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Chapter 176.

Partition of Real Estate.

Cross references.—See c. 36, § 59, re location on partition; c. 124, § 5, re joint tenants and tenants in common liable in treble damages for cutting trees and timber pending partition.

Sec. 1. Partition, by writ at common law.—Persons seized or having a right of entry into real estate in fee simple or for life, as tenants in common or joint tenants, may be compelled to divide the same by writ of partition at common law. (R. S. c. 162, § 1.)

Cross references.—See note to § 2, re distinction between common-law and statutory proceedings; note to § 27, re right of mortgagee, attaching creditor or judgment creditor to maintain suit for partition.

History of chapter.—See Hanson v. Willard, 12 Me. 142.

Purpose of partition.—The purpose of the statute authorizing partition of real estate is to eliminate by a simple and inexpensive procedure the evils and injustices which often are incident to the holding of land in common or joint tenancy. As the common owners have equal rights in the use and enjoyment of the estate, serious injury is likely to occur to the interests of all if they are not in accord in its management. To meet this difficulty the statutes provide for a prompt division of their respective interests. Hoadley v. Wheelwright, 131 Me. 435, 163 A. 790.

This section covers the now almost obsolete common-law writ of partition, while § 2 provides for the customary petition for partition. Hawes v. Nason, 111 Me. 193, 88 A. 538.

Partition of lands held in common may be had either at common law or under the statute. Longley v. Longley, 92 Me. 395, 42 A. 798.

A right to partition is incident to all real estate held in joint tenancy or tenancy in common. Wood v. Little, 35 Me. 107.

This chapter does not modify the common law as to the species of property that may be the subject of partition, but of whatever kind of property partition might be demanded by parceners at common law, it may be demanded by joint tenants and tenants in common under both this section and § 2 of this chapter. Hanson v. Willard, 12 Me. 142.

One having right of entry only may maintain process.—A tenant interested in the estate, although out of possession, if he has a right of entry, may maintain this process. Call v. Barker, 12 Me. 320.

Thus section recognizes that title of petitioner may be in dispute.—This section, which provides that one having a right of entry into real estate may bring a petition for partition, recognizes that the petitioner may not be seized and that his title may be in dispute. Hoadley v. Wheelwright, 131 Me. 435, 163 A. 790.

But this provision does not apply to one whose title is conditional on fact of entry.—The provisions of this section and § 2 conferring the right of partition upon a petitioner who has only "a right of entry" into lands refer to one having the title and not the possession of land, and not to one whose title is conditional upon the fact of entry. Jenks v. Walton, 64 Me. 97.

A mortgagor in possession may maintain a petition for partition. Upham v. Bradley, 17 Me. 423.

But not after mortgagee has entered for condition broken.—If a tenant in common in possession resorts to partition under § 2, it may be no objection, on the part of the other cotenants, that he is the owner only of an equity of redemption. But it is otherwise after the mortgagee has entered for condition broken, for then the mortgagor has at law no interest whatever in the estate. Call v. Barker, 12 Me. 320. See note to § 27.

And mortgagee out of possession cannot maintain petition.—Where the petitioners are neither seized of the estate in fee simple, or for life, or for a term of years, nor have they the right of entry in such manner, but sustain rather the relation of mortgagees out of possession, but with the right of entry to foreclose or hold possession for condition broken, they cannot maintain a petition for partition. Robbins v. Gleason, 47 Me. 259.

A widow, to whom lands descend from her husband, may have partition thereof at common law. Longley v. Longley, 92 Me. 395, 42 A. 798.

Partition is appropriate for determining status of "omitted child" in will.—A proceeding for partition under this chapter is

appropriate for determining the status of an alleged "omitted child" in a will. Norwood v. Packard, 125 Me. 219, 132 A. 519.

A tenant in common cannot enforce partition of a part of the common tenement by metes and bounds. Duncan v. Sylvester, 16 Me. 388.

One tenant in common cannot enforce partition of part only of the common estate. Bigelow v. Littlefield, 52 Me. 24.

Partition should be made of whole tract.—To make the partition legal and effectual, it should be made of the whole tract. Duncan v. Sylvester, 16 Me. 388.

When partition of real estate held in common is to be enforced by legal process, the whole tract so held must be partitioned at the same time. Bigelow v. Littlefield, 52 Me. 24.

And conveyance by cotenant of part only of land does not authorize partition of such part.—A conveyance by one tenant in common, of his interest in a part only of the land thus held, does not authorize a cotenant to enforce partition of such part against the grantee, leaving the residue of the estate unpartitioned. Bigelow v. Littlefield, 52 Me. 24.

Partition may be had of a mill and mill privilege, under the provisions of this chapter. Hanson v. Willard, 12 Me. 142.

Where partition will destroy property for purpose for which it was maintained.—It is not a valid objection to a petition for partition, that the principal part of the estate, as for instance a cotton factory, is not divisible into the parts prayed for without destroying it for the purposes for which it had been erected and maintained, where the division would not destroy it for other purposes. Wood v. Little, 35 Me. 107.

Applied in Richardson v. Merrill, 21 Me. 47; Dwinal v. Holmes, 33 Me. 172; Cheney v. Cheney, 110 Me. 61, 85 A. 387; Hoadley v. Wheelwright, 130 Me. 395, 156 A. 692.

Sec. 2. Partition by petition; form.—Persons entitled as provided in section 1, and those in possession or having a right of entry for a term of years, as tenants in common, may present a petition to the superior court held in the county where such estate is, clearly describing it and stating whether it is a fee simple, for life or for years, and the proportion claimed by them, the names of the other tenants in common and their places of residence, if known, and whether any or all of them are unknown. (R. S. c. 162, § 2.)

Cross references.—See note to § 1, re property subject to partition and persons who may maintain petition; note to § 27, re right of mortgagee, attaching creditor or judgment creditor to maintain suit for partition.

Purpose of section.—Under the common-law writ de partitione, a partial partition cannot be made. The demandant must institute his process against all the other cotenants. He must, at his peril, state his own share, and that of the others, with precision, and everyone must have a part set out in severalty. To remedy this and other inconveniences, a mode was provided by which persons interested with others in any lot, tract of land or other real estate might have their share or shares set off and divided from the rest. This is the mode prescribed by this section. Hanson v. Willard, 12 Me. 142.

Section provides customary procedure for partition.—Section 1 covers the now almost obsolete common-law writ of partition, while this section provides for the customary petition for partition. Hawes v. Nason, 111 Me. 193, 88 A. 538.

This section changes the mode of procedure, but it neither limits nor enlarges the objects on which the process is to operate. If the estate be such that the petitioner could demand partition of it by writ under the first section, he may have it by petition, in the mode pointed out in the second. He has his election. In the one case, the whole common property must be divided among all the cotenants; in the other, the petitioner's share alone is to be set out, and the residue will continue as before, the common property of all the remaining tenants. Hanson v. Willard, 12 Me. 142.

Who may maintain petition.—By the provisions of this section, persons in possession or having a right of entry into real estate in fee simple for life, or a term of years, may maintain a petition for partition. Robbins v. Gleason, 47 Me. 259.

Cotenant may have his share set out without causing division of whole.—Under the provisions of this section, a tenant in common may have his property divided and set out from the residue of the common property, without causing a division of the whole, as he must if he proceeds by writ. Hanson v. Willard, 12 Me. 142.

In a petition for partition, all persons interested, if known, must be made parties; if unknown, it must be so alleged. New parties cannot be subsequently cited into

court as respondents. Richardson v. Watts, 94 Me. 476, 48 A. 180.

Petition dismissed for failure to name cotenant.—Where there is a cotenant not named in the petition, and it is neither alleged that he was unknown, nor does it appear that he was unknown in fact, nor is reason shown, if any there could be, for not joining him as party defendant, and no notice has been given to him, the petition must be dismissed. Richardson v. Watts, 94 Me. 476, 48 A. 180.

Petition not stating or referring to boundaries dismissed as too indefinite.—Where the petition neither states nor refers to any boundaries by which partition is claimed, it will be dismissed upon motion, demurrer or plea, as too indefinite for any judgment to be rendered upon it. Swanton v. Crooker, 52 Me. 415.

Petition not dismissed for failure to allege that land lies within county.—The court will not, on motion, dismiss a petition for partition, because it is not therein alleged that the land lies within the county. Upham v. Bradley, 17 Me. 423.

Amendment of petition.—The petition may, in the discretion of the court, be amended at any time before the interlocutory judgment. Swanton v. Crooker, 52 Me. 415.

Where petitioner's title is in dispute.—If one owner, by merely filing a plea setting up want of title in the petitioner, could force him to establish his title in a suit at law before proceeding with his petition for partition, the salutary purpose of the statutory remedy would be thwarted. Such has not been the procedure in this state. Hoadley v. Wheelwright, 131 Me. 435, 163 A. 790.

The rulings of the presiding justice in refusing to stay the proceedings and in determining the issue of title were correct. Hoadley v. Wheelwright, 131 Me. 435, 163 A. 790.

Attempted partition by parol void.—See Chenery v. Dole, 39 Me. 162.

Applied in Dwinal v. Holmes, 33 Me. 172; Boothby v. Stanley, 34 Me. 515.

Cited in Burpee v. Burpee, 118 Me. 1, 105 A. 289.

Sec. 3. Filing, if all cotenants named; service. — The petition may be filed in the office of the clerk of the court in vacation, if all the cotenants are named in it. A copy thereof, attested by the clerk, left with each or at his last and usual place of abode 20 days before the session of the court to which it is addressed is sufficient service. (R. S. c. 162, § 3.)

Cited in Wyman v. Piscataquis Woolen Co., 100 Me. 546, 62 A. 655.

Sec. 4. Order of notice when not all named.—When the cotenants are not all named in the petition, it may be presented to the court in that or in any other county, returnable in the county where the estate is, and such notice shall be given to the other cotenants as the court orders; and in case of noncompliance therewith, or other imperfection of notice, the court may order further notice to be given. (R. S. c. 162, § 4.)

Notice to cotenants not named is indispensable.—A petition for partition cannot be heard when notice has not been ordered or given to cotenants who are not named but who are described as "unknown." On such a petition notice such as the court orders to all cotenants not named is indispensable. Savage v. Gray, 96 Me. 557, 53 A. 61.

Stated in Richardson v. Watts, 94 Me. 476, 48 A. 180.

Sec. 5. When those not notified may appear; pleadings.—A person interested and not named in the petition, or out of the state, and not so notified as to enable him to appear earlier, may, in the discretion of the court, be permitted to appear and defend at any time before final judgment on such terms as may be imposed. Any person, defendant in an action at law or respondent in a petition for partition, may, jointly with others or separately, by brief statement, without a plea of the general issue, allege any matter tending to show that partition ought not to be made as prayed for. (R. S. c. 162, § 5.)

The language of this section is very broad, embracing all persons interested, and, in the judgment of the court, any person who is interested in the premises to be parted comes within the terms of the section, notwithstanding such person might not have been bound by the final judgment in the case if he had not appeared. Huntress v. Tiney, 46 Me. 83.

Granting of motion is in discretion of

court.—The granting of a motion to appear and defend under this section is at the discretion of the court. Field v. Persons Unknown, 34 Me. 35.

And is not subject to review on exceptions.—The case falling within the purview of this section, the question whether the persons moving to be admitted to appear and defend should be admitted was one of discretion, and the exercise of this discretion is not subject to revision upon exceptions. Huntress v. Tiney, 46 Me. 83.

Motion refused unless made prior to interlocutory judgment.—The court, in the exercise of its discretion, will refuse to grant the motion unless it is made prior to the interlocutory judgment that partition be made. Field v. Persons Unknown, 34 Me. 35.

Persons allowed to appear and defend are bound by subsequent judgment.—Where, before final judgment, certain individuals, on motion to the court, were allowed to appear and defend as provided in this section, and no exception was taken to the action of the court in that particular, such individuals became parties to the record and would be bound by any subsequent judgment. Huntress v. Tiney, 46 Me. 83.

Applied in Saco Water Power Co. v. Goldthwaite, 35 Me. 456.

Quoted in Marr v. Hobson, 22 Me. 321.

Cited in Boothby v. Stanley, 34 Me. 515; Ham v. Ham, 39 Me. 216; Blaisdell v. Pray, 68 Me. 269.

Sec. 6. Counter brief statement filed.—The plaintiff or petitioner may reply by counter brief statement, alleging that the defendant or respondent has no interest in the premises, or other matter to show the insufficiency of the defense. (R. S. c. 162, § 6.)

Cross reference.—See note to § 9, re taking issue on question of respondent's interest.

Purpose of section.—This section and the second sentence of § 9 were manifestly intended to prevent the interference of strangers who could have no interest whatever in the subject. Marr v. Hobson, 22 Me. 321.

Sec. 7. Guardian for infant or insane and agent for nonresident.—When an infant or insane person, living in the state, has no guardian and appears to be interested, the court shall appoint a guardian ad litem for him and an agent for persons interested who had been out of the state for 1 year before the petition was presented and do not return before judgment for the partition is to be made. (R. S. c. 162, § 7.)

Guardian not appointed for infants living out of state.—This section, which requires that a guardian be appointed in partition proceedings by the court, does not apply in the case of infants living out of the state. The court has jurisdiction for that purpose only of infants living within the state. Coombs v. Persons Unknown, 82 Me. 326, 19 A. 826.

Sec. 8. Division of time for occupation of sawmills.—Tenants in common of a sawmill may have a division of the time during which each may occupy according to his interest, as partition is made of an estate; and the court may make all necessary decrees in relation thereto. (R. S. c. 162, § 8.)

At common law each tenant in common of the realty may, at all times, reasonably enjoy every part of the common property, reasonable enjoyment being such as will not interfere with the like rights of his cotenants. In the case of sawmills, this section has reduced this abstract rule to a practical one, by apportioning the time of occupancy among the tenants according to their respective interests. Carter v. Bailey, 64 Me. 458.

Sec. 9. Respondent, claiming specific part, may have separate trial.—When it appears from the pleadings that one or more respondents claim to be seized of the whole of a specific parcel of the premises of which partition is prayed, there may first be a separate trial of that question only, at the discretion of the presiding judge. When it appears on trial that any respondent has no interest in the estate, he shall be heard no further and the petitioner shall recover of him the costs of the trial. (R. S. c. 162, § 9.)

Purpose of second sentence of section.—Section 6 and the second sentence of this section were manifestly intended to prevent the interference of strangers who

could have no interest whatever in the subject. Marr v. Hobson, 22 Me. 321.

Petitioner may take issue on question of respondent's interest.—If the petitioner chooses to take an issue on the question of the respondent's interest, he may do so, and on its being determined in his favor, he is placed as he would have been, if the respondent had not appeared. Marr v. Hobson, 22 Me. 321.

If respondent is interested petitioner must prevail by strength of his own title.—If the petitioner takes an issue on the question of respondent's title and the respondent shows himself to be interested, and so authorized to contest the claim to partition, the petitioner must prevail by the strength of his own title, and not by the weakness of the other party. Marr v. Hobson, 22 Me. 321.

Applied in Coombs v. Persons Unknown, 82 Me. 326, 19 A. 826; Bennett v. Davis, 90 Me. 102, 37 A. 864.

Sec. 10. Costs.—When a petitioner is found to own a less share than is claimed in his petition, he shall have partition of such share, but the respondent recovers costs. When found entitled to have partition of the share claimed, he recovers costs of the respondent. In such cases or on default, a judgment that partition be made shall be entered. In all other cases, including default of the respondent or respondents, when judgment for partition is given, the court, after notice to all parties in interest, may, in the discretion of the presiding justice, apportion the costs between the petitioner and respondent or respondents or allow the petitioner to recover costs of the proceedings against the respondent or respondents, to be taxed the same as in a civil action, and execution may be issued therefor. (R. S. c. 162, § 10.)

When prevailing party recovers costs.—Where no issue is raised as to the title of the petitioner, and judgment for partition is entered, the respondent cannot recover costs as matter of right. It is only when an issue is joined and tried as to the right of the petitioner to partition that the prevailing party recovers costs, and then only up to the time when judgment for partition is rendered. Counce v. Persons Unknown, 76 Me. 548.

Effect of admission of new parties.—By the admission of new parties, the case stands open for further proceedings. Under such circumstances, therefore, no costs can be allowed to the petitioner at that stage of the case. Huntress v. Tiney, 46 Me. 83.

If there are several parcels embraced in the petition, and the petitioner's share in some of them is less than he claims, but the respondents have no interest in those parcels in which he recovers less, the case is not within the first sentence of this section, and the petitioner is entitled to costs. Thornton v. York Bank, 45 Me. 158.

Applied in Spear v. Fogg, 87 Me. 132, 32 A. 791.

Sec. 11. Owners may join or sever; when petitioner dies or conveys.—The owners may join or sever in their petitions. When they join and one dies or conveys his share, or when a several petitioner dies or conveys his share, the petition, by leave of court, may be amended by erasing his name and inserting the names of his heirs, devisees or grantees, and they may proceed with the process for their respective shares. (R. S. c. 162, § 11.)

Applied in Larrabee v. Rideout, 45 Me. 193.

Stated in Ayer v. Gleason, 60 Me. 207.

Sec. 12. On death of respondent, heirs or devisees cited in. — The petition is not abated by the death of a party respondent. His heirs or devisees or, if the estate is for a term of years, his executor or administrator may be cited to appear, and upon service on them, they shall become parties to the proceedings; and the court may order such judgment, and with such costs, as the law and facts require. (R. S. c. 162, § 12.)

Sec. 13. Commissioners appointed.—After judgment that partition be made, the court shall appoint 3 or 5 disinterested persons as commissioners to make partition and set off to each his share, which shall be expressed in the

warrant. Their shares may be set off together or in 1 tract, or the share of each may be assigned to him, at his election. (R. S. c. 162, § 13.)

The commissioners have no judicial power, like referees, to determine any questions between the parties relating to their respective proportions, titles or interests. All these questions are for the jury, and must be settled before the interlocutory judgment in order to determine what that judgment shall be. This section gives the commissioners no power to decide them. Allen v. Hall, 50 Me. 253.

They must determine location and boundaries of property, and what whole estate is. —An interlocutory judgment, in which there are no exceptions, covers all the real estate within the specified boundaries. The commissioners are to find the property and determine where and what it is. This is implied in their warrant and is indispensable to their execution of it. They must determine the location and boundaries, and, if the question arises, they must determine what the whole estate is, by distinguishing personal property from real estate. These questions are entirely different from those relating to the title, interests and proportions of individual parties. Allen v. Hall, 50 Me. 253.

But they have no authority to try questions of title and interests of parties.—The duties of the commissioners are plain. They are simply to make partition of the estate, assigning to the petitioners the share or shares belonging to them, as expressed in their warrant. They have no authority to try the question of title, or to determine what portion of the estate to be divided belongs to either party. The whole question of right is determined before their appointment, and the interlocutory judgment is the evidence of the rights of the parties. Ham v. Ham, 39 Me. 216.

Commissioners should be governed by comparative value of land.—In making partition of real estate, the commissioners should be governed by the comparative value of the land assigned to each share, and not exclusively by the quantity. Field v. Hanscomb, 15 Me. 365.

Cited in Burpee v. Burpee, 118 Me. 1, 105 A. 289.

Sec. 14. Oath and certificate on warrant.—Before proceeding to discharge their duty, the commissioners shall be sworn to the faithful and impartial performance of it; and the justice of the peace before whom they are sworn shall make his certificate thereof on the back of their warrant. (R. S. c. 162, § 14.)

Sec. 15. Notice; all present, but majority may report. — The commissioners shall give reasonable notice of the time and place for making partition to all concerned who are known and within the state. They must all be present at the performance of their duties but the report of a majority is valid. (R. S. c. 162, § 15.)

Commissioners should make return of manner in which they gave notice.—The commissioners appointed to make partition of lands held by tenants in common should make return of the manner in which they gave notice to the persons interested of the time and place of their meeting, in order that the court may determine whether due notice was given. Ware v. Hunnewell, 20 Me. 291.

The commissioners should state what they have done, and whether any, and what persons, if any, were known to them to be concerned and resident within the state, and what notice was given to each of them. Hathaway v. Persons Unknown, 32 Me. 136.

For court must ascertain whether persons concerned had sufficient notice.—The court, in acting upon a report of commissioners appointed to make partition of land, cannot properly perform its duty without ascertaining whether persons known to be concerned and within the state have had sufficient notice of the time and place of making partition to enable them to be present at the partition for the protection of their rights. Hathaway v. Persons Unknown, 32 Me. 136.

And it must appear from return that reasonable notice was given.—Unless it appears from the return of the commissioners that reasonable notice was given to the persons interested, the report will not be accepted. Ware v. Hunnewell, 20 Me. 291.

But return is not conclusive on question of notice.—The commissioners' return, that they have given sufficient notice, is not conclusive upon the court. Hathaway v. Persons Unknown, 32 Me. 136.

Sufficiency of notice.—See Ware v. Hunnewell, 20 Me. 291.

Where one of the persons appointed to make the division declined to act, and the

court designated another, the substitution of one commissioner for another did not annul the commission in other respects or impair its legal effect. Parsons v. Copeland, 38 Me. 537.

Sec. 16. Share of tenant in exclusive possession of part assigned; improvements considered.—When one of the tenants in common, by mutual consent, has had the exclusive possession of a part of the estate and made improvements thereon, his share shall be assigned from or including such part; and the value of the improvements made by a tenant in common shall be considered and the assignment of shares be made in conformity therewith. When any person shall have heretofore made or shall hereafter make improvements upon a part of any real estate with the consent of the owners thereof, or any of them, and such person shall have thereafter become a tenant in common of such real estate, his share shall be assigned from or including such part, and the value of the improvements so made shall be considered and the assignment of shares made in conformity therewith. (R. S. c. 162, § 16.)

Questions arising under section to be determined before interlocutory judgment.—The questions arising under this section, as they refer entirely to the individual interests and proportions of the parties, must be determined by the jury before the interlocutory judgment. And the result should be incorporated into the interlocutory judgment, that the proper directions may be given therefor in the warrant. Allen v. Hall, 50 Me. 253.

Tenant in common is entitled to benefit of improvements made by him.—A tenant in common, on a division of the estate, is entitled to the benefit of the improvements made by him. Reed v. Reed, 68 Me. 568.

Cases where possession was with and where it was without consent distinguished.—By the second sentence of this section it is provided that "the value of the improvements made by a tenant in common shall be considered, and the assignment of shares be made in conformity therewith." This is distinct from the provision in the first of the section. That provides what shall be done where there is an exclusive possession "by mutual consent." This provides for the disposition of the improvements simply, and gives the maker the benefit of them irrespective of possession or consent. In the one case, the place of the improvements is to be set off; in the other, the benefit of the improvements is to go to him who made them, though in the division some other part shall fall to him. Reed v. Reed, 68 Me. 568.

Improvements where one cotenant was in possession with consent of others.—If one has had exclusive possession of any part of the premises "by the mutual consent" of the cotenants, and has made improvements thereon, he is entitled to have such part assigned to him, unless, exclusive of the improvements, it exceeds his share. Allen v. Hall, 50 Me. 253.

If improvements are made on a part of which a tenant in common has the exclusive possession with the consent of his cotenants, his share should be assigned from such part or including it. Reed v. Reed, 68 Me. 568.

Improvements where one cotenant was in possession without consent of others.—Where one has occupied any part of the premises in severalty, and has made any improvements thereon without the consent of his cotenants, he cannot claim to have his share so set out as to embrace such improvements. He may be compelled to take some other portion of the estate. But he is entitled to have the improvements made by him "considered," and the assignment made "in conformity therewith." This language, though somewhat indefinite, is without meaning unless it means that he shall have the entire benefit of the improvements made by him. If not assigned to him specifically, he shall have their value, over and above his share of the common property. Allen v. Hall, 50 Me. 253.

If possession was without consent, the tenant making improvements is entitled to the benefit of their actual value to the estate in the share to be assigned to him, though that share may be elsewhere. Reed v. Reed, 68 Me. 568.

Applied in Read v. Hilton, 68 Me. 139; Lunt v. Lunt, 71 Me. 377.

Cited in Brunswick Motor Mart v. Strout, 120 Me. 555, 117 A. 92.

Sec. 17. Parcel of greater value than share, assigned to one who pays to others.—When any parcel of the estate to be divided is of greater

value than either party's share and cannot be divided without great inconvenience, it may be assigned to one party by his paying the sum of money awarded to the parties who have less than their shares; but the report shall not be accepted until the sums so awarded are paid or secured to the satisfaction of the parties entitled thereto. (R. S. c. 162, § 17.)

The meaning of this section is that where the estate cannot be divided without great inconvenience, it may be assigned to any one of the part owners who will accept it and pay the price awarded by the commissioners. Wilson v. European & North American R. R., 62 Me. 112.

The language of this section is permissive, not mandatory. Wilson v. European & North American R. R., 62 Me. 112.

One part owner of real estate cannot be compelled against his will to take more than his share of the estate, and to pay for the excess to the other part owners who have less than their share. If neither party will consent to take more than his share, and to pay for the excess to the other, then the division must be equal. Wilson v. European & North American R. R., 62 Me. 112.

Cited in Dyer v. Lowell, 30 Me. 217; Brunswick Motor Mart v. Strout, 120 Me. 555, 117 A. 92.

Sec. 18. Expenses apportioned.—An account of all the charges and expenses attending the partition shall, on request of any petitioner, be presented to the court, and the presiding justice shall determine, after notice to all concerned, the equitable proportion thereof to be paid by the several owners in the lands of which partition has been made, and execution therefor may be issued against any owner neglecting to pay. (R. S. c. 162, § 18.)

Sec. 19. When share of greater value set off to one, part owner out of state may have new division. — If a share larger than his real interest or more than equal in value to his proportion is set off to a part owner, an aggrieved part owner, who at the time of partition was out of the state and was not notified in season to prevent it, his heirs or assigns, may within 3 years thereafter apply to the court that made the partition and it shall cause a new partition to be made. (R. S. c. 162, § 19.)

Interests of absent parties protected.— In proceedings for partition, the petition sought for cannot be prevented by respondents who set up the objection that a share in the estate, not, however, in conflict with their shares, is owned by minors out of the state, who have not become parties to the record. The interests of absent parties are reasonably protected by this section and §§ 20 and 22, and by the care of the court. Coombs v. Persons Unknown, 82 Me. 326, 19 A. 826.

Sec. 20. New partition.—In such new partition, so much shall be taken from any share as the same shall be adjudged to be in excess of its just proportion of the whole, estimated as in the condition when first divided, and no more; and if improvements have been made on the part taken off, reasonable satisfaction therefor, to be estimated by the commissioners, shall be made to him who made the improvements, by him to whose share they are added; and the court may issue execution therefor and for costs of the new partition. (R. S. c. 162, § 20.)

See note to § 19.

Sec. 21. Report; judgment; effect. — Commissioners in all cases shall make and sign a written return of their proceedings, and make return thereof with their warrant to the court from which it issued. Their report may be confirmed, recommitted or set aside, and new proceedings be had as before. When confirmed, judgment shall be entered accordingly and recorded by the clerk and by the register of deeds of the district where the estate is.

Such judgment is conclusive on all rights of property and possession of all parties and privies to the judgment, including all persons who might have appeared and answered, except as hereinafter provided. (R. S. c. 162, § 21.)

Cross reference.—See c. 89, § 235, re duplicate plans to be filed in registry of deeds.

Judgment bars title of respondent and all who might have been respondents.— The judgment establishing the partition

completely bars the legal possessory title of the respondent and of all others who might have become respondents. Foxcroft v. Barnes, 29 Me. 128.

But adverse possessor cannot be regarded as party to proceeding.—One having an adverse possession of the land divided for a period of more than six years before the filing of the petition, not being affected by the judgment of partition, cannot be regarded as a party thereto, under this section. Tilton v. Palmer, 31 Me. 486.

An adverse possession for a less period than six years before the filing of the petition cannot make the holder a party to the petition and the proceedings thereunder before judgment, notwithstanding he may have entered and withdrawn his appearance, because he had no interest in the premises upon which he could be heard in that cause. Tilton v. Palmer, 31 Me. 486.

And his rights are not affected thereby.—In a petition for partition, the whole object sought is a division of the land between those who have a title thereto as tenants in common. The question touching the equitable rights of a person in possession by disseizin cannot be presented, and consequently such rights are not to be changed or in any way affected by the proceedings under such a process. Tilton v. Palmer, 31 Me. 486.

What commissioners' report should show.—See Dyer v. Lowell, 30 Me. 217.

Report recommitted for correction of error. — The commissioners, having erroneously undertaken to determine a question of right to a portion of the estate to be divided, therein exceeded their authority, and their report was properly recommitted for the correction of that error. Ham v. Ham, 39 Me. 216.

Cited in Moore v. Mann, 29 Me. 559; Jewett v. Persons Unknown, 61 Me. 408.

Sec. 22. When unequal share left to person out of state, new partition made.—When a person to whom a share was left was out of the state when notice was served on him and did not return in season to become a party to the proceedings, he may, within 3 years after final judgment, apply to the same court for a new partition; and if it appears that the share left for him was less than he was entitled to, or that it was not equal in value to his proportion of the premises, the court may order a new partition as provided in section 20. (R. S. c. 162, § 22.)

See note to § 19.

Sec. 23. Claimant not party to proceedings, not affected by judgment.—When a person not a party to the proceedings claims to hold the premises described or any part thereof, in severalty, he is not precluded by the judgment for partition; but may bring his action therefor as if no such judgment had been rendered. (R. S. c. 162, § 23.)

Cross reference.—See note to § 26, re proceedings not conclusive against holder of elder and better title than party to partition.

Applied in Larrabee v. Larrabee, 33 Me. 100.

Stated in Coombs v. Persons Unknown, 82 Me. 326, 19 A. 826.

Sec. 24. Person not party claiming share assigned or left.—When a person, not a party to the proceedings, claims a share assigned to or left for a part owner, he is concluded so far as it respects the assignment of the shares; but he is not prevented from maintaining an action within the time in which it might have been brought if no judgment for partition had been rendered, for the share claimed, against the tenant in possession, the same as if the demandant had claimed the piece demanded, instead of an undivided part of the whole. (R. S. c. 162, § 24.)

Sec. 25. Part owner, to whom no share assigned. — When a person, not a party to the proceedings, to whom no share was assigned or left, claims to have been a part owner of the estate, he is concluded so far as it respects the partition, but not from maintaining an action against each person holding a share, for his proportion of each share as owned before partition was made. (R. S. c. 162, § 25.)

Sec. 26. Person evicted of share, to have new partition.—When a per-

son to whom a share has been assigned or left is evicted by an elder and better title than that of the parties to the judgment, he is entitled to a new partition of the residue, as if no partition had been made. (R. S. c. 162, § 26.)

Proceedings in partition not conclusive against holder of elder and better title.—By the provisions of this section and § 23, the proceedings and judgment on a petition for partition are not conclusive, unless against one who appeared and answered to the petition, upon an elder and better title than that of the person holding by virtue of the partition. Argyle v. Dwinel, 29 Me. 29.

Sec. 27. Mortgage, attachment or lien on share in common holds share set out.—A person having a mortgage, attachment or other lien on the share in common of a part owner shall be concluded by the judgment, so far as it respects the partition, but his mortgage or lien remains in force on the part assigned or left to such part owner. (R. S. c. 162, § 27.)

History of section.—See Hawes v. Nason, 111 Me. 193, 88 A. 538.

Mortgage on undivided interest attaches automatically to several interest.—Under this section a mortgage on an undivided interest follows after and attaches itself automatically to the several interest of the mortgagor after partition is made. The several interest takes the place of the undivided interest. Thomaston Savings Bank v. Hurley, 117 Me. 211, 103 A. 234.

Rights of partition belong to mortgagor or judgment debtor.—Taking this section in connection with §§ 1 and 2, the intention of the legislature is clear, namely that the rights of partition belong to the holder of the equity of redemption in case of a mortgagor and to the debtor in case of an attachment or execution sale, until, in the one case, the title is rendered indefeasible in the mortgagee by perfected foreclosure and, in the other, in the judgment creditor by perfected levy or sale. Hawes v. Nason, 111 Me. 193, 88 A. 538.

So long as the right of redemption exists, this section, by clear implication, makes the holder of the right the proper party, plaintiff or defendant, in partition proceedings, and both the mortgagee and creditor are protected by having their mortgage and their lien attach to the part assigned, in case such mortgagor or debtor is the party plaintiff, or to the part that is left in case such mortgagor or debtor is the party defendant. Hawes v. Nason, 111 Me. 193, 88 A. 538.

A judgment creditor who has received a sheriff's deed under execution sale of real estate, held by his debtor in common with third persons, cannot maintain a petition for partition of the estate against such third persons, until after the expiration of one year, within which the debtor may redeem. Hawes v. Nason, 111 Me. 193, 88 A. 538.

Sec. 28. Lots reserved for public uses first set off.—When portions or lots are reserved for public uses in a tract of land to be divided, they shall first be set out, of an average quality and situation, and a return made thereof to the forest commissioner's office, with a description of its quality and location; and the commissioners' return of partition, accepted and recorded as before provided, shall be a valid location of such reserved lands. (R. S. c. 162, § 28.)

Applied in Upham v. Bradley, 17 Me. 423.

Cited in Jewett v. Persons Unknown, 61 Me. 408.