (which is to be at least thirty days from the date of the notice), the said A. B., C. D. and E. F., will then be appointed commissioners to make partition of the said land, pursuant to an act entitled "An act for the more easy partition of lands held by coparceners, joint tenants and tenants in common." Given under my hand, this \_\_\_\_\_ day of \_\_\_\_\_.

Appointment of commissioners.  
Ib. § 2.

Tracts described.

Objections.

2. That if no objections are made before the said justice or judge, on the day appointed by him for that purpose, to the persons nominated as commissioners, then the said justice or judge shall, in writing, under his hand and seal, appoint the persons so nominated to be commissioners to divide the said land, pursuant to the directions prescribed in this act; and the said justice or judge shall, in the said writing, describe the tract or tracts so to be divided, and direct the number of parts or shares into which the same is to be allotted; but if objections are made to the persons nominated as commissioners, or any of them, the said justice or judge shall then proceed to hear and determine such objections, (d) and in case he find them

whether the remainder be contingent or vested, and who are not at the time of suing out the writ in actual possession, or entitled to immediate possession in severalty after partition made, cannot be parties to the writ of partition. In such case the judges of the common pleas have no authority to make an order of sale, nor to approve and confirm it, and the commissioners have no authority to make sale or conveyance, *Ibid.* *Burroughs v. Dunlap*, 1 Gr. 284. See *Young v. Rathbone*, 1 C. E. Gr. 224, 226, *Infra*, § 25, *et seq.* No owners can be parties but such as are entitled to the present possession of their shares. The design of partition is, that owners, who before enjoyed in common, shall each have possession of his share in severalty, *Ibid.* So where a father devised to his three sons certain lands, as tenants in common during their natural lives, and, after the death of either of them, his share to go to his lawful issue; and if any of his said sons should die without leaving lawful issue, his share to go to the survivors of them; or if any of them had deceased, their lawful issue to have the share that would have gone to their father if living. *Held*, that no partition could be made among the sons, except of their present interest or estate in the lands, *Reeves v. Reeves*, 2 Hal. Ch. 156. A grantee of the right to dig ores, from one tenant in common, cannot call for a partition, *Boston Franklinite Co. v. Condit*, 4 C. E. Gr. 394. A justice of the supreme court, has power and authority, under the act of 1789, to appoint commissioners to make partition of lands, which have descended to males and females under the former statute of descents passed in 1780, notwithstanding each male is entitled to two shares, and each female to one share only, by the provisions of that act, *Kennedy v. Armstrong, Spen.* 693. *Query*. Whether partition may be made among heirs, before the assignment of dower, *Laird v. Wilson, Pen.* \*280, \*287. The right of a widow to dower does not give her an estate or make her a particular tenant, whose consent to a partition is required, *Bleecker v. Hennion*, 8 C. E. Gr. 123.

(a) The justice or judges ought to require the applicant to produce such documentary and other evidence, as will at least *prima facie* establish the fact of a co-tenancy. Unless that is done, no nomination ought to be made; and if on the day fixed for appointing the commissioners, or at any

time before the commissioners are appointed, objections are made, and it appear that there is a possession adverse to the applicant, or a real dispute about his title to an undivided part of the premises, no appointment should be made, or partition ordered; but the application should be dismissed, and the parties left to their legal remedies, *Van Riper v. Berdan*, 2 Gr. 132. The application, it seems, need not be made in writing, *Kennedy v. Armstrong, Spen.* 693, 695. It is the duty of the justice to ascertain that a co-tenancy exists, and to determine the number of equal shares, in which the lands were held by the original coparceners, joint-tenants or tenants in common; but it is no part of his duty to determine who are the owners of the different shares at the time of the application, *Ibid.* That there are encumbrances on the premises is no objection to a partition, *Low v. Holmes*, 2 C. E. Gr. 148, 150. Nor that there was a verbal agreement by one co-tenant with another, that the former would convey to the latter his interest in the premises, *Polhemus v. Hudson*, 4 C. E. Gr. 63. There can be no division where the ancestor has given or advanced to his children in his lifetime, any part of his lands or tenements, *State v. Rickey*, 3 Hal. 50.

(b) When application is made to three judges, they are to ascertain the number of shares, to nominate commissioners, to make an order directing an advertisement thereof, to appoint the commissioners, to order the proceedings to be recorded. If done by a less number than three, the proceedings will be erroneous, *Van Riper v. Berdan*, 2 Gr. 132.

(c) Commissioners appointed by judges of a court, cannot be also authorized in the same commission, to subdivide a part among the heirs of one of the original co-tenants, *Oram v. Young*, 3 Harr. 54. But see *Coles v. Coles*, 2 Beas. 365.

(d) If any objection be made to a person nominated as commissioner, it must be heard and determined judicially by the appointing power, before appointing either the person objected to, or any substitute in his place, *Oram v. Young*, 3 Harr. 54. The mere making of an objection is not sufficient to set aside an appointment, if such objection be not well founded, *Ibid.* 58.

well founded, to appoint under his hand and seal, other fit and disinterested persons in the room of those he may think proper to remove.

## II. Proceedings of commissioners.

3. The said commissioners having taken the oath or affirmation hereinafter prescribed, shall cause a survey to be made, in their presence, of the tract or tracts to be divided, and shall then proceed to divide (a) the same into the number of parts or shares directed by the said justice or judge in the writing containing their appointment; each part or share to contain one or more lots, as the commissioners may think proper, they having due regard in the partition to the situation, quantity, quality and advantages of each part or share, so that they may be equal in value as nearly as may be; (b) and if the bounds of any tract or tracts so to be divided, shall be controverted, the commissioners are hereby directed, if such controverted part is valuable, to separate the same from the uncontroverted part, and to make partition of the tract or tracts, in such manner that a proportion of the controverted part may be allotted to each share, as well as a proportion of the uncontroverted part; and the said commissioners, previous to the said survey, shall administer an oath or affirmation to the surveyor and chain-bearers, that they will well and truly perform their respective duties, honestly and impartially; which oath or affirmation any one of the said commissioners is hereby empowered to administer.

Survey and division into lots.  
Ib. § 3.

When part is controverted.

Surveyor and chain-bearers to be sworn.

4. The said commissioners shall number the several parts or shares by them laid off, from number one, progressively, and shall, in the same manner, number each lot in the several shares, if the same contain more than one lot, and shall make a true field-book, specifying the bounds and numbers of each lot, and also a map or maps of the tract or tracts, on which the several shares or lots shall be laid down and numbered, and shall keep an exact and particular account of their time expended in the execution of the duties of this act, and of the money due for the same, and also of all expenses accrued for surveying or otherwise, agreeably to the directions of this act; and the said commissioners shall thereupon give notice, by advertisement in manner aforesaid, for three weeks successively, that on a certain day by them named, not less than one month from the date of such notification, attendance will be given at a place therein named; and an allotment, by ballot, take place, of the several parts or shares of the tract or tracts therein described, to the original coparceners, joint tenants or tenants in common, their heirs or assigns.

Shares numbered and described.  
Ib. § 4.

Notice of allotment advertised.

5. On application made to the said justice or judge by one of the parties to the partition intended to be made, the said justice or judge shall attend at the time and place specified in the advertisement of the commissioners, and shall, with the assistance of the said commissioners, proceed to allot the several parts or shares of the tract or tracts intended to be divided, in the manner hereinafter described; (c) but if no application shall be made to the said justice or judge for his attendance, then the said commissioners shall, on the day appointed for that purpose, proceed, in a public manner, to number as many tickets as there are shares of land marked on the map, which shall be put in a box, and the names of the original coparceners, joint tenants or tenants in common shall be put, in separate tickets, into another box, when a person, appointed by the said justice, judge or commissioners, shall proceed to draw a ticket of the names, and

Allotment, how made.  
Ib. § 5.

(a) The legislature intended to give power to set off shares by metes and bounds, and the judges or commissioners cannot exercise jurisdiction or hold plea of any other subject than the fixing of lines for partition. No power is given to them by the act beyond this; it is the delegation of a special authority, that must be taken strictly, and cannot be enlarged by construction or extended over any other subject, *Van Riper v. Berdan*, 2 Gr. 132. A division and report of commissioners may be set aside, if lands not of the estate be set off to one of the heirs, *State v. Judges of Burlington*, 2 Smith. \*554. Improvements being part of the estate, no allowance can be made by the administrators or by the commissioners in dividing the land, to the person who made them, unless by agreement of all the heirs; and an agreement between the heirs to divide the estate equally, and providing that nothing in the agreement shall bar or release any claim of either of the heirs against the estate, will not bar the claim of the heir who has made the improvements, or prevent him from recovering their value from the estate, *Smith v. Smith*, 4 Dutch. 208.

(b) Each party must have his share in value, which is all that is required. *Brookfield v. Williams*, 1 Gr. Ch. 341. Under certain circumstances, to make the value of the several shares, equal, one party may be required to pay money on his share to those who receive a share of less value, *Ibid*. Equal partition of each parcel among all the owners is not required. And a partition so made, without necessity, and practically destructive of the value of the parcel divided, will be set aside, *Haulenbeck v. Conkright*, 11 C. E. Gr. 159. It is not, of itself, sufficient to set aside a partition, that the commissioners gave to one of the tenants nearly the whole of the most valuable part of the tract, *Hay v. Estell*, 4 C. E. Gr. 133.

(c) The allotment of the shares must be in the names of the original co-tenants, but if one be dead or have aliened his share, the heir or purchaser will be entitled to the share allotted to such original co-tenant, *Kennedy v. Armstrong*, *Spen*. 693, 695.

Certificate. then a ticket of the numbers, and so proceed until all the tickets are drawn, and the share on the map bearing the number of the ticket drawn next after drawing the ticket with the name, shall be the separate and divided share of that original coparcener, joint tenant or tenant in common, his or her heirs or assigns, in the land so divided; of which balloting the said justice or judge or commissioners shall make a full and ample certificate, under his or their hands and seals, specifying particularly the time, place and manner of balloting, and the allotment of the shares.

Witnesses may be examined. *Ib.* § 6.

6. The said justice or judge and the said commissioners are hereby authorized, as the case may require, to issue his or their precept or precepts, under his or their hands and seals, commanding such person or persons who are able to give any necessary information, to come before him or them, when and where he or they may direct, to testify, by an oath or affirmation, concerning such acts, matters or things as may be necessary for the said justice or judge or commissioners to investigate in the execution of the trust, duties and service required of them by this act, and to bring with them all such patents, surveys, maps, records, deeds or other writings as may be necessary to be examined by the said justice, judge or commissioners.

Proceedings to be recorded. *Ib.* § 7.

7. The said commissioners shall transmit the writing containing their appointment and their oath or affirmation of office, properly certified by the person administering the same, and the map and field-book, together with the said certificate of allotment, and also their accounts, to the justice or judge from whom they received their appointment, or in case of his death, resignation or removal, then to any other justice or judge of the same court, who, after inspecting the same, shall order the said instruments, excepting the account of expenses, to be recorded<sup>(a)</sup> in the clerk's office of the supreme court, or in the clerk's office of the county in which the lands lie, which shall be good evidence of such partition; and which partition shall be as valid and effectual in law to divide and separate the said lands as if the same had been made on writs of partition, according to the course of the common law.<sup>(b)</sup>

Justice's fees. *Ib.* § 8.

8. The said justice or judge shall be allowed for the services hereinbefore required of him, at the rate of three dollars a day while employed in the said business.

Expenses apportioned. *Ib.* § 9.

9. After the said justice or judge shall have ascertained the whole expense of such partition,<sup>(c)</sup> he shall divide the same among the several parts or shares, which shall be paid by the persons to whom such shares were allotted, their heirs or assigns, within four weeks after the same shall be ascertained, or in default of payment of such expense, the said justice or judge shall direct a sale to be made by the commissioners of so much of those parts or shares deficient in paying the expense, as will be sufficient to pay their respective proportions thereof, together with the expense accruing on such sale, and shall direct the same to be sold by the said commissioners, at public auction, to the highest bidder; and the said commissioners' deed to the purchaser shall pass as good a title for the separate enjoyment of the same as if all the owners and claimants of shares of the entire tract divided had joined therein.

Sale to pay expenses.

Commissioners' deed.

### III. Partition in prerogative or orphans' court.

If owners are minors, or land in several counties. *Ib.* § 10.

10. That when two or more persons shall hold real estate as coparceners, joint tenants or tenants in common, any one or more of whom are minors under the age of twenty-one years, it shall and may be lawful for the orphans' court of the county in which such real estate may be,<sup>(d)</sup> or for

(a) If by the death, resignation or removal of one or more of the judges, since the appointment of the commissioners, in consequence of which it becomes necessary to associate others to act with those remaining, the reason of such change, ought to appear on the proceedings, either in the report made by the commissioners, or by the order directing the same to be recorded. The order for recording the proceedings is the life-giving act, and ought to be made, and to appear to have been so made, by the officers pointed out by the statute, *Van Riper v. Berdan*, 2 Gr. 132. Failure to record the appointment of commissioners, will not invalidate the proceedings; it is a mere neglect of duty on the part of the clerk, *Oram v. Young*, 3 Harr. 54, 57.

(b) Where a person seized in fee of premises, by mistake supposes that he is seized as tenant in common with others, and applies to the orphans court so stating in his petition,

and on his application a partition is had, a share set off by such proceedings may be recovered by him from a person who *bona fide* purchased it of one of the alleged tenants in common, *Den, Richman v. Baldwin*, 1 Zab. 395; *S. C.*, 1 Stock. 394.

(c) Costs and expenses of defendants in the proceedings at law for partition, will be allowed out of proceeds of sale, where such proceedings being authorized by statute, are arrested in order to more complete equity, *Hall v. Piddock*, 6 C. E. Gr. 311.

(d) The orphans court has no authority to appoint commissioners to make division of lands held between the heirs of a tenant in common, and the person who had been the tenant in common with their ancestor, *State v. Parker*, 4 Hal. 242.

the prerogative court, when such real estate is situate in two or more counties, (a) upon application (b) made by one or more of said coparceners, joint tenants or tenants in common, or by any person duly authorized in their behalf, or claiming under them or any of them, to order and direct a division of such real estate to be made between the said owners, in such shares and proportions as they may be entitled to by law; the metes and bounds of each share to be ascertained by three disinterested commissioners to be appointed by the court, whose report, made in writing under their hands, to [any] term of the said court after such division shall be made and approved by the said court, shall be conclusive to all parties concerned; and a copy of the appointment of said commissioners, together with their report, shall be recorded in a book to be kept for that purpose in the office of the clerk of said court, and copies thereof, duly certified under the seal of said court, shall be evidence in all courts of law or equity.

P. L. 1875, p. 94,  
§ 11.  
Record.

11. That notice of application to the prerogative court or orphans' court for the partition of any real estate shall be served upon all the joint tenants, coparceners or tenants in common interested therein, who shall not have joined in such application, and upon the guardian or guardians (if any there be) of such as are minors, at least four weeks before the time of making such application, or be published for the like space of time in one of the newspapers of this state circulated in the neighborhood of the said real estate; and no order for partition shall be made upon such application until satisfactory proof be made to the court of the service or publication of such notice as aforesaid.

Notice, to whom given.  
Ib. § 11.

12. That where partition shall be made by commissioners, to be appointed by the prerogative court, the court of chancery, or the orphans' court of any county, it shall be lawful for the court making such appointment to order a certified copy of the report of such commissioners, with map annexed, if any there be, to be recorded by the clerk or clerks, or when there is or may be a register or registers of deeds provided by law, then with the register or registers, of the county or counties in which said land or lands so ordered or directed to be partitioned shall lie, whereupon it shall be the duty of such commissioners to cause the same to be recorded accordingly at the cost and expense of the parties interested in said lands.

Map and report of commissioners recorded.  
P. L. 1876, p. 99,  
§ 1.

13. That upon filing such copy of the report and maps, if any there be, and of said order, with such clerk or clerks, register or registers, it shall be his or their duty to record the same in the proper book as a deed; and that the papers required by the seventh section, and preceding section of this act to be recorded, shall be recorded by such clerk or clerks in the proper book, as a deed, and not elsewhere.

Duty of clerk or register.  
Ib. § 2.

14. That the necessary costs and expenses which shall arise under an order of the prerogative court or orphans' court in any of the cases aforesaid, shall be assessed by the said court upon each share, in proportion to the value divided to him or her, and may be recovered by a warrant from the said court, directing distress and sale to be made of so much timber, wood or herbage as may be found on the part divided to him or her, or of other property belonging to such owner as will be sufficient to pay the costs and expenses aforesaid, and costs of such distress and sale.

Costs assessed and paid.  
R. S. 101, § 12.

15. That on a partition made by virtue of an order of the prerogative court or orphans' court in any of the cases aforesaid, if any owner or any person claiming under him or her, hath, after the death of the testator or intestate, and before the division, cut off or made use of any timber or committed any waste or destruction on the premises, the commissioners appointed to make the division shall estimate the damage done by such owner or person claiming under him or her, and divide the premises so that the owner shall be charged with said damage and have a share proportionably less in value than the other owners who have done no waste or damage.

Distrained for.

Provision in case of waste.  
Ib. § 13.

(a) A general partition of lands of a decedent, lying in two or more counties, cannot be made by commissioners appointed by the orphans courts of those counties, although they be the same persons. They must divide the land in each county among all the heirs. The surrogate general is the proper appointing power, if the partition is to be general, *Den, Watson v. Kelly, 1 Harr. 517.*

(b) Upon application to the orphans court, the petition must not only allege that some of the owners are minors, but must name them and show which are minors, otherwise the proceedings will be set aside on *certiorari, Curtis v. Jenkins, Spen. 679.*

## IV. Sale when partition cannot be made.

When land to be sold.  
Ib. § 15.

16. If the commissioners appointed by virtue of this act shall in any case be of opinion that the tract or tracts of land or real estate in question are so circumstanced that a partition thereof cannot be made without great prejudice to the owners of the same, they shall so report; and if it shall appear by satisfactory proof that the said tract or tracts of land or real estate cannot be partitioned among the owners and proprietors without great prejudice to their interest, then and in such case the court or justice or judge to whom the application for the partition of such tract or tracts of land or real estate shall have been made, or in case of the death, resignation or removal of the said justice or judge, any other justice or judge of the same court, may order the said commissioners, or persons appointed to make partition as aforesaid, to sell<sup>(a)</sup> such tract or tracts of land or real estate at public auction to the highest bidder.<sup>(b)</sup>

Report of sale.  
Ib. § 16.  
P. L. 1866, p. 418.  
[ " 1875, p. 94,  
§ 2].

17. The said commissioners shall, after making such sale or sales, report the same by writing, under their hands, to [any] stated or special term of the court by which, or by a justice or judge whereof, such sale was ordered to be made.

If approved, deeds made.

R. S. 101, § 17.

18. If the court to which the report of the sale of such land or real estate shall be made as aforesaid, shall approve<sup>(c)</sup> of such sale, it shall confirm the same as valid and effectual in law, and shall, by rule of said court, direct the said report to be recorded, and the said commissioners to execute good and sufficient conveyances in the law to the purchaser or purchasers for the tract or tracts of land or real estate so sold; which said conveyances, duly executed as aforesaid, shall operate as an effectual bar, both in law and equity, against the said owners and proprietors, and against all and every person or persons claiming by, from or under them, or either of them; and a copy of any such report, so recorded as aforesaid, duly certified under the seal of said court, shall be evidence in any court of this state.

Commissioner's oath.  
Ib. § 18.

19. Every commissioner appointed by virtue of this act, shall, before he enters upon the duties of his appointment, take an oath or affirmation before some person duly authorized to administer oaths and affirmations in this state, that he will honestly, faithfully and impartially execute the trust and perform the duties and services required of him by this act, to the best of his skill, knowledge and judgment.

When vacancies supplied.  
Ib. § 19.

20. In case of the death, resignation, neglect or refusal to serve of any of the commissioners to be appointed by virtue of this act, before the trust, duties and services hereby required of them shall be completed, then the court, justice or judge to whom the application for partition shall have been made, or in case of the death, resignation or removal of such justice or judge, any other justice or judge of the same court shall, by writing under his hand and seal, appoint another commissioner or commissioners who, after taking the oath or affirmation prescribed by this act, shall be vested with the like powers and authority as if he or they had been originally appointed.

Survivors may make deed.  
Ib. § 20.

21. In all cases where a sale shall be made by commissioners by virtue of this act, if any of the said commissioners shall die after making such sale, and either before or after the confirmation thereof, it shall and may be lawful for the surviving commissioner or commissioners to make report of such sale, and if the sale be confirmed, to execute a deed or deeds of conveyance to the purchasers of the said real estate, pursuant to such

(a) Partition is a matter of right; and by the ancient practice, both at law and in equity, the partition was made, however prejudicial it might be to the interests of the parties. *Bentley v. Long Dock Co.*, 1 *McCart*, 480, 2 *McCart*, 501. To remedy this evil the statute of 1816 authorized a sale of the land when commissioners reported that a partition could not be made without great prejudice; by the act of 1846, the same power was conferred upon the court of chancery upon bills filed for partition. *Ibid.* Where the land may be divided a sale will not be ordered. *Lacey v. Bowly*, April, 1825. WILLIAMSON, C. Where a partition cannot be made without prejudice, the complainant is entitled, as of course, to have a sale made of the premises. *Bentley v. Long Dock Co.*, 1 *McCart*, 480, 2 *McCart*, 501. If true, the suggestion that the property is of so great value that no one individual can buy it, constitutes no objection to a sale. *Ibid.* Nor can one of the tenants object to a sale on the ground

that he is not capable alone of purchasing the entire premises, and therefore his interest may be sacrificed by a combination among his associates. *Ibid.* When directed to sell, commissioners of partition have power to sell one part, with an easement in another part annexed to it, and to sell the servient parcel subject to such servitude. *Rosenkrans v. Snover*, 4 *C. E. Gr.* 420.

(b) In case of any misunderstanding as to the bids or rights of bidders thereby acquired, the commissioners are the proper persons to decide. *Conover v. Walling*, 2 *McCart*, 167, 184. Such bidder acquires a right which the court is bound to protect, and has a right to have a deed for the property, unless for good cause the sale be set aside. *Conover v. Walling*, 2 *McCart*, 167.

(c) The proceedings may be discontinued at any time before the order approving the sale is made. *Bellerjeau v. Ely*, 3 *Hal.* 273.

sale; which deed or deeds shall have the same force, effect and validity as if made and executed by all the said commissioners.

22. The moneys arising from every sale as aforesaid shall be ordered by the court to be paid by the commissioners to the parties interested in the real estate so sold, their guardians or legal representatives, in proportion to their respective rights in the same, (a) deducting from their respective shares the costs and charges which may be allowed and ordered to be retained out of the same; and if any of the said parties shall be absent from this state, without such legal representative, the proportion of the money due to every such party shall be put out at interest on sufficient security of real property, or invested in public stock, by order and under the direction and control of said court for the benefit of such party.

Proceeds of sale paid over.  
Ib. § 21.

When invested.

23. It shall be the duty of the said courts respectively, to require of the guardian of any person under the age of twenty-one years, entitled to a proportion of the moneys arising from any sale as aforesaid, such security by bond to the ordinary of this state, as the said court shall judge to be sufficient, for the benefit of such minor, conditioned for the faithful discharge of the trust committed to such guardian.

Guardian to give bond.  
Ib. § 22.

24. In all cases where commissioners appointed by virtue of this act to make partition of real estate, shall make sale thereof as aforesaid, and shall pay the net proceeds of such sale or sales to the persons entitled by law to receive the same, it shall and may be lawful for the said commissioners to produce the receipts and discharges therefor to the surrogate of the county in which the said real estate, or the more valuable part thereof, is situate; and the said surrogate shall immediately record the same in the book of receipts and discharges in his office, provided the same be first proved or acknowledged in the manner that deeds of conveyance of land are required to be proved or acknowledged, which proof or acknowledgment shall be recorded with such receipts and discharges; and the said surrogate shall endorse on such receipts and discharges the book and page on which the same are recorded, with the time of recording the same, and sign his name thereto; and the said record, or a certified copy thereof, under the hand and seal of office of the surrogate, shall be received in evidence in any court of record in this state, if it shall be made to appear to the satisfaction of said court that the original receipt and discharge hath been lost; or that it is not in the power of the party offering the copy in evidence to produce the same.

Commissioners' receipts and discharges may be recorded by surrogate.  
Ib. § 23.

#### V. Proceedings with respect to remainders, reversions and expectancies.

25. Partition of lands held by coparceners, joint tenants or tenants in common, may be made by any court or jurisdiction having authority to make partition of lands, on any proceeding authorized for that purpose, notwithstanding the share held by any coparcener, joint tenant or tenant in common, may be for a less estate than a fee, or may be limited over after an estate for life, or any estate therein; and such partition shall bind all tenants of such share, in remainder, reversion or expectancy, who shall be entitled only to that part of the lands partitioned as may be set off in severalty to the share upon which such remainder or expectancy is limited; *provided*, that in all cases where such remainder, reversion or expectancy is limited over to any person in being, such person shall be served with like notice or process as may be by law required to be served on the owner or tenant of such share in such proceeding of partition, if notice be required therein; and in all such cases where partition is made of lands, of which any share is limited over, and which are held in equal undivided shares, the commissioners, or other persons making partition, shall divide said lands and allot the shares, and certify such division and allotment in the manner directed by this act.

Partition made though lands limited over.  
P. L. 1852, p. 157.

(a) On application for the division of the proceeds, the orphans' court should admit evidence to show that the petitioner is entitled to the equal undivided one-fourth part of another tenant in common, although such petitioner in his petition claimed only one-fourth part of the lands. *Coombs's Case*, 4 Hal. Ch. 78. The deficiency incurred by a re-sale of the property, when recovered, must be distributed by order of the court, as part of the money arising from the sale of the land. *Michener v. Lloyd*, 1 C. E. Gr. 38. After an order of distribution, each heir or tenant in common may have an action at law against the commissioners for his share. The commissioners are jointly liable, *Hall v. Higgins*, 3 Gr. 58. Upon sale of land of married women the proceeds will be ordered paid to the husband and wife, *Matter of Partition, &c.*, 3 Hal. 88.

When sale may  
be made.

P. L. 1861, p. 318,  
§ 1.

Proceeds of sale,  
how invested.  
Ib. § 2.

Final disposition  
of the fund.  
Ib. § 3.

Clerk's fees.  
Ib.

Punishment for  
embezzlement.  
Ib. § 4.

Partition on sale  
by consent of ten-  
ant of particular  
estate.

P. L. 1858, p. 478.

26. In all proceedings for the partition of lands, where all or any of the undivided shares thereof is or are limited over in the manner specified in the next preceding section of this act, a sale thereof may be made upon an order or decree of the court of chancery, when such proceedings shall have been commenced in that court; but no such sale shall be ordered unless a division of said lands cannot be made without impairing their value to the extent of at least one-fourth part thereof, and shall be so reported or otherwise made to appear to the satisfaction of the chancellor.

27. In all such partition proceedings, when a sale shall be made as aforesaid, such sale and deed to the purchaser shall convey the title to said lands of all the tenants either in possession, remainder, reversion or expectancy; but the net proceeds of the sale of any share not held in fee simple or limited over, shall be invested and kept invested in the name of the state of New Jersey, under the order and direction of the court of chancery, for the use of the person or persons owning such share, upon bond secured by mortgage to said state, either upon the property so sold, or any part thereof, or the fee simple of other unencumbered real estate in this state, worth at least double the principal sum so secured thereon, two-thirds of which value shall be in the land itself, independently of any building thereon; and such bond and mortgage, after being duly recorded, shall be filed in the office of the clerk in chancery, and there remain as of record until duly satisfied and discharged; and said clerk shall be authorized to certify copies thereof under the seal of said court, and such copies, so certified, shall be evidence as other records and files of said court are, when so certified; and the interest accruing on such bond shall be paid yearly or half-yearly, according to the condition thereof, to the person or persons who would have been tenant or tenants of the particular estate of such share if there had been no such sale thereof, his heirs, executors, administrators or assigns, and shall be so secured by the condition of such bond and mortgage; and the principal and the interest also, when not paid as aforesaid, shall be collected under the order and direction of the court of chancery.

28. Whenever all or any portion of the principal sum of money so as aforesaid secured shall be collected, it shall be paid only to the said clerk in chancery, and when so paid it shall be considered as in that court, and shall there remain until paid out or re-invested under the order and direction of that court, and said clerk and his sureties shall be responsible therefor, and no other payment shall discharge such bond and mortgage or authorize any county clerk to discharge the registry or record thereof; and the said clerk in chancery shall be entitled to one-quarter of one per centum on all moneys paid into said court and re-invested or paid out under or by virtue of this act, to be taken out of the increase or interest and not out of said principal; and whenever the particular estate or estates in such share of said lands would have been determined and the same become vested in fee simple absolute, if no such sale thereof had been made, then the said principal shall be paid or such bond and mortgage assigned, under the order and direction of said court of chancery, to the person or persons in whom such share would then have become vested in fee simple absolute, had no such sale been made, his, her or their heirs or assigns.

29. If any master in chancery, clerk, or other person shall wilfully embezzle or convert to his own use any money that shall come to his hands under or by virtue of the provisions of this act, he shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by imprisonment at hard labor, or otherwise, not exceeding two years, or by fine not exceeding one thousand dollars, or both.

30. Where there is an estate for life or lives, or other less estate, in any lands or tenements situate in this state, and the reversion or remainder in fee is owned by several persons as joint tenants, coparceners or tenants in common, and the particular tenant or tenants shall consent thereto, partition of the said lands or tenements may be made among said joint tenants, coparceners or tenants in common, by any court or jurisdiction having authority to make partition of lands; and the said particular tenant or tenants shall have the same estate or estates in the respective

parts which may be set off in severalty, as he, she, or they may have had in the whole lands or tenements before such partition shall have been made; and in case partition cannot be made of such lands or tenements, or any part thereof, without great prejudice to the said joint tenants, coparceners or tenants in common, so that a sale thereof shall be ordered, the whole estate, in possession as well as in expectancy, in the said lands or tenements, or in the said part thereof which cannot be divided, shall be sold, and such portion of the proceeds of said sale shall be paid to the particular tenant or tenants as shall be just and reasonable, according to the quantity of his, her, or their estate and interest in said lands or tenements, and as shall be ascertained by the court ordering such partition or sale.

**VI. Proceedings where some of the owners are unknown, or the residence of some of them is unknown.**

31. Where real estate is held by coparceners, joint tenants or tenants in common, some or any one of whom are unknown, the others, or either one or more of them, may commence a suit by bill, for partition, in the court of chancery, in the same manner as if all the owners of such real estate were known, making such unknown owner or owners of said real estate a party or parties thereto, by a publication according to the law and practice of said court in case of absent defendants, under the order (said order describing such real estate in such manner and terms as will identify the same, by abuttals and boundaries or otherwise, and naming the ancestor or other person last owning the said real estate in severalty), of the chancellor, in one or more of the newspapers of this state, or elsewhere, directing such unknown owner or owners to appear, plead, answer or demur to the said bill within such time as the chancellor shall direct, not less than six months from the date of such order; which order shall be published, as aforesaid, within twenty days from the date thereof, and continued in said newspaper or newspapers at least once each week to within ten days of the expiration of the time limited to appear, plead, answer or demur; and at the expiration of the time limited in said order, the chancellor shall make such decree against said unknown owner or owners as if they were known to the court, and as may be equitable and just; and shall have power to decree a partition of said real estate among the owners thereof, in the same manner as if all were known and by name had been made parties to said suit; and if the court shall be unable to determine the estates of such unknown parties, then the chancellor shall make partition among those owners whose estates can be ascertained, in such manner as may in his judgment be equitable, and so that the owners of such ascertained estates shall hold their respective shares in severalty; and in case it shall appear to the chancellor that the said real estate is so circumstanced that such partition thereof cannot be made without great prejudice to the interests of the owners thereof, then the chancellor shall have power to decree a sale of said real estate, and to direct the execution of a deed or deeds therefor, to the purchaser or purchasers, which deed or deeds shall convey all the right, title and estate of all the owners of said real estate, ascertained and unascertained, as completely and effectually as if all the owners were by name made parties to said bill, and, as such, brought before the court; and after such sale the chancellor shall decree the distribution of the moneys arising therefrom among the owners of said real estate, in such shares as they may be entitled to, and shall invest, under the direction and control of said court, such portion of the proceeds of said sale as may belong to those owners who are unknown to the court, for the benefit of such owners, and shall order the payment thereof, from time to time, to those who are entitled to receive the same, and as they shall be ascertained by the court.

32. That in proceedings under the preceding section the chancellor shall be governed by the rules and practice of said court, and by the provisions of this act, in suits in partition in said court, except only as the same may be altered by the next preceding section; and all estate by curtesy and dower in said real estate, may be sold by the decree of said court, and a certain sum be ordered to be paid in lieu thereof; or a certain share of the

Proceedings in case some of the tenants are unknown.

P. L. 1863, p. 482, § 1.

Partition.

On sale.

Proceedings to be according to practice of court. Ib. § 2.

Estates by curtesy and dower may be sold. Amended.

proceeds of the sales of said real estate be invested for the benefit of the person or persons entitled to such estate, in the same manner as is hereinbefore provided for on the sale of such estates.

Chancellor to  
make rules.  
Ib. § 3.

33. That the chancellor shall make such order for the payment of the costs and expenses of the proceedings aforesaid, as the practice and authority of said court, in partition and sale thereon, will permit, and as he shall deem equitable and just.

If it is not known  
whether a party  
is living, or his  
residence is un-  
known.

P. L. 1865, p. 909.

34. That where the residence of any person interested in the proceeds of lands or real estate which have been heretofore, or may be hereafter sold, by virtue of any proceedings in partition in this state, is unknown; or where it is not known whether a person who, if living, would be interested in such proceeds of the sale of lands or real estate, is living or not, it shall be lawful for the court having the power, by order or decree, of distributing such proceeds, to order the share or interest of any such person to be invested in bonds of this state, or of any city or county of this state, authorized by law to issue bonds, or on bonds secured by mortgage on real estate, or in such public or other securities as the court may approve, and to direct and control the custody of the securities which may be taken, from time to time, for any investment ordered; and also, either before or after an investment is ordered at such time as the court may determine to order or decree a distribution of the share or interest, which any such person, if living, would be entitled to, among and to the person or persons interested in such proceeds, as are known to be living, in proportion to their interest therein respectively, or to and among the person or persons who are, if it shall appear such person has died, entitled by law to receive the same as an heir or heirs; and the court may fix the time when it shall be supposed or deemed such person died; and may order refunding bonds to be given by or on behalf of any of the persons to whom any part of such share shall be distributed, to the clerk of the court and his successors in office, in such sum and with such condition, with or without security, as the court may direct.

Custody and con-  
trol of bonds.

P. L. 1864, p. 672,  
§ 2.

35. That it shall be lawful for said court to control the custody of said refunding bonds; and on petition of any person or persons who shall make it appear to the satisfaction of said court that the petitioner or petitioners is or are entitled to the money secured by one or more of said refunding bonds, or any part thereof, to order that the money secured thereby be collected for the benefit of such person or persons, by and in the name of the clerk of the court who is hereby authorized to sue thereon, and in case of his death pending a suit thereon, the same may be continued in the name of his successor, and said court may dispose of the money collected thereon, by order or decree, as to said court may seem just and right; and the said court may order and decree the payment of such costs and expenses out of said share or interest at any time, as the court may deem necessary and expedient.

Suit on.

Disposition of  
money.

Costs.

#### VII. General provisions.

Judgments, &c.,  
to be liens only  
on shares allotted  
to debtor.

R. S. 101, § 14.

36. That if there be, at the time of making any partition by virtue of this act, a lien upon the undivided estate of any owner, by judgment, decree, mortgage, or otherwise, (a) such lien shall thereafter be a lien only on the share assigned or allotted to such owner; and such share shall be first charged with its just proportion of the costs of the partition in preference to any such lien.

Part of land may  
be divided, and  
residue sold.

P. L. 1858, p. 104.

37. In all proceedings for partition under this act, it shall and may be lawful to divide a part of the lands included in the application, and to sell the remainder thereof, whenever it shall appear by the report of the commissioners which shall designate the lands to be divided and those to

(a) A voluntary partition between tenants in common, in all respects fair, equal and just, upheld, and a lien upon the lands held in common, under a judgment against one of the co-tenants, held, to have been transferred to the lands conveyed in the partition to the judgment debtor, *Polhemus v. Empson*, 12 C. E. Gr. 190, appeal pending. A partition will not affect any rights, legal or equitable, which a creditor may have. If the land is liable for debts before the partition, it will remain so afterwards, *Speer v. Speer*, 1 McCart. 240. By partition, a mortgage deed as a lien, is transferred exclusively to the share set off to the mortgagor, *Kline v. McGuckin*, 9 C. E. Gr. 411. *Anonymous*, 3 Harr. 415. Where one tenant in common makes a parol agreement for the purchase of the interest of another tenant in common, and advances money in part payment, although the former cannot claim a specific performance of the agreement, a court of equity, in a suit for partition, will decree the money so advanced a lien upon the land, *Campbell v. Campbell*, 3 Stock. 268.

be sold and by other satisfactory proof, that the whole of the lands cannot be divided among owners and proprietors without great prejudice to their interest.

38. In all causes now pending, or which may hereafter be commenced in the court of chancery, for partition of lands devised by a parent to his or her children, of which lands any share is limited over, the proceedings may be in conformity with the authority and practice of said court, as the same were before the passage of this act; unless the said court shall otherwise order and direct.

With respect to lands devised by parent. \_\_\_\_\_  
P. L. 1858, p. 121.

39. That the court of chancery shall have power upon bill filed in that court for the partition of real estate, to decree the sale thereof.

Chancery may decree sale of lands. \_\_\_\_\_  
R. S. 101, § 26.  
Report of sales may be made to special term. \_\_\_\_\_  
P. L. 1866, p. 418.  
Orders also made.

40. That all the courts in this state, exercising power under this act, are hereby authorized to receive reports of all sales made by their order or by the order of a justice or judge thereof, at any special term of said courts, and to confirm such sales and order title to be made to the purchaser, and which shall be valid and effectual in law, as if made at any stated term of said court.

41. That in case the term of office of the justice or judge who shall have made, or who shall hereafter make an appointment of commissioners for the division of real estate shall have expired, or shall hereafter expire, or in case of his death during the progress of the proceedings, then any justice or judge of the same court, or the court to which such justice or judge belonged, may order the said commissioners to sell such real estate, in the same manner as such justice could have done in case he had survived and his term of office had not expired.

Remedy if judge shall die or go out of office. \_\_\_\_\_  
P. L. 1861, p. 19.

42. No partition of lands in this state heretofore made between coparceners, joint tenants or tenants in common, by order of any orphans' court in said state, nor any sale thereof by commissioners appointed to make such partition, shall be held or esteemed to be invalid by reason of any defect in the form of the application, or of any supposed want of power in said court to order or decree said partition or sale, where the said application for partition is in fact between coparceners, joint tenants or tenants in common, and the heir or heirs of a deceased coparcener, joint tenant or tenant in common, or any claiming under them, but that the said partition and sale, if in other respects legal, shall and the same is hereby declared to be valid and effectual in law.

Defects in form, &c., not to invalidate partitions or sales. \_\_\_\_\_  
P. L. 1853, p. 34.

43. Any partition of lands heretofore made or hereafter to be made upon application by any coparcener, joint tenant or tenant in common therein, to any court, judge, judges or other officers having jurisdiction in matters of partition, in which process has been served or notice given in the manner required by law, and any sale of lands by virtue of an order therefor made in any such proceeding for partition, shall be binding and conclusive upon all coparceners, joint tenants or tenants in common, and all persons claiming or to claim any interest in any share in said lands, in reversion or remainder, notwithstanding any error or illegality in such proceedings for partition or sale, unless such proceedings shall have been reversed or set aside on certiorari, writ of error or other proceedings to review the same, (a) brought within three years after such partition or sale.

Limitation on writ of error and certiorari. \_\_\_\_\_  
P. L. 1861, p. 434.

44. That nothing in this act contained shall be so construed as to injure, prejudice, defeat or destroy the estate, right or title of any person or persons claiming such tract or tracts of land, (b) or any part thereof, or anything therein, by title under any other person or persons, or by title paramount or superior to the title of such coparcener, joint tenant or tenant in common, among whom partition is to be made; and that nothing in this act contained shall extend to the partitioning of the lands held in common by the general proprietors of the eastern or western divisions of this state.

Rights of other parties saved. \_\_\_\_\_  
R. S. 101, § 27.

East and West Jersey proprietors.

(a) Mandamus or certiorari may be allowed to review the proceedings, *Burroughs v. Dunlap*, 1 Gr. 284, 289. See *Hall v. Higgins*, 3 Gr. 58, 62.

(b) The act was not intended by the legislature as a mode by which the real estate of the wife, without her consent, could be converted into personalty, and placed at the dis-

posal of the husband. The sole object of the act is to provide a mode "for the more easy partition of lands held by coparceners, joint-tenants and tenants in common," and not to prejudice or destroy, by its operation, the legal or equitable rights of the parties interested in the land, *Osborne v. Edwards*, 3 Stock. 73.

## PARTNERSHIP.

## VIII. Fees.

Fees.  
Ib. § 24.

45. There shall be allowed in proceedings under this act :

TO THE JUSTICE, JUDGE OR COURT.

For order for sale, one dollar ;  
For confirmation of sale and ordering conveyance, one dollar ;

TO THE CLERK.

For entering and filing report of sale, fifty cents ;  
For recording the same, for each sheet, eight cents ;  
For entering order of confirmation and for conveyance, fifty cents ;

TO THE SURROGATE.

For drawing petition, reading, filing and recording decree appointing commissioners, and a certified copy of such decree, three dollars and forty cents ;

For recording report of commissioners, for each sheet, eight cents ;

COMMISSIONERS.

For each commissioner one dollar and fifty cents a day for each day employed in the service, together with all actual expenses for surveying, chain-bearing assistants and other necessary expenses, and such further reasonable allowance as the court may judge proper, to be taxed by the court.

Commissions on  
sales.

P. L. 1855, p. 503.

46. That whenever any commissioners, appointed under this act, shall make sale of any lands, and the court or judge shall allow them commissions on the amount of sales, such commissions shall not exceed the following rates, to wit: on all sums not exceeding one thousand dollars, two per centum; if over one thousand dollars, and not exceeding three thousand dollars, one per centum on such excess; and if over three thousand dollars, one-half of one per centum on such excess.

P. L. 1875, p. 94.

Partitions and  
sales heretofore  
confirmed de-  
clared valid.

Proviso.

## Supplement.

Approved April 9, 1875.

[The amendments made by SEC. 1 and 2 have been made in this act].  
47. SEC. 3. That all partitions and sales of real estate heretofore confirmed by the prerogative court, or by any orphans' court of any county in this state, at any term of said court, shall be valid and effectual in law, though the same were confirmed at the same term during which such partition or sale was made; *provided*, said partition or sale was otherwise legal.

## Partnership.

1. Limited partnership may be formed.
2. Of general and special partners.
3. General partners, only, to transact business.
4. Certificate to be signed.
5. Certificate to be acknowledged.
6. To be filed and recorded.
7. Affidavit of general partner to be filed with certificate.
8. Partnership not formed, if certificate and affidavit not filed.
9. Terms of partnership to be published.
10. Affidavits of publication may be filed.
11. Renewal of partnership to be certified, etc.
12. What deemed a dissolution.
13. What names compose firm.
14. Suits may be brought against general partners.
15. Special partners may receive interest and profits.
16. Reduction of capital to be made good.
17. Rights of special partner.
18. Accountability of general partners.
19. Liability and penalty for fraud of partner.
20. Assignment of partnership property, when void.
21. Assignment of property of partners, when void.
22. When special partner liable as general partner.
23. Special partners postponed to creditors.
24. When partnership may be dissolved.
25. What business special partner may transact.
26. Special partner may sell his interest without working dissolution.