

WESTERN AUSTRALIA

ANNO QUADRAGESIMO SECUNDO

VICTORIÆ REGINÆ

No. 1

An Act to amend the Law relating to Partition.

[Assented to 3rd July, 1878.]

Imperial Acts 31
& 32 Vic., c. 40,
and 39 & 40
Vic., c. 17

Short title

As to the term
'Court'

Power to Court
to order a sale
instead of a
division

Sale on applica-
tion of certain
proportion of
parties interested

BE it enacted by His Excellency the Governor of Western Australia and its Dependencies, by and with the advice and consent of the Legislative Council thereof, as follows:—

1. This Act may be cited as 'The Partition Act, 1878.'

2. In this Act the term 'the Court' means the Supreme Court of Western Australia in its equitable jurisdiction.

3. In a suit for partition, where if this Act had not been passed, a decree for partition might have been made, then if it appears to the Court that by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions.

4. In a suit for partition where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the Court to direct a sale of the property and a distribution of the proceeds instead

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of a division of the property between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions.

5. In a suit for partition, where if this Act had not been passed, a decree for partition might have been made, then if any party interested in the property to which the suit relates requests the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or amongst the parties interested, the Court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions; and in case of such undertaking being given the Court may order a valuation of the share of the party requesting a sale, in such manner as the Court thinks fit, and may give all necessary or proper consequential directions.

As to purchase of share of party desiring sale

6. On any sale under this Act, the Court may, if it thinks fit, allow any of the parties interested in the property to bid at the sale on such terms as to non-payment of deposit, or as to setting off or accounting for the purchase money or any part thereof instead of paying the same, or as to any other matters, as to the Court shall seem reasonable.

Authority for parties interested to bid

7. Section twenty-eight of 'The Trustee Ordinance, 1854,' shall extend and apply to cases where in suits for partition the Court directs a sale instead of a division of the property.

Application of the Trustee Act

8. Sections twenty-three to twenty-five (both inclusive) of the Imperial Act, of the Session of the nineteenth and twentieth years of Her Majesty's reign (chapter one hundred and twenty), 'to facilitate Leases and Sales of Settled Estates' (adopted by the Act of Council 41st Victoria, No. 9), shall extend and apply to money to be received on any sale effected under the authority of this Act.

Application of proceeds of sale, 19 & 20 Vic., c. 120 (41 Vic., No. 9)

9. Any person, who, if this Act had not been passed, might have maintained a suit for partition, may maintain such suit against any one or more of the parties interested, without serving the other or others (if any) of those parties; and it shall not be competent to any defendant in the suit to object for want of parties; and at the hearing of the cause the Court may direct such inquiries as to the nature of the property, and the persons interested therein, and other matters as it thinks necessary or proper, with a view to an order for partition or sale being made on further consideration; but all persons who, if this Act had not been passed, would have been necessary parties to the suit, shall be served with notice of the decree or order on the hearing, and after such notice shall be bound by the proceedings, as if they had been originally parties to the suit, and shall be deemed parties to the suit; and all such persons may have liberty to attend the proceedings; and any such person may within a time limited by general orders apply to the Court to add to the decree or order.

Parties to partition suits

10. Where in a suit for partition it appears to the Court that notice of the decree or order on the hearing of the cause cannot be served on all the persons on whom that notice is by the last preceding section

Power to dispense with service of notice of decree or order in special cases

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required to be served, or cannot be so served without expense disproportionate to the value of the property to which the suit relates, the Court may, if it thinks fit, on the request of any of the parties interested in the property, and notwithstanding the dissent or disability of any others of them, by order dispense with that service on any person or class of persons specified in the order, and instead thereof may direct advertisements to be published at such times and in such manner as the Court shall think fit, calling upon all persons claiming to be interested in such property who have not been so served to come in and establish their respective claims in respect thereof before a Judge in Chambers within a time to be thereby limited. After the expiration of the time so limited all persons who shall not have so come in and established such claims, whether they are within or without the jurisdiction of the Court (including persons under any disability) shall be bound by the proceedings in the suit as if on the day of the date of the order dispensing with service they had been served with notice of the order or decree, service whereof is dispensed with ; and thereupon the powers of the Court under the Trustee Ordinance, 1854, shall extend to their interests in the property to which the suit relates as if they had been parties to the suit ; and the Court may thereupon, if it shall think fit, direct a sale of the property, and give all necessary or proper consequential directions.

Proceedings
when service is
dispensed with

11. Where an order is made under this Act dispensing with service of notice on any person or class of persons, and property is sold by order of the Court the following provisions shall have effect :—

- (1) The proceeds of sale shall be paid into Court to abide the further order of the Court.
- (2) The Court shall by order fix a time, at the expiration of which the proceeds will be distributed, and may from time to time by further order extend that time.
- (3) The Court shall direct such notices to be given by advertisements or otherwise as it thinks best adapted for notifying to any persons on whom service is dispensed with, who may not have previously come in and established their claims, the fact of the sale, the time of the intended distribution, and the time within which a claim to participate in the proceeds must be made.
- (4) If, at the expiration of the time so fixed or extended, the interests of all the persons interested have been ascertained, the Court shall distribute the proceeds in accordance with the rights of those persons.
- (5) If, at the expiration of the time so fixed or extended, the interests of all the persons interested have not been ascertained, and it appears to the Court that they cannot be ascertained, or cannot be ascertained without expense disproportionate to the value of the property or of the unascertained interests, the Court shall distribute the proceeds in such manner as appears to the Court to be most in accordance with the rights of the persons whose claims to participate in the proceeds have been established, whether all those persons are or are not before the Court, and with such reservations (if any) as to the Court may seem fit in favour of any other persons (whether ascer-

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tained or not) who may appear from the evidence before the Court to have any *prima facie* rights which ought to be so provided for, although such rights may not have been fully established, but to the exclusion of all other persons, and thereupon all such other persons shall, by virtue of this Act, be excluded from participation in those proceeds on the distribution thereof; but notwithstanding the distribution any excluded person may recover from any participating person any portion received by him of the share of the excluded person.

12. Where in a suit for partition, two or more sales are made, if any person who has by virtue of this Act been excluded from participation in the proceeds of any of those sales, establishes his claim to participate in the proceeds of a subsequent sale, the share of the other persons interested in the proceeds of the subsequent sale shall abate to the extent (if any) to which they were increased by the non-participation of the excluded person in the proceeds of the previous sale, and shall to that extent be applied in or towards payment to that person of the share to which he would have been entitled in the proceeds of the previous sale if his claim thereto had been established in due time.

Provision for case of successive sales in same suit

13. In a suit for partition a request for sale may be made or an undertaking to purchase given on the part of a married woman, infant, person of unsound mind, or person under any other disability, by the next friend, guardian, committee in lunacy (if so authorised by order in lunacy), or other person authorised to act on behalf of the person under such disability, but the Court shall not be bound to comply with any such request or undertaking on the part of an infant, unless it appear that the sale or purchase will be for his benefit.

Request by married woman, infant or person under disability

14. For the purposes of this Act, a suit for partition shall include a suit for sale and distribution of the proceeds, and in a suit for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition.

Suit for partition to include suit for sale and distribution of proceeds

15. In a suit for partition the Court may make such order as it thinks just respecting costs up to the time of the hearing.

Costs in partition suits

H. ST. GEORGE ORD,
GOVERNOR.