

GENERAL STATUTES

OF THE

STATE OF MINNESOTA,

IN FORCE JANUARY, 1891.

VOL. 2.

CONTAINING ALL THE LAW OF A GENERAL NATURE NOW IN FORCE AND NOT IN
VOL. 1, THE SAME BEING THE CODE OF CIVIL PROCEDURE AND ALL REME-
DIAL LAW, THE PROBATE CODE, THE PENAL CODE AND THE CRIM-
INAL PROCEDURE, THE CONSTITUTIONS AND ORGANIC ACTS.

COMPILED AND ANNOTATED

BY

JNO. F. KELLY,

OF THE ST. PAUL BAR.

SECOND EDITION.

ST. PAUL:

PUBLISHED BY THE AUTHOR.

1891.

CHAPTER 78 (G. S. ch. 74).

ACTIONS FOR THE PARTITION OF REAL PROPERTY.

Sections.
 5451-5452. Authorized.
 5453-5456. Proceedings.
 5457-5473. Judgment of partition.
 5474-5478. Allotment in kind.

Sections.
 5479-5488. Sale.
 5489-5494. Disposition of proceeds.
 5495-5496. Fees and costs.

AUTHORIZED.

SEC. 5451. **By joint tenants and tenants in common.**—When two or more persons are interested in 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 against the others, in the district court of the proper county, for a partition thereof, according to the respective rights and interests of the persons interested therein, or a sale of such property or part of it, if it appears that a partition cannot be had without great prejudice to the owner.

G. S. ch. 74, § 1. 19 M. 167; 38 N. W. 806. Since reign of Elizabeth parties almost invariably resorted to courts of equity for partition. 1 Story, Eq. § 654; 2 Lead. Cas. Eq. 503; 2 Ves. 570; 1 Ves. & B. 555; 1 Jac. & W. 473. At common law joint tenants were not compelled to make partition. 2 Bl. Com. 185; 1 Tho. Co. Lit. 753; 1 Story, Eq. § 647. The statutes 31 Hen. VIII. and 32 Hen. VIII. ch. 32, first subjected joint tenants and tenants in common to compulsory partition. 2 Bl. Com. 185. The principle of the American statutes of partition is to recognize the remedy in chancery only and make it *ex debito justitia*, not discretionary as at common law, and to abolish the common-law rule that to entitle the plaintiff to relief he must have a clear legal title. 1 Story, Eq. § 647. This statute does not embrace coparceners. It is not prudent to partition joint tenancy for life. 2 Bl. Com. 187.

SEC. 5452. **When the state is party.**—The state may be made a party to an action for the sale or partition of real property, in which case the summons and complaint shall be served upon the attorney general, who shall appear on behalf of the state.

G. S. ch. 74, § 45.

PROCEEDING.

SEC. 5453. **Governed by rules in civil actions.**—Such action shall be governed by the rules and provisions applicable to civil actions, including the right of appeal, except that, when service of the summons is made by publication, it shall be accompanied by a brief description of the property sought to be divided, and except as herein otherwise expressly provided.

G. S. ch. 74, § 4.

SEC. 5454. **Summons.**—The summons shall be addressed by name to all the owners and lien-holders who are known, and generally to all persons unknown, having or claiming an interest in the property.

G. S. ch. 74, § 2. 14 M. 13.

SEC. 5455. **Complaint.**—The interest of all persons in the property, whether by way of ownership or lien, and whether such persons are known or unknown, shall 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, is unknown to the plaintiff, or uncertain or contingent, or the ownership of the inheritance depends upon executory devise, or the remainder is a contingent remainder, so that such parties cannot be named, that fact shall be set forth in the complaint. The

complaint shall also contain an allegation of the cash value of the property, and shall be verified.

G. S. ch. 74, § 3. 14 M. 13.

SEC. 5456. Proof of title and right.— Judgment of partition shall not be rendered in any case until the title to the property and the rights of the parties are established by evidence, unless upon written stipulation of the parties to be affected thereby.

Provided, that it shall be no defense to an action for partition in which the title of the plaintiff or plaintiffs to a certain undivided share or shares of the property is proved or admitted; that there is a dispute or litigation undetermined between some of the defendants as to the title or right of such defendants, or any of them, in or to any undivided share or shares of such property claimed by them or any of them, but in such case the court shall proceed to render judgment that partition be made or to order a sale of such property as in other cases, and shall cause the portion of such property or of the proceeds thereof pertaining to the undivided share or shares in dispute to be allotted to the defendants claiming such undivided share or shares without determining their respective rights thereto, and in case of sale of said property may order the proceeds pertaining to the undivided share or shares in dispute to be paid into court to abide the result of any existing or subsequent litigation between such disputing defendants as to their title and right therein.

G. S. ch. 74, § 5, as amended 1887, ch. 38. Approved February 26th. Amendment added the proviso.

JUDGMENT OF PARTITION.

SEC. 5457: When — Referees to make partition.— The title and rights of the parties, respectively, being duly proved or admitted, the court shall render judgment that partition be made accordingly, and appoint three disinterested and judicious citizens of the county, referees, to make partition of the estate, and set off each share of the several persons interested, according to their respective rights as determined in the action.

G. S. ch. 74, § 6. Partition should be in kind whenever possible. 1 Story, Eq. §§ 654, 655; 1 P. Wms. 447; 8 Ves. 145; 2 Danl. Ch. Pr. 1327.

SEC. 5458. Liens — How charged.— When there is a lien on an undivided interest or estate of any of the parties, such lien, if partition is made, is thenceforth a charge only on the share assigned to such party; but such share shall be first charged with its just proportion of the costs of the partition, in preference to such lien.

G. S. ch. 74, § 10.

SEC. 5459. Sale when property incumbered.— In every case, proof shall be made of the existence, priority and amount of any liens on the property of which partition is sought, in such manner, and upon such notice to those interested, as the court shall direct; and if said liens do not amount to the value of the premises as admitted or proved, a sale may be ordered, by referees, under the direction of the court.

G. S. ch. 74, § 18.

SEC. 5460. Same — Not to delay sale.— 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, shall not delay the sale, nor affect any other party whose rights are not involved in such proceedings.

G. S. ch. 74, § 20.

SEC. 5461. Same — Application of proceeds.— The proceeds of the sale of the incumbered property shall be applied, under the direction of the court, as follows:

First. To pay its just proportion of the general costs of the action;

Second. To pay the costs of the reference;

Third. 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;

Fourth. The residue among the owners of the property sold, according to their respective shares.

G. S. ch. 74, § 19.

SEC. 5462. Compensation by one party to another.— 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 appears that he has personal property sufficient for that purpose, and that his interest will be promoted thereby.

G. S. ch. 74, § 41.

SEC. 5463. Same — Where tenement cannot be divided.— When the premises consist of a mill or other tenement which cannot be divided without damage to the owners, or when any specified part of the estate is of greater value than either party's share, and cannot be divided without damage to the owners, the whole estate, or the part thereof so incapable of division, may be set off to any one of the parties who will accept it, he paying to any one or more of the others such sums of money as the referees award to make the partition just and equal; or the referees may assign the exclusive occupancy and enjoyment of the whole, or the part, to each of the parties alternately, for certain specified times, in proportion to their respective interests.

G. S. ch. 74, § 14.

SEC. 5464. Guardian may consent.— The general guardian of an infant, and the guardian entitled to the custody and management 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.

G. S. ch. 74, § 44.

SEC. 5465. Right of dower.— 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 shall 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 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.

G. S. ch. 74, § 29. 33 N. W. 767.

SEC. 5466. Wife may release dower.— 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 state, 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 state. Upon the release, the share of the proceeds of the sale arising from her contingent

interest shall 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.

G. S. ch. 74, § 30.

SEC. 5467. **Gross sum in lieu.**— The persons entitled to such estate in dower, tenancy by curtesy, or tenancy for life or years, whose estate has been sold, are entitled to receive such sums 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 the same manner as deeds for the purpose of record.

G. S. ch. 74, § 25.

SEC. 5468. **Same — How ascertained.**— If such consent is not given at or before the report of sale, the court shall 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 order the same to be deposited in court for that purpose.

G. S. ch. 74, § 26.

SEC. 5469. **Same — How determined.**— The proportions of the proceeds of the sale to be invested, shall be ascertained and determined in the several cases, as follows:

First. If an estate in dower is included in the order of sale, its proportion shall 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;

Second. If an estate by the curtesy, or other estate for life or years, is included in the order of sale, its proportion shall 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 shall be deducted from the proceeds of the sale.

G. S. ch. 74, § 27.

SEC. 5470. **When unknown.**— If the persons entitled to such estate in dower, by the curtesy, or for life or years, are unknown, the court shall provide for the protection of their rights, in the same manner, as far as may be, as if they were known and had appeared.

G. S. ch. 74, § 28.

SEC. 5471. **Life estates to be set off.**— When a part of the property only is ordered to be sold, if there is 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.

G. S. ch. 74, § 17.

SEC. 5472. **Same — When to be sold.**— 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.

G. S. ch. 74, § 23.

SEC. 5473. **Same — Effect of such sale.**— If a sale of the property, including such estate, is ordered, the estate and interest of every such tenant or person passes thereby; and the purchaser, his heirs and assigns, shall hold the property

MINNESOTA STATUTES 1891

SECS. 5474-5478.]

PARTITION OF REAL PROPERTY.

discharged from all claims by virtue of such estate or interest, whether the same relate to the individual share of a joint tenant, or tenant in common, or to the whole or any part of the property sold.

G. S. ch. 74, § 24.

ALLOTMENT IN KIND.

SEC. 5474. By referees — Report.— When partition is made, the referees shall 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 landmarks, and may employ a surveyor, with the necessary assistants, to aid them therein. They shall 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.

G. S. ch. 74, § 7.

SEC. 5475. Confirmation of report.— The court may confirm or set aside the report, and, if necessary, appoint new referees; upon the report being confirmed, judgment shall be rendered that such partition be effectual forever, which judgment is binding and conclusive:

First. 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.

Second. On all persons interested in the property who may be known, to whom notice has been given of the application for partition, by publication; and,

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

G. S. ch. 74, § 8. 19 M. 167.

SEC. 5476. Same — Who not affected.— 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.

G. S. ch. 74, § 9. 19 M. 167.

SEC. 5477. Rights after assignment.— While an estate is in the exclusive occupancy of a cotenant under such an assignment, he shall be entitled to the same remedy against whoever trespasses upon, or otherwise injures the premises, as if he held the same under a lease for the term for which they were so assigned to him; and he and all the other tenants in common shall be entitled to recover such other and further damages as they have sustained by the same trespass or injury, in like manner as if the premises had been leased by them. Joint damages recovered by such tenants in common, by force of this or the preceding section, shall be apportioned and divided among them, according to their respective rights, by the court in which the judgment is recovered.

G. S. ch. 74, § 16.

SEC. 5478. Liability after assignment.— When the whole or any specific part of the premises is thus assigned, the person entitled for the time being to the exclusive occupancy shall be liable to his cotenants for any injury to the

MINNESOTA STATUTES 1891

PARTITION OF REAL PROPERTY.

[SECS. 5479-5485.]

premises occasioned by his misconduct, as a tenant for years, under a common lease without express covenants, would be liable to his landlord; and the other tenants in common may have their remedy therefor against him by action, jointly or severally at their election.

G. S. ch. 74, § 15.

SALE.

SEC. 5479. **When sale to be made.**— If it is alleged in the complaint, and established by evidence, that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court, except as provided in the next section, may order a sale thereof, and for that purpose may appoint one or more referees; or when, without such allegation and proof, referees are appointed to make partition, who report that the property, or any distinct portion thereof, is so situated that a partition thereon 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.

G. S. ch. 74, § 12.

SEC. 5480. **When no sale.**— When there are liens on the property amounting to more than the value thereof as stated in the complaint, or when, after due examination, it appears probable that the property will not sell for a sum in cash equal to the amount of the liens thereon existing, with costs and expenses of sale, no sale shall be made.

G. S. ch. 74, § 13.

SEC. 5481. **Notice of sale.**— All sales of real property made by referees, under this chapter, shall be made by public auction, to the highest bidder for cash, upon notice published in the manner required for the sale of real property on execution; the notice shall 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 shall be stated in the notice.

G. S. ch. 74, § 22.

SEC. 5482. **Terms of sale.**— The terms of the sale shall be made known at the time; and if the premises consist of distinct farms or lots, they shall be sold separately.

G. S. ch. 74, § 31.

SEC. 5483. **Who may purchase.**— 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 shall also pay over to the plaintiff or his attorney, and take his receipt for, the costs and charges of the action.

G. S. ch. 74, § 35.

SEC. 5484. **Who may not purchase.**— Neither of the referees, nor any person for the benefit of 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.

G. S. ch. 74, § 32.

SEC. 5485. **Report of sale.**— After completing the sale, the referees shall 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; the report shall be filed in the office of the clerk of the district court of the county where the property is situated.

G. S. ch. 74, § 33.

MINNESOTA STATUTES 1891

SECS. 5486-5493.]

PARTITION OF REAL PROPERTY.

SEC. 5486. **Confirmation of sale.**— If the sale is confirmed by the court an order shall be entered, directing the referees to execute conveyances, which they are authorized to do; such order may also give directions to them respecting the disposition of the proceeds of the sale.

G. S. ch. 74, § 34.

SEC. 5487. **Record and effect of conveyance.**— The conveyance shall 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 have been named as parties in the action, and against all such parties and persons as were unknown, if the summons has been properly served, and against all persons claiming from them or either of them.

G. S. ch. 74, § 36.

SEC. 5488. **Bar liens, when.**— The conveyances shall also be a bar against all persons having specific or general liens or incumbrances, by judgment, on any undivided share or interest in the premises sold, or who have been served with notice, as prescribed by section eighteen; and also against all persons having specific liens of any undivided share or interest therein, who 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.

G. S. ch. 74, § 37.

DISPOSITION OF PROCEEDS OF SALE.

SEC. 5489. **Claims of parties known.**— 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 shall 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.

G. S. ch. 74, § 21.

SEC. 5490. **Of unknown parties.**— When there are proceeds of sale belonging to an unknown owner, or to a person without the state 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 shall be invested in securities, on interest, for the benefit of the persons entitled thereto.

G. S. ch. 74, § 38.

SEC. 5491. **Same — Investment of.**— When an investment of any such proceeds is made it shall 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.

G. S. ch. 74, § 39.

SEC. 5492. **Same — Interest and securities.**— The clerk by whom an investment is made, and his successors in office, shall receive the interest and principal as it becomes due, and apply and invest the same as the court may direct; and shall file, in his office, all securities taken, and keep an account-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.

G. S. ch. 74, § 40.

SEC. 5493. **Share of infant.**— When the share of an infant is sold, the proceeds of the sale may be paid, by the referees making the sale, to his gen-

MINNESOTA STATUTES 1891

PARTITION OF REAL PROPERTY.

[SECS. 5494-5496.]

eral 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, has given the security required by statute.

G. S. ch. 74, § 42.

SEC. 5494. Share of insane person.— The guardian who is 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 has been sold, may receive, in behalf of such person, his share in the proceeds of such real property, from the referees, if the guardian, before the money is paid into court, has executed, with sufficient sureties, an undertaking approved by the 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.

G. S. ch. 74, § 43.

FEEES AND COSTS.

SEC. 5495. Fees and expenses of referees.— The expenses of the referees, including those of a surveyor and his assistants, when employed, shall be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by law to the referees, shall be paid by the plaintiff, and may be allowed as part of the charges.

G. S. ch. 74, § 11.

SEC. 5496. Costs.— The costs, charges and disbursements of partition shall be paid by the parties respectively entitled to share in the land. The amounts to be paid by each party shall be determined by the court, and be specified in the judgment. Such amounts may be docketed in like manner as judgments requiring the payment of money are docketed, and payment thereof may be enforced by executions against the property of the respective judgment debtors, as provided by section two hundred and sixty-four of chapter sixty-six of the general statutes.

G. S. ch. 74, § 46, as amended 1874, ch. 63. Approved March 9th.