

PARTITION.

Partition.

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R. S. 101.

- P. L. 1853, p. 84.
" 1855, p. 503.
" 1856, p. 104,
121, 478.
" 1861, p. 19,
318, 434.
" 1863, p. 492.
" 1864, p. 672.
" 1865, p. 909.
" 1866, p. 418.
" 1875, p. 94.
" 1876, p. 99.

Application for partition.
R. S. 101, § 1.

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I. Appointment of commissioners by a justice or judge.

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

Revision—Approved March 27, 1874.

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

(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 Fr. 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. *Id.* A deed in the nature of a mortgage, given by a tenant in common leaves in him an estate which entitles him to apply. *Kane v. McGuckin*, 9 C. E. Gr. 411. The legislature intended to apply the

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 _____.

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 pro-

Appointment of commissioners.
Ib., § 2.

Tracts described.

Objections.

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. Euders*, 1 Gr. 271. Persons in remainder, 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. *Ib.* *Burroughs v. Dunlap*, 1 Gr. 284. See *Young v. Rutledge*, 1 C. E. Gr. 224, 226. *Infra*, Sec. 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. *Ib.* 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 Hut. Ch. 156. A grantee of the right to dig ores, from one tenant in common, cannot call for a partition. *Boston Franklin 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. *Beecher v. Hennion*, 8 C. E. Gr. 123. A partition of lands containing mineral deposits cannot be ordered, if the location, extent and value of such deposits cannot be ascertained. *Kemble v. Kemble*, 17 *Stew.* 454.

(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 appears 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. *Ib.* That there are incumbrances 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 cotenant with another, that the former would convey to the latter his interest in the premises. *Pothemus 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 *Har.* 54. But see *Coles v. Coles*, 2 *Beas.* 365.

ceed to hear and determine such objections, (a) and in case he find them 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.

Survey and division into lots.
Ib., § 3.

3. That 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 (b) 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; (c) 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.

When part is controverted.

Surveyor and chain-bearers to be sworn.

Shares numbered and described.
Ib., § 4.

4. That 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.

Notice of allotment advertised.

Allotment, how made.
Ib., § 5.

5. That 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; (d) 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

(a) 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. *Oran v. Young*, 3 Har. 54. The mere making of an objection is not sufficient to set aside an appointment if such objection be not well founded. *Oran v. Young*, 3 Har. 58.

(b) 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 Ripper v. Beaman*, 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 South, 354. 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 pro-

viding 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.

(c) 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. *Ib.* 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. *Hautenbreck v. Cronkright*, 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. Estill*, 4 C. E. Gr. 133.

(d) 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.

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 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.

Certificate.

6. That 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.

Witnesses may be examined.
Ib., § 6.

7. That 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 (a) 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. (b)

Proceedings to be recorded.
Ib., § 7.

8. That 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.

Justice's fees.
Ib., § 8.

9. That after the said justice or judge shall have ascertained the whole expense of such partition (c), 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.

Expenses apportioned.
Ib., § 9.

Sale to pay expenses.

Commissioners' deed.

(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 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 Har. 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 from 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. Pidcock*, 6 C. E. Gr. 311.

III. Partition in prerogative or orphans' court.

If owners are
minors, or land in
several counties.
Ib., § 10.
P. L. 1875, p. 94, § 1.

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, (a) or for the prerogative court, when such real estate is situate in two or more counties, (b) upon application (c) 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.

Record.

Notice, to whom
given.
Ib., § 11.

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.

Map and report of
commissioners
recorded.
P. L. 1876, p. 98, § 1.

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.

Duty of clerk or
register.
Ib., § 2.

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.

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

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.

Distrained for.

(a) 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.
(b) 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 Har. 517.

(c) 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. 678.

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. (a)

Provision in case of waste.
Ib., § 13.

IV. Sale when partition cannot be made.

16. That 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 (b) such tract or tracts of land or real estate at public auction to the highest bidder. (c)

When land to be sold.
Ib., § 15.

17. That 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.

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

18. That if the court to which the report of the sale of such land or real estate shall be made as aforesaid, shall approve (d) 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.

If approved, deeds made.
R. S. 101, § 17.

19. That 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.

Commissioner's oath.
Ib., § 18.

20. That 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

When vacancies supplied.
Ib., § 19.

(a) See *Polhemus v. Empson*, 12 C. E. Gr. 195.
(b) 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 McCurt. 480, 2 McCurt. 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. *Ib.* Where the land may be divided a sale will not be ordered. *Lacey v. Bowdoy*, 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 McCurt. 480, 2 McCurt. 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. *Ib.* 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. *Ib.* 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.

(c) 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 McCurt. 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 McCurt. 167.

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

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

Proceeds of sale
paid over.
Ib., § 21.

22. That 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.

When invested.

Guardian to give
bond.
Ib., § 22.

23. That 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.

Commissioners'
receipts and dis-
charges may be
recorded by sur-
rogate.
Ib., § 25.

24. That 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 indorse 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.

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

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

25. That 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

(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' Case*, 4 Hal. Ch. 78. The deficiency incurred by a resale 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. 33. 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. *Muller of Partition, &c.*, 3 Hal. 88.

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. (a) [See Sec. 66, *post.*]

26. That 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.

When sale may
be made.
P. L. 1861, p. 318,
§ 1.

27. That 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 unincumbered 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.

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

28. That 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

Final disposition
of the fund.
Ib., § 3.

Clerk's fees.
Ib.

(a) Upon a bill for partition among remaindermen, the consent of the owner of the particular estate in possession is requisite, and, if a sale be ordered, it must be a sale of the

whole estate, as well that in possession as that in expectancy. *Smith v. Gaines*, 12 *Stew.* 545, reversing 11 *Stew.* 65.

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.

Punishment for embezzlement. *Ib.*, § 4.

29. That if any master in chancery, clerk, or other person shall willfully 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.

Partition on sale by consent of tenant of particular estate. *P. L. 1858, p. 478.*

30. That 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. (a)

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

Proceedings in case some of the tenants are unknown. *P. L. 1863, p. 482, § 1.*

31. That 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,

Partition.

(a) See *Smith v. Gaines*, 12 *Stew.* 545.

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.

On sale.

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 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.

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

Estates by curtesy or dower may be sold. Amended.

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.

Chancellor to make rules. *Ib.*, § 3.

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.

If it is not known whether a party is living, or his residence is unknown. P. L. 1865, p. 908.

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

Custody and control of bonds. P. L. 1864, p. 672, § 2.

Suit on.

Disposition of money.
Costs.

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.

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. That 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 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.

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

38. That 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.

Chancery may decree sale of lands.
R. S. 101, § 26.

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. (b)

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.

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

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.

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

42. That 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

(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; reversed, 1 *Stew.* 439. 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 *Har.* 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.

(b) Where the defendant, in a suit for partition in chancery, sets up an equitable title to the whole estate in the premises, the court will not suspend the suit until the title be settled, but will pass upon such title in the partition suit. *Read v. Huff*, 13 *Stew.* 228. A sale of lands may be set aside, where no advertisement was set up in the township where the lands lie, the purchaser being repaid his purchase-money with interest. *Euclerow v. Dudley*, 14 *Stew.* 611.

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.

43. That 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.

VIII. Fees.

45. That there shall be allowed in proceedings under this act:

Fees.
Ib., § 24.

TO THE JUSTICE, JUDGE OR COURT.

For order of 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. (c)

(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. See *Maxwell v. Goetschius*, 11 Vr. 385.

(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 disposal 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.

(c) As to the power of the court of chancery in making allowances to commissioners, see *Cronkright v. Haulenbeck*, 8 Stev. 273.

PARTITION.

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.

Supplement.

Approved April 9, 1875.

P. L. 1875, p. 94.

[The amendments made by Secs. 1 and 2 have been inserted in Secs. 10 and 17 of the foregoing act.]

Partitions and sales heretofore confirmed declared valid.

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.

Proviso.

Supplement.

Approved April 17, 1884.

P. L. 1884, p. 215.

Liens of creditor not affected by partition of premises.

48. SEC. 1. That it shall not be necessary, in the first instance, to make any creditor having a lien on any real estate whereof a partition is sought in the court of chancery, or any part thereof, by judgment, decree, mortgage or otherwise, a party to the proceedings, nor shall the partition of the premises alter, affect or impair the lien of such creditors, except in the cases provided for in the next section.

How lien on undivided interest is affected by partition.

49. SEC. 2. That where the lien is on the undivided interest or estate of any of the parties, such lien, if partition be made of the premises, shall thereafter be a charge only on the share assigned to such party, and such share shall be first charged with its just proportion of the costs of the proceedings in partition in preference to any such lien.

Creditors having liens on undivided interests may be made parties to proceedings.

50. SEC. 3. That the complainant in any such suit in partition may, at his or her election, make every creditor having a lien on the undivided interest or estate of any of the parties, by mortgage, judgment, decree, devise or otherwise, a party to the proceedings, and in such case the bill shall set forth the nature of such lien or incumbrance.

When court may order bill amended to make lien creditors a party to proceedings.

51. SEC. 4. That before the making of any order for the sale of the premises where the creditors having liens shall not have been made parties, the court, on the motion of either party, shall direct the complainant to amend his or her bill of complaint by making every creditor having a lien on the undivided interest, share or estate of any of the parties, by mortgage, judgment, decree, devise or otherwise, a party to the proceedings, and may thereupon, by an order of reference for that purpose, direct a master of the court to ascertain and report whether the shares or interests in the premises of the parties in such suit, or any of them, are subject to any lien or incumbrance by mortgage, devise, judgment or decree, or otherwise, and if so, to what liens or incumbrances, and by whom they are held.

Order of reference may be made.

52. SEC. 5. That if it shall appear, by the proceedings in the suit or by such report, that there are any existing liens or incumbrances upon the estate, share or interest in the premises of any party named in the proceedings in said suit, the court shall, if it order sale, in the decree for sale direct the master or commissioners, as the case may be, to bring into the court of chancery and pay to the clerk thereof the portion of the moneys arising from the sale of the estate, share and interest of said party after deducting the portion of the costs, charges and expenses to which it shall be liable.

Proceeds of sale of certain interests to be paid into court.

53. SEC. 6. That any party in interest, either owner or incumbrancer, may apply to the court to order such moneys or such part thereof as he shall claim to be paid to him, which application shall be accompanied by his affidavit, stating, to the best of his knowledge, information and belief, the true amount actually due on each incumbrance, the owner of such incumbrance

Proceedings in case parties in interest apply to court for moneys claimed.

and his residence, so far as known to such party; and it shall be also accompanied by proof, by affidavit, of the due service of a notice on each owner of any incumbrance, and on the owner of the share if the notice be given by an incumbrancer of the intention to make such application; if such owner reside in this state, the notice shall be a fourteen days' notice, at least, and shall be served personally, or, if he be absent from his residence, by leaving a copy there with some person of over the age of fourteen years; if the person to be notified reside out of this state, such notice shall be served on him or her personally, twenty days previously to the time named therein for making the application or by publishing the same in a newspaper (to be designated by the court) published in this state, for four weeks successively, at least once in every week, and mailing a copy thereof to his address (if it can be ascertained) at least twenty days before the time named for the application.

54. SEC. 7. That upon such application and proof of notice being made, the court shall proceed to hear the proofs and allegations of the parties, and make such order thereupon as the circumstances of the case may require.

Court to hear proofs, &c., and make order.

55. SEC. 8. That when the amount of existing incumbrances shall have been ascertained, the court shall proceed to order a distribution of the moneys so brought into and remaining in court among the several creditors having such incumbrances, according to the priority thereof, respectively, and the other persons, if any, entitled thereto.

Distribution of moneys to creditors, how made.

56. SEC. 9. That the clerk or other officer of the court by whom any such incumbrance shall be paid off, shall procure satisfaction thereof to be acknowledged in the form required by law, and shall cause such incumbrance to be duly satisfied or canceled of record, and shall defray the expenses thereof out of the portion of the moneys in court belonging to the party by whom such incumbrance was payable, if there be enough for the purpose, but if not, then out of the money due the incumbrancer.

Clerk or other officer to procure satisfaction of claims.

57. SEC. 10. That the proceedings to ascertain and settle the amount of incumbrances as herein provided shall not affect any other party in such suit for partition nor delay the paying over or investing of moneys to or for the benefit of any party except the one upon whose share in the premises the incumbrances are.

Proceedings not to affect other parties to suit.

58. SEC. 11. That any conveyance executed in pursuance of sale in partition, under proceedings in partition in the court of chancery, under and in pursuance of the provisions of this act, shall be recorded in the county where the premises are situated, and shall be a bar, both in law and equity, against all persons interested in such premises in any way who shall have been parties in the said proceedings, and against all other persons claiming by, from or under such parties or either of them.

Conveyances to be recorded and to bar persons interested in premises.

59. SEC. 12. That proceedings in partition which may be pending when this act goes into effect shall not be invalidated thereby, but any proceedings to be had upon any suit already commenced or hereafter to be brought after this act shall take effect, shall be conducted according to the foregoing provisions.

Proceedings pending not invalidated by act.

Supplement.

Approved April 20, 1885.

P. L. 1885, p. 285.

60. SEC. 1. That where two or more parties to a suit now pending, or which may hereafter be commenced, in the court of chancery for the partition of lands, make it appear to the court that they desire to enjoy their respective shares of the whole or any part of said lands in common with each other, it shall be lawful for the court, in its discretion, to direct partition to be so made as to set off to them their shares of the lands partitioned, without partition as between themselves, to be held by them in common; and where any party to any such suit for partition is a minor, under the age of twenty-one years, it shall be lawful for the court, in its discretion, and if it shall appear to be for the benefit of such minor, to direct partition to be so made as to set off to such minor, and to any other

Partition of lands of parties to suit in chancery who desire to enjoy their shares in common.

PARTITION.

party or parties to such suit who may consent thereto, their respective shares in the lands partitioned, without partition as between themselves, to be held by them in common.

Supplement.

Approved April 16, 1886.

P. L. 1886, p. 241.

61. SEC. 1. [Amended by Sec. 62, *post.*]

A supplement to an act entitled "A further supplement to an act entitled 'An act for the more easy partition of lands held by copartners, joint tenants and tenants in common,' approved March twenty-seventh, one thousand eight hundred and seventy-four," which supplement was approved April sixteenth, one thousand eight hundred and eighty-six.

Approved April 8, 1887.

P. L. 1887, p. 159.

62. SEC. 1. That the first section of the act entitled "A further supplement to an act entitled 'An act for the more easy partition of lands held by copartners, joint tenants and tenants in common,' approved March twenty-seventh, one thousand eight hundred and seventy-four," which further supplement was approved April sixteenth, one thousand eight hundred and eighty-six, be and the same is hereby amended so as to read as follows:

Court may order inchoate estates of dower in lands to be sold, &c.

One-third of proceeds to be invested, &c.

Principal, to whom paid.

Proviso.

[That in any proceedings for the partition of lands in the court of chancery of this state, or the orphans' court of any county therein, or upon any application made or hereafter made to any justice of the supreme court or judge of any circuit court or court of common pleas of the county wherein such lands may lie, all inchoate estates of dower in lands ordered in said proceedings to be sold, may be sold by the order of said court, justice or judge, and in such case said estates in dower shall be forever barred, and the court by which said sale shall be confirmed shall direct one-third of the net proceeds of the sale of the share or shares in such lands as are subject to such dower to be invested and the income thereof during the lifetime of the tenant in fee of such share or shares to be paid to such tenant or to the lienors upon such share or shares and upon the death of such tenant said income shall be paid to the tenant in dower during her lifetime, and upon her death the court shall order the principal of said fund to be paid to the heirs-at-law of the tenant in fee or to the parties holding liens upon the said share or shares at the time of the sale thereof and remaining unsatisfied at the death of the tenant in dower, as equity may require; *provided, however*, if such tenant in dower or person holding such inchoate estate of dower shall signify her consent thereto in writing, acknowledged as deeds are required to be acknowledged by married women, the proceeds of the sale of such share or shares as are subject to such dower shall be paid over as though no such estate existed.]

Supplement.

Approved April 9, 1887.

P. L. 1887, p. 155.

Disposition of proceeds when inchoate estates of dower are sold.

63. SEC. 1. That in all partition cases in the court of chancery where inchoate estates of dower in any lands are ordered to be sold therewith, instead of investing one-third of the net proceeds of the sale of the share or shares in such lands subject to such dower, as now directed by law, it shall be lawful for the master or other officer making such sale, on executing to him a full release and discharge, duly acknowledged according to law, from the tenant in fee and his wife entitled to such inchoate right of dower, to pay to them the one-third of the net proceeds aforesaid; *provided, however*, that where the share or interest of the tenant in fee has been sold by judgment or otherwise, or become subject to any valid lien, then such payment shall not be made without all such parties in interest shall join in such release and discharge.

Supplement.

Approved February 21, 1888.

P. L. 1888, p. 81.

64. SEC. 1. That any executor or administrator with the will annexed, whose testator has or shall have died seized of an undivided share of any lands, tenements or hereditaments situated in this state, and who has or shall have, under the provisions of such testator's will, power to sell such undivided share, shall hereafter have the same power to bring an action to effect a partition of such lands, tenements or hereditaments in any court in this state of competent jurisdiction, that such testator might have brought, if living.

Executor, &c., of will having power to sell lands, may maintain action for partition.

Supplement.

Approved March 23, 1888.

P. L. 1888, p. 298.

65. SEC. 1. That all suits in partition heretofore or hereafter begun, in any of the courts of this state, wherein a sale of the lands sought to be partitioned is or shall be made, and any judgment or judgments are or shall be obtained against any of the distributees, their executors, administrators or legal representatives, at any time prior to the distribution of the proceeds of any such sale, such judgment creditor or creditors may, upon petition filed in such cause, have an order, and such court is hereby authorized to make the same, directing the payment of such judgment or judgments out of the proceeds of the sale of such share or shares against which the same would be a lien had such share or shares been owned by such debtor or debtors in severalty.

Payment to judgment creditors out of distributive shares, when ordered by court.

Supplement.

Approved April 14, 1891.

P. L. 1891, p. 423.

66. SEC. 1. That in all proceedings now or hereafter pending for the partition of lands where all or any of the undivided shares whereof is or are limited over in the manner specified in section twenty-five of the act [Revision] to which this is a supplement, a sale thereof may be made upon an order or decree of the court of chancery, whenever it shall be made to appear to the court 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 or persons interested in the same.

Sale of lands limited over may be made in partition proceedings.

67. SEC. 2. That in all partition proceedings wherein the sale of lands limited over shall hereafter be decreed by the court of chancery, and there shall be an executor, trustee or administrator cum testamento annexo appointed by any last will and testament or by virtue of the order or decree of any court and by the terms of such will, such executor, trustee or administrator cum testamento annexo has authority to collect and receive the rents and issues of all or any part of such lands during the lives of any person or persons named in such will, but has no power to make sale of said lands or any interest therein upon such executor, trustee or administrator cum testamento annexo giving bonds to the ordinary (in the same manner as now required upon the granting of letters of administration) in the offices of the clerk of the court wherein said will was proved, or from which he received his appointment as such trustee or administrator, then it shall be lawful for the chancellor to decree that the proceeds of sale of any lands or interest in any lands to which said executor, trustee or administrator cum testamento annexo was entitled to the rents and profits shall be paid over to said executor, trustee or administrator cum testamento annexo, to be by him held and invested according to the law concerning other trust funds and the income thereof, paid and applied by him to the persons entitled to the rents and profits of said lands which said moneys represent; and upon the death of the person so entitled to such income, to pay said principal sum to the persons entitled to the same under the provisions of said will.

Proceeds of sale, how invested.

PARTITION.

A supplement to an act entitled "An act to authorize the partition of lands, in cases where particular undivided shares therein are limited over," approved March sixth, eighteen hundred and fifty-two. (1)

P. L. 1893, p. 245.

Proceeds of sale may be paid over to trustee to whom share may have been devised in trust.

Approved March 13, 1893.

68. SEC. 1. That whenever it shall be made to appear to the court of chancery that any land in this state, or any estate therein, hereafter sold in any partition proceeding by the order or decree of any court of this state, has been devised by any last will or testament of any person or persons, a citizen or resident of any other state at the time of the making of such last will and testament, upon any trust, or subject to any limitation over by way of expectancy or otherwise, it shall be the duty of the chancellor to direct the payment of the proceeds of such sale to such devisee or devisees, being trustees as aforesaid, as are, by the provisions of such last will and testament, under said trust, entitled to have and hold the land sold as aforesaid, notwithstanding the estate of such devisee or devisees, trustees as aforesaid, created or passed by said last will and testament, be subject to a limitation over or be less than estate in fee-simple; which proceeds of sale shall be held, accounted for and disposed of by such devisee or devisees, trustees as aforesaid, in all respects as directed by the provisions of such last will and testament, and not otherwise; *provided*, that nothing herein contained shall relieve such devisee or devisees, trustees as aforesaid, from the duty to give security, in the state of which such testator was a citizen or resident at the time of his death, for the faithful execution of such trust in respect to such proceeds of said sale, when required so to do either by the provisions of such last will and testament or by the order of any court of competent jurisdiction in said state.

Security to be given.

Repealer.

69. SEC. 2. That all acts and parts of acts inconsistent with the provisions of this act, to the extent of such inconsistency, be and the same are hereby repealed, and that this act shall take effect immediately.

A supplement to the act entitled "An act for the partition and sale of real estate where some of the owners are unknown," approved March twenty-fifth, one thousand eight hundred and sixty-three. (2)

P. L. 1871, p. 8.

Provision for partition of real estate held by coparceners, joint tenants or tenants in common, any of whom shall be presumed to be dead.

Approved January 31, 1871.

70. SEC. 1. That where real estate is held by coparceners, joint tenants, or tenants in common, any of whom shall be presumed to be dead, pursuant to the provisions of the act entitled "An act declaring when the death of persons absenting themselves shall be presumed," passed the seventh day of March, one thousand seven hundred and ninety-seven, and it shall not be known whether such owner is living or not, or whether, if dead, he or she has devised his or her interest in such real estate, or who are his or her heirs-at-law, the other coparceners, joint tenants, or tenants in common, or any one 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 parties thereto as well such owner so presumed to be dead, by his right name, as his heirs-at-law and devisees, by the right name of such of them (if any there be) as shall be known to be his or her heirs-at-law if such owner were actually dead, and by the name of the unknown heirs-at-law and devisees of such owner, by the service of a subpoena to answer, as in other suits in the said court, or by a publication according to the law and practice of said court in case of absent defendants, and by such further publication as is provided for and required in the first section of the act to which this is a supplement, and thereupon such proceedings shall be had as are directed by the act to which this is a supplement; and the chancellor shall have the power to make such decree against the said owner so presumed to be dead, and against his heirs-at-law, known or unknown, and his unknown devisees, as if they were known to the court

(1) The act to which this is a supplement (P. L. 1852, p. 137) is embodied in the foregoing act, section 25 *et seq.*
 (2) The act to which this is a supplement (P. L. 1863, p. 482) is embodied in the foregoing act, sections 31 to 33.

and their respective interests in such real estate determined; and shall also have all such power and authority in respect to the cases provided for by this act, as is granted to him by the act to which this is a supplement in respect to the cases therein provided for; and any deed or deeds for such real estate, made pursuant to the decree and order of the chancellor in any such cases, shall convey all the right, title and estate of all the owners of such 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.

Partnership.

1. Limited partnership may be formed.
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29. Liability of individual members for judgments, debts, &c.
30. The word "limited" to be added to name in all notices, &c.
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32. Meetings of members and elections of managers.
33. Profits of business, how divided.
34. Unlawful to loan credit, &c.
35. How association dissolved.
36. Association may sue and be sued, &c.
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38. May hold real estate.
39. Title to certain real estate validated.

An act to authorize limited partnerships.

Passed February 9, 1837.

P. L. 1837, p. 121.

R. S. 872.

1. That limited partnerships, for the transaction of any mercantile, mechanical, or manufacturing business, within this state, may be formed by two or more persons, upon the terms, with the rights and powers, and subject to the conditions and liabilities, herein prescribed; but the provisions of this act shall not be construed to authorize any such partnership for the purpose of banking or making insurance.

Limited partnerships may be formed.

2. That such partnerships may consist of one or more persons, who shall be called general partners, and who shall be jointly and severally responsible, as general partners now are by law, and of one or more persons, who shall contribute, in actual cash payments, a specific sum, as capital, to the common stock, who shall be called special partners, and who shall not be liable for the debts of the partnership, beyond the fund so contributed by him or them to the capital.

Liabilities of partners.

3. That the general partners only, shall be authorized to transact business, and sign for the partnership, and to bind the same. [See Sec. 26, *post.*]

General partners, only, to transact business.

4. That the persons desirous of forming such partnership shall make and severally sign a certificate, which shall contain:

Contents of certificate to be signed by partners.

1st. The name or firm under which such partnership is to be conducted.

2d. The general nature of the business intended to be transacted.

3d. The names of all the general and special partners interested therein, distinguishing which are general, and which are special partners, and their respective places of residence.

4th. The amount of capital which each special partner shall have contributed to the common stock.

5th. The period at which the partnership is to commence, and the period at which it will terminate.