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CHAPTER 75.

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SEC. 1. When several persons hold and are in possession of real property as joint tenants, or as tenants in common, in which one or more of them have an estate of inheritance, or for life or years, an action may be brought by one or more of such persons in the district court of the proper county, for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property, or a part of it, if it appear that a partition cannot be made without great prejudice to the owners.

Action for partition of real property allowed.

SEC. 2. The summons must be addressed by name to all the joint tenants, or in common who are known, and generally to all persons unknown having or claiming an interest in the property.

To whom summons is addressed.

SEC. 3. The interest of all persons in the property whether such persons be known or unknown, must be set forth in the complaint specifically and particularly as far as known to the plaintiff, and if any one or more of the parties or the share or quantity of interest of any of the parties be unknown to the plaintiff or be uncertain or contingent, or the ownership of the inheritance, depend upon executory devise or the remainder be a contingent remainder so that such parties cannot be named, that fact must be set forth in the complaint.

Complaint how to set forth interests of parties.

SEC. 4. The plaintiff may at his option make creditors, having spe-

Creditors having

general liens may be parties.

cified or general lien upon the property, or upon any particular portion thereof parties to the action.

Liens on individual shares.

SEC. 5. When the lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, is thenceforth a charge only on the share assigned to such party, but such share must be first charged with its first proportion of the costs of the partition in preference to such lien.

Unknown owners made parties.

SEC. 6. If a party having a share or interest be unknown, or either of the known parties reside out of the territory, or cannot be found therein, and such fact be made to appear by affidavit, the summons may be served on such absent or unknown party by publication, directed by the court or judge in the manner hereinbefore prescribed. When the publication is made, the summons as published must be accompanied by a brief description of the property which is the subject of the action.

Rights of parties may be put in issue.

SEC. 7. The rights of the several parties, plaintiffs as well as defendants, may be put in issue tried and determined by such action. And where a defendant fails to answer, or where a sale of the premises is necessary, the title must be ascertained by proof, to the satisfaction of the court, before the judgment for partition or sale is given.

Order may allow sale or partition.

SEC. 8. If it be alleged in the complaint and established by evidence to the satisfaction of the court that the property, or any part of it is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof, and for that purpose may appoint one or more referees; otherwise upon the requisite proofs being made, it must order a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees thereof, and must designate the portion to remain undivided for the owners whose interests remain unknown or not ascertained.

Manner of making partition.

SEC. 9. In making the partition, the referees must divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties, as determined by the court, designating the several portions by proper land marks, and may employ a surveyor, with the necessary assistant, to aid them therein.

Referees to make report.

SEC. 10. The referees must make report of their proceedings specifying the manner of executing their trust, describing the property divided, and the shares allotted to each party, with a particular description of each share.

When report is confirmed judgment how rendered.

SEC. 11. The court may confirm or set aside the report, and if necessary appoint new referees; upon the report being confirmed, judgment must be rendered, that such partition be effectual forever, which judgment is binding and conclusive:

1. On all the parties named therein and their legal representatives who have at the time any interest in the property divided as owners in fee, or as tenants for years, or as entitled to the reversion, remainder, or inheritance of such property, after the determination of a particular estate therein, or who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in an individual share thereof, as tenants for years, for life, by the curtesy, or in dower:

2 On all persons interested in the property who may be known, to whom notice shall have been given of the application for partition, by the publication directed by section six; and,

3. On all other persons claiming from such parties or persons or either of them.

Tenants in dower, &c., not affected.

SEC. 12. But such judgment and partition cannot affect tenants or persons having claims as tenants in dower, by the curtesy, or for life, to the whole of the property which is the subject of the partition; nor can

such judgment and partition preclude any person except such as are specified in the last section, from claiming title to the property in question, or from controverting the title of the parties between whom the partition is made.

SEC. 13. The expenses of the referees, including those of a surveyor and his assistants, when employed, must be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by law to the referees must be paid by the plaintiff, and may be allowed as part of the charges.

Expenses of referees and surveyor.

SEC. 14. If the referees report to the court that the property, of which partition shall have been directed, or any distinct portion thereof is so situated that a partition thereof cannot be made without great prejudice to the owners, and the court is satisfied that such report is correct, it may thereupon by an order direct the referees to sell the property or portions so situated.

Sale when allowed.

SEC. 15. When a part of the property only is ordered to be sold, if there be an estate by the curtesy, in dower, or for life, or years, in an undivided share of the property, the whole of such estate may be set off in any part of the property not ordered to be sold.

When part only is sold, life estate.

SEC. 16. Before the making of an order for sale, where the creditors having specified liens have not been made parties, the court on the motion of either party, must direct the plaintiff to amend his complaint if necessary, by making every person, having a specified lien on the undivided interest or estate of any of the parties, by mortgage, devise, or otherwise, a party to the action.

Before sale certain creditors may be made parties.

SEC. 17. The plaintiff must produce to the court the certificate of the clerk of the district court, where the property is situated, showing whether there are any general liens by judgment upon the property or any part thereof.

Certificates as to general liens.

SEC. 18. Unless it be made to appear to the court, by the certificate of the clerk, pursuant to the last section, that there are outstanding no general liens on the property, or on any share or parcel thereof, the court must order a reference to ascertain them.

Court may order reference as to liens.

SEC. 19. If it appears by the certificate, that there are outstanding of record, such general liens, the court must appoint a referee to ascertain whether such liens have been paid, or if not paid, what amount remains due, or secured by them respectively, and the order of priority in which they are entitled to be paid out of the property.

Court may order reference as to liens.

SEC. 20. The plaintiff must cause a notice to be served at least ten days before the time for appearances, on each person having such general liens, to appear before the referee, at a specified time and place, to make proof by his own affidavit or otherwise, of the true amount due or to become due, contingently or absolutely, on his judgment.

Notice to creditors to make proof.

SEC. 21. The referee must receive the evidence and report the names of the creditors whose liens are established, the amounts thereof, and their priority, respectively, and if such liens are contingent, he must specify them. He must attach to his report the proof of service of the notices, and the affidavits and copies of other evidence before him.

Referees to report priority of liens.

SEC. 22. Any creditor having a lien, and being dissatisfied with the report of the referee, may move the court to correct it at any time before distribution of the proceeds of sale, on ten days notice to the plaintiff, and the other persons in whose favor liens are reported, and thereupon the court may correct the report on the evidence reported, or if necessary, may order a new reference of the whole or of any part of the matter. When confirmed, the report is conclusive of the rights of the several creditors on whom notice was served.

Any creditor may have report corrected.

Proceeds of sale how applied.

SEC. 23. The proceeds of the sale of the incumbered property must be applied, under the direction of the court, as follows:

1. To pay its just proportion of the general costs of the action:
2. To pay the costs of the reference:
3. To satisfy and cancel of record the several liens, in their order of priority, by payment of the sums due, and to become due, the amount remaining due to be verified by affidavit at the time of payment:
4. The residue among the owners of the property sold, according to their respective shares.

Sale not to be delayed by reference.

SEC. 24. The proceedings, to ascertain the amount of incumbrances, and to determine their priority, as above provided, or those herein authorized, to determine the rights of parties to funds paid into court, must not delay the sale nor affect any other party whose rights are not involved in such proceedings.

Referees may deliver securities to parties.

SEC. 25. The proceeds of sale, and the securities taken by the referees on any part thereof, may be distributed by them to the persons entitled thereto whenever the court so directs; but in case no direction be given, all such proceeds and securities must be paid into court, or be deposited as required by law, or directed by the court.

Manner of litigating as to claims.

SEC. 26. When the proceeds of sales of any shares or parcels, belonging to persons who have become parties to the action, and who are known, are paid into court, the action may be continued as between such parties, for the determination of their respective claims thereto, which must be ascertained and adjudged by the court; further testimony may be taken in court, or by a referee, at the discretion of the court, and the court may if necessary, require such parties to present the facts or law in controversy, by pleadings as in an original action.

All sales to be at auction.

SEC. 27. All sales of real property made by referees under this chapter, must be made by public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution; the notice must state the terms of the sale, and if the property or any part of it is to be sold subject to a prior estate, charge, or specific lien, that must be stated in the notice.

Terms of sale to be directed in order.

SEC. 28. The court must in the order for sale, direct the terms for credit which may be allowed for the purchase money, of any portion of the premises, of which it may direct a sale on credit, and for that portion of which the purchase money is required by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants, parties out of the territory, or tenants in dower, or by the curtesy, or for life, or years, when the estate of such tenants is ordered to be sold.

Separate securities allowed.

SEC. 29. The referees may take separate mortgages and other securities for the whole, or convenient portions of the purchase money, on such parts of the property, as are directed by the court to be sold on credit, in the name of the clerk of the district court, and his successor in office, and for the shares of any known owner of full age, in the name of such owner.

Estate for life or by the curtesy, how disposed of.

SEC. 30. When the estate of a tenant in dower, or by the curtesy, or for life, or years, in the whole or any part of the property in question, has been admitted by the parties, or ascertained by the court to be existing at the time of the order for sale, and the person entitled to such estate has been made a party to the action, such estate may be first set off out of any part of the property, and a sale made of such parcel, subject to the prior unsold estate of such tenant therein; but if in the judgment of the court, a due regard to the interest of all the parties requires that such estate be also sold, the sale may be so ordered.

What title passes by the sale.

SEC. 31. If a sale of the property including such estate be ordered, the estate and interest of every such tenant or person passes thereby;

and the purchaser, his heirs and assigns, shall hold the property, discharged from all claims, by virtue of such estate or interest, whether the same be to the individual share of a joint tenant, or tenant in common, or to the whole, or any part of the property sold.

SEC. 32. The persons entitled to such estate, in dower, tenancy by curtesy, or tenancy for life or years, whose estate shall have been sold, are entitled to receive such sum in gross as may be deemed upon principles of law applicable to annuities, a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument under seal duly acknowledged or proved, in same manner as deeds for the purpose of record.

Sum in gross allowed for dower, &c.

SEC. 33. If such consent be not given at or before the report of sale, the court must ascertain and determine what proportion of the proceeds of the sale, deducting expenses, will be a just and reasonable sum to be invested for the benefit of the person entitled to such estate in dower, by the curtesy, or for life, and must order the same to be deposited in court for that purpose.

Investments if no consent given.

SEC. 34. The proportions of the proceeds of the sale to be invested, must be ascertained and determined in the several cases, as follows:

Proportion of proceeds how ascertained.

1. If an estate in dower be included in the order of sale, its proportions must be one third of the proceeds of the sale of the property, or of the sale of the individual share in such property, upon which the claim of dower existed:

2. If an estate by the curtesy, or other estate for life, or years, be included in the order of sale, its proportion must be the whole proceeds of the sale of the property, or of the sale of the individual share thereof in which such estate may be.

And in all cases the proportion of the expenses of proceedings must be deducted from the proceeds of the sale.

SEC. 35. If the persons entitled to such estate in dower, by the curtesy, or for life, or years, be unknown, the court must provide for the protection of their rights, in the same manner, as far as may be, as if they were known and had appeared.

Unknown tenants in dower how protected.

SEC. 36. In all cases of sales in partition, when it appears that a married woman has an inchoate right of dower in any of the property divided or sold, or that any person has a vested or contingent future right or estate therein, the court must ascertain and settle the proportional value of such inchoate, contingent, or vested right or estate, according to the principles of law applicable to annuities and survivorships, and must direct such proportion of the proceeds of the sale to be invested, secured or paid over in such manner as to protect the rights and interests of the parties.

Investment for inchoate right of dower.

SEC. 37. A married woman may release such right, interest, or estate to her husband and acknowledge the same in the manner required by law, in respect to the acknowledgment of deeds by married women, before any officer authorized to take acknowledgment of deeds, or if executed out of this territory, before any officer residing in the state, territory, district, or county, where the acknowledgment is made, who is authorized to take the acknowledgment of deeds, to be recorded in this territory. Upon the release, the share of the proceeds of the sale arising from her contingent interest, must be paid to her husband, and the release, or the payment, investment, or otherwise securing of a share of the proceeds of a sale, shall be a bar against such right, estate, or claim.

Dower how released.

SEC. 38. The terms of the sale must be made known at the time; and if the premises consist of distinct farms or lots, they must be sold separately.

Terms of sale to be published.

SEC. 39. Neither of the referees, nor any person for the benefit of

Who may not purchase at sale. either of them, can be interested in the purchase, nor can a guardian of an infant party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section are void.

Referees to report sale. SEC. 40. After completing the sale, the referees must report the same to the court, with a description of the different parcels of land, sold to each purchaser, the name of the purchaser, the price paid or secured, the terms and conditions of the sale, and the securities if any taken; the report must be filed in the office of the clerk of the district court of the county where the property is situated.

Report when to be confirmed by the court. SEC. 41. If the sale be confirmed by the court an order must be entered, directing the referees to execute conveyances and take securities pursuant to such sale, which they are hereby authorized to do; such order may also give directions to them respecting the disposition of the proceeds of the sale.

Receipt of Incumbrances. SEC. 42. When a party, entitled to a share of the property, or an incumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him, and must also pay over to the plaintiff or his attorney, and take his receipt for the costs and charges of the action.

Conveyances must be recorded. SEC. 43. The conveyances must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way, who shall have been named as parties in the action, and against all such parties and persons as were unknown, if the summons have been served as is directed by section six, and against all persons claiming from them or either of them.

Conveyance what to be a bar of. SEC. 44. The conveyances shall also be a bar against all persons having specified or general liens or incumbrances, by judgment, on any undivided share or interest in the premises sold, who shall have been served with notice, as prescribed by section twenty, and also against all persons having specific liens of any undivided share or interest therein, who shall have been made parties to the action; but no creditor having such specific lien can be affected by the sale or conveyance, unless he has been made a party.

Records of sales, when invested. SEC. 45. When there are proceeds of sale belonging to an unknown owner, or to a person without the territory, who has no legal representative within it, or when there are proceeds arising from the sale of an estate subject to the prior estate of a tenant in dower, or by the curtesy, or tenant for life, or years, which are paid into court, or deposited with an officer, by order of the court, the same must be invested in securities on interest for the benefit of the persons entitled thereto.

Investment, how to be made. SEC. 46. When security for the proceeds of sale is taken, or when an investment of any such proceeds is made, it must be done, except as herein otherwise provided, in the name of the clerk of the district court of the county where the papers are filed, and his successors in office, who shall hold the same, for the use and benefit of the parties interested, subject to the order of the court.

Securities to be in name of parties and filed with clerk. SEC. 47. When security is taken by the referees on a sale, and the parties interested in such security, by an instrument in writing under their hands, delivered to the referees, agree upon the shares and proportions to which they are respectively entitled, or when such shares and proportions have been previously adjudged by the court, such securities must be taken in the names of, and payable to the parties respectively entitled thereto, and must be delivered to such parties upon their receipt therefor; such agreement and receipt must be returned and filed with the clerk.

SEC. 48. The clerk in whose name a security is taken, or by

whom an investment is made, and his successors in office, must receive the interest and principal as it becomes due, and apply and invest the same as the court may direct; and must file in his office, all securities taken, and keep an account, in a book provided and kept for that purpose, in the clerk's office free for inspection by all persons, of investments, and moneys received by him thereon, and the disposition thereof.

The clerk to collect interest.

SEC. 49. When it appears that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights and interest of some of them, the court may adjudge compensation to be made by one party, to another for equality of partition; but such compensation cannot be required to be made to others by owners unknown, nor by infants, unless in case of an infant, it appear that he has personal property sufficient for that purpose, and that his interest will be promoted thereby.

Partition made equal by compensation.

SEC. 50. When the share of an infant is sold, the proceeds of the sale may be paid by the referees making the sale, to his general guardian, or to the special guardian appointed for him in the action, if such general or special guardian, before the payment of such share into court shall have given the security required by statute.

Infants share on sale of guardian.

SEC. 51. The guardian who may be entitled to the custody and management of the estate, of an insane person, or other person, adjudged incapable of conducting his own affairs, whose interest in real property shall have been sold, may receive in behalf of such person, his share of the proceeds of such real property, from the referees, if the guardian before the money is paid into court, shall have executed with sufficient sureties, an undertaking approved by a judge of the district court, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled, or to his legal representative.

Shares of insane persons.

SEC. 52. The general guardian of an infant, and the guardian entitled to the custody and arrangement of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is entitled to real estate, held in joint tenancy, or in common, or in any other manner, to authorize his being made party to an action for the partition thereof, may consent to a partition, without action and agree upon the share to be set off to such infant, or other person entitled, and may execute a release in his behalf to the owners of the shares of the parts to which they may be respectively entitled, upon an order from the court.

Consent to partition by guardian.

SEC. 53. The territory may be made a party to an action for the sale or partition of real property, in which case, the summons and complaint must be served upon the attorney general, who must appear on behalf of the territory.

The territory may be made party.

SEC. 54. The costs of partition, including fees of referees, and other disbursements, must be paid by the parties respectively entitled to share, in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment; in that case, they are a lien on the several shares, and the judgment may be enforced by execution against the parties separately. Where however a litigation arises between some of the parties only, the court may require the expense of such litigation, to be paid by the parties thereto, or any of them.

Costs of partition how allowed.