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NOVEL PARTITION PROCEDURE.

Before entering on our discussion of the theme of this paper it may be well to consider the historical side of compulsory partitions of property. The Roman law made ample provision for the compulsory partition of what common lawyers call "real" and "personal" property, and it was there laid down, "*in communione vel societate nemo potest invitus detineri.*" In the primitive stage of English law this "*communio*," between female inheritors at least, was easily dissolved in a judicial proceeding,¹ which was, without doubt, copied from the Roman "*judicium familiæ herciscundæ.*"²

The Anglican law of feuds was distinctly opposed to the principle of divisibility of estates in lands, and the law of primogeniture generally obviated the necessity of subdivision except in the case of an inheritance of a fee by females. However, before the reign of King Henry VIII the English law recognized to some extent a distinction between co-ownership created by inheritance and co-ownership created by the act of a feoffor. The former, in analogy to the Roman law, was divisible by compulsion; the latter, indivisible.³ This distinction was felt to be a hardship at the dissolution of feudalism.

The present English law of compulsory partition is generally attributed to the reformatory statute enacted in

¹ Bracton f. 71 b, cap. 33.

² Hunter, Roman Law 114; Güterbock 132.

³ Bracton f. 71 b; 2 Pol. & Mait. Eng. Law 244. note.

the legally brilliant reign of King Henry VIII.¹ This statute extended to joint tenants, as well as to tenants in common. Subsequently, and in the reign of Elizabeth, chancery assumed a like jurisdiction of making compulsory partition through commissioners of its own.² This jurisdiction once assumed became to some extent concurrent.³ Such, in brief, is an outline of the growth of compulsory partition in the law of England.

The law of compulsory partition in our own ancient commonwealth of New York is not primarily due to the re-enactment of the statute of Henry VIII by the State Legislature in 1788, as Chancellor Kent intimates rather than states in his Commentaries.⁴ Partition acts of special import had been enacted here by our local assembly as early as 1708.⁵ Independently of these acts, the jurisdiction to make compulsory partition seems to have been recognized even in 1708.⁶ It is unquestionable, therefore, that the English statutes of Henry VIII were regarded as part of the common law of New York;⁷ and this fact would account for their re-enactment in Jones & Varick's revision of 1788;⁸ for those eminent lawyers were limited to the revision of such English statutes as extended here prior to our independence of the Crown. Quite outside of the legislation mentioned, there was a custom in the early days in this colony of making partition, or severing tenancies, by agreement and entry.⁹ This custom was ratified by an act of the Assembly.¹⁰ It was good, however, at common law.¹¹

¹ 31 Hen. 8, c. 1 as amended by 32 Hen. 8, c. 32.

² 1 Spence Eq. Jurisdic. 653; Croghan v. Livingston (1858) 17 N. Y. 218.

³ Hargrave's note, Co. on Litt. 169 a. cf Faublanque Eq. 18, *et vide infra*.

⁴ 4 Com. 364.

⁵ 1 N. Y. Col. Laws 633, 882, 1006; 3 id. 1107; 4 id. 584, 1036. 1 New Revised Laws of 1813, p. 507 note—*cf* these acts with the English acts 8 and 9 Wm. III c. 31 and 3 & 4 Anne c. 18.

⁶ See 1 N. Y. Col. Laws at p. 634; Wood v. Clute (1843) 1 Sandf. Ch. 199.

⁷ Smith v. Smith (1843) 10 Paige 470. ⁸ 2 J. & V. 185.

⁹ Van Schaack's N. Y. Laws 408; Jackson v. Harder (1809) 4 Johns. 202, 212; Wood v. Fleet (1867) 36 N. Y. 499.

¹⁰ 4 N. Y. Col. Laws 591. ¹¹ Hewlett v. Wood (1875) 62 N. Y. 75.

After the establishment of our State government and the re-enactment of the English Act of Henry VIII, compulsory partition of lands continued to be effected in two ways: at law under the statute, and by bill in equity. The statute was from time to time amended and re-enacted,¹ and finally, in 1830, it was drastically revised in that epoch-making revision—the Revised Statutes.² The Revised Statutes recognized both the legal and the equitable jurisdictions,³ and simply regulated and reformed their several procedures. From 1801 until 1849 the initial procedure at law was by petition,⁴ and in equity by bill.⁵ The Constitution of 1846 consolidated, or fused, the Supreme Court and the Court of Chancery,⁶ and in 1849 the Code of Procedure first attempted to make an action the substitute for procedure by petition.⁷ Thereafter actions for compulsory partition became common, although procedure by petition was not expressly abolished until 1880,⁸ when the substance of the Revised Statutes and supplemental legislation was re-enacted, with some changes, in the present Code of Civil Procedure.⁹

The jurisdiction at law, subsequently to 1788 and prior to 1830, was virtually on the re-enacted statute of Henry VIII. The proceeding was a real action, and the only issue tryable was, whether or not there was a tenancy in common, or a joint tenancy, of the lands in controversy. The general issue was therefore direct, simple and sufficient. It was "*non in simul tenuerant.*"¹⁰ Without entering into the long controversy as to whether the equitable jurisdiction in New York over partition was original, concurrent or supplementary, it will suffice for our present purposes to point out that, in the State of New York, it soon became referable wholly to statute.¹¹ But before

¹ 1 K. & R. 542; 1 R. L. 507. ² 2 R. S. 315-332.

³ 2 R. S. 317, sec. 1; 2 R. S. 329, sec. 79.

⁴ 1 K. & R. 542; 1 R. L. 507; 2 R. S. 317.

⁵ *Hewlett v. Wood* (1875) 62 N. Y. 75, 76; 2 R. S. 329, sec. 79.

⁶ Art. VI. ⁷ Sec. 448 Old Code; *Hewlett v. Wood*, *supra*.

⁸ C. 245 Laws of 1880; *Hewlett v. Wood*, *supra*. *Croghan v. Livingston* (1858) 17 N. Y. 218, 225. ⁹ Secs. 1532-1595.

¹⁰ Booth, Real Actions (N. Y. Edition of 1809) p. 246.

¹¹ *Wood v. Clute* (1843) 1 Sandf. Ch. 199; *Postley v. Kain* (1847) 4 Sandf. Ch. 508; *Larkin v. Main* (1830) 2 Paige 27; 2 R. S. 329 sec. 79.

1830, and even subsequently, if a question of legal title arose in equity it generally defeated the partition.¹

Neither the fusion of legal and equitable jurisdictions nor the old code made much change in the rule, that legal titles were not tryable in partition proceedings. Indeed, prior to 1880, and the enactment of Part II of the Code of Civil Procedure, it was well settled that questions of legal title could not be tried in actions for partition. The plaintiff and the defendants must be seised, or possessed, of the lands described in the complaint in partition, and a question on the legal title defeated the action.² With this retrospect we may turn to the theme of this paper.

Part II of the Code of Civil Procedure made radical changes in the former scope of partition actions. An heir at law might bring partition, notwithstanding a devise to another of the lands of his ancestor, and in such partition test the validity of the devise by simply alleging that the devise was void.³ The title of the plaintiff might be put in issue in any answer to a complaint in partition, and defendants might even try title *inter sese*.⁴

Since the Revised Statutes, and *a fortiori* since the adoption of Part II of the Code of Civil Procedure, partition actions, although regarded primarily as on the equity side of the court,⁵ are referable wholly to the statute, and not to the common law or the equitable jurisdictions.⁶ The right of trial by jury of certain issues arising in the action of partition was, however, a fundamental or common-law right and guaranteed by all the constitutions of government. Thus it could not be taken away. Consequently, on the present composite action we necessarily find grafted a common-law jurisdictional provision for a trial by jury. If the issue was, originally, in any form tryable only by jury, it continues so tryable. The present statute makes pro-

¹ *Phelps v. Green* (1818) 3 Johns. Ch. 302; 4 Kent Com. 364.

² *Florence v. Hopkins* (1871) 46 N. Y. 182; *Van Schuyver v. Mulford* (1875) 59 N. Y. 426; *Culver v. Rhodes* (1882) 87 N. Y. 348, 350; *Weston v. Stoddard* (1893) 137 N. Y. 119, 123.

³ Sec. 1537 Code Civ. Pro. ⁴ Sec. 1543 Code Civ. Pro.

⁵ *Southack v. Central Trust Co.* (1901) 62 App. Div. 260.

⁶ *Wood v. Clute*, *supra*; *Postley v. Kain*, *supra*; *Larkin v. Main*, *supra*; *Hewlett v. Wood*, *supra*; *Miller v. Struppman* (1878) 6 Abb. N. C. 343.

vision for such trial in all partition actions.¹ Although the modern partition action is regarded as of an equitable nature, the verdict of a jury in such action is no longer one on a feigned issue and cannot be disregarded by the court, as if it were one in equity.²

As the issues of fact in the reformed action of partition are very complex, oftentimes, under the new procedure, the court may order them stated for trial;³ or, in some cases, it would seem, may sever the action.⁴ If a complaint in partition, for instance, alleges the invalidity of a devise, and a defendant taking issue on this allegation sets up also an affirmative defense of title in himself by adverse possession, as he may now do,⁵ such a course would seem proper; for otherwise the trial of the case would be too complicated and its duration interminable. Trying so many issues of a grave nature in one action and at one time would also complicate, rather than simplify, procedure under the Code of Practice, as well as tend to unsettle titles to estates in lands.

It was some time since well understood, that in at least one case—that of an heir at law—a disseisee, or person out of possession, may bring partition under the Code of Civil Procedure.⁶ It is now, contrary to what was generally believed by the profession,⁷ also held that disseisors in possession may be made defendants in all cases where a partition is sought by a person claiming the right as a tenant in common or a joint tenant.⁸ Thus the allegation of seisin in plaintiff, so long held to be essential to a complaint in partition,⁹ is no longer necessary.¹⁰ A parti-

¹ Sec. 1544, Code Civ. Pro.

² *Jones v. Jones* (1890) 120 N. Y. 589; *Bowen v. Sweeney* (1894) 143 N. Y. 349. ³ Sec. 970 Code Civ. Pro.

⁴ *Cassidy v. Wallace* (1881) 61 How. Pr. 240.

⁵ *Satterlee v. Kobbe*, (1903) 173 N. Y. 91.

⁶ Sec. 1537, Code of Civil Procedure; *Weston v. Stoddard* (1893) 137 N. Y. 119.

⁷ *Kurtz v. Wiechman* (1902) 75 App. Div. 26; *Damron v. Champion* (1898) 24 Misc. 234. ⁸ *Satterlee v. Kobbe* (1903) 173 N. Y. 91.

⁹ *Van Schuyver v. Mulford* (1875) 59 N. Y. 426.

¹⁰ *Drake v. Drake* (1901) 61 App. Div. 1. *Wainman v. Hampton* (1888) 110 N. Y. 429, 433; *Weston v. Stoddard* (1893) 137 N. Y. 119; *Satterlee v. Kobbe* (1903) 173 N. Y. 91.

tion may now involve issues once tryable in ejectment only.

Not only may a disseisee now bring partition and test the defense of a title by adverse possession in such an action, but reversioners and remaindermen out of possession may bring partition against a life tenant, and with the latter's consent the lands may be sold at judicial sale.¹ In like manner tenant for life, or years even, may bring partition against his co tenants and join remaindermen and reversioners and without their consent have the fee sold at judicial sale, free of all contingent remainders and interests.² Thus successive estates, and not estates held "*simul*" or together, by the same tenancy, have now become the subject of compulsory partition proceedings. This is a great innovation upon all old conceptions of the proper scope of compulsory partition proceedings. Under the ancient statute (31 Hen. VIII.), the original of all compulsory partition acts, only those seised of estates of inheritance could have partition *inter se*. But, in the following year, the right was extended to those seised of estates for life, or possessed of estates for years. There the legislation stopped for centuries. Remaindermen or reversioners, or those disseised, then never dreamed of a proceeding in partition,³ while tenants for life never conceived of a partition in which a forced judicial sale might be had, cutting off the enjoyment of successive estates in remainder or reversion, contrary to all settlements, and substituting therefor *in presenti* a share of a fund in court.

This brings us to the consideration of that novel and extraordinary judicial remedy, a judicial sale which is not an execution, but an expedient to resettle estates in land. In the minds of older generations of statesmen and lawyers land was only to a limited extent "property." It was primarily regarded as the seat and the source of family life, the perpetuation, well-being and permanence of which were essential to a justly ordered and conservative State. Forced judicial sales of land were then regarded with horror. To

¹ Sec. 1533 Code Civ. Pro.

² Secs. 1532, 1538 Code Civ. Pro. *Jenkins v. Fahey* (1878) 73 N. Y. 355.

³ *Sullivan v. Sullivan* (1876) 66 N. Y. 37.

some extent this sentiment survives in those States where "Homesteads" are exempt from execution. In at least one State this exemption was extended to places of business, and even this extraordinary exemption has not injured the temporal prosperity of the State in question. To those who regard the permanence and the security of the families of a State as paramount to mere mercantile considerations, forced judicial sales of the home remain abhorrent. This subject in all its aspects certainly receives too little consideration at the present time. Forced judicial sales in so-called partition proceedings are inconsistent with the sentiment denoted, even if they are not inconsistent with vested rights of property.

A judicial power to order lands sold without the consent of those solvent owners having estates in possession or remainder is a tremendous power, and certainly should be circumscribed by every safeguard known to constitutional experience. The original partition acts never contemplated a sale in any partition proceeding. In England the partition statute still only provides for a forced sale of part of the lands to defray costs;¹ and an actual partition of the remainder is always contemplated in that case.

In America, on the other hand, a forced sale of land is treated as an ordinary, not an extraordinary, proceeding in partition actions. Yet a court has no inherent power to decree a sale of land. It is a power conferred by statute only, and, like all statutory powers, should be most strictly construed. If the parties to a partition action conspire to effect a sale, the court, at least, should have its eyes open, even if all the parties consent.

In the Province of New York an act of the Assembly passed in 1762 provided for a sale of a small part of the lands, sought to be partitioned, to defray the expense of actually partitioning the residue of the lands.² After the establishment of the State government the legislature reenacted a like provision, and then first provided that, in case an actual partition of houses and lots could not be made "without great prejudice," the court might order a sale.³

This was the entering wedge in the modern practice of

¹ 31 & 32 Vict. c. 40.

² Chap. 1171 Van Schaack's N. Y. Laws.

³ 2 J. & V. 207.

judicial sales in partition actions. Yet, as the act of Henry VIII was at the same time re-enacted,¹ it is highly probable that no forced sale of agricultural or unimproved lands in partition proceedings was then ever contemplated, except of that small part necessary to defray the costs of partitioning the residue.² When the property was urban or improved property, a sale was intended to take place only in the event that a partition could not be made '*without great prejudice.*'³ These acts have been from time to time re-enacted, but always with the same reservation—that no sale should be made unless actual partition would occasion great prejudice to the owners.⁴

Notwithstanding this fundamental limitation upon the judicial power to decree a compulsory sale in partition actions, an examination of the records in partition cases will often disclose a careless or a perfunctory investigation of the jurisdictional question. In several cases examined the finding was wholly unsupported by proper evidence; yet a decree of sale had passed, and the parties to the action were undoubtedly bound. So frequent have sales in partition actions become that it has even been said by the highest authority that the power to decree a sale or an actual partition is discretionary.⁵ But as such a decree is open to examination on appeal for error in decreeing a sale instead of a partition,⁶ it is difficult to comprehend how it can be held discretionary, as the power to order a sale is wholly dependent upon proof that great prejudice to owners will be incurred by an actual partition.

It has also become the practice, that evidence of the values of the whole tract and of the aggregate of the subdivided parts is taken as sufficient proof of that great prejudice to owners within the statute, whenever a probable sale of the parts is shown as likely to be less productive than a probable sale of the whole, or when the value of the whole is shown to be more than the value of the

¹ 2 J. & V. 185. ² *Clason v. Clason* (1837) 6 Paige 546.

³ 1 J. & V. 201, 207.

⁴ 1 K. & R. 542, 544; 1 R. L. 507, 510; 2 R. S. 317; Sec. 1532 Code Civ. Pro.

⁵ *Scott v. Guernsey* (1871) 48 N. Y. 106; *Brooks v. Davy* (1888) 109 N. Y. 495.

⁶ *Blakeley v. Calder* (1857) 15 N. Y. 617, 622; *Howell v. Mills* (1874) 56 N. Y. 226; *Jordan v. Van Epps* (1881) 85 N. Y. 427, 436.

aggregated and proposed subdivisions.¹ Yet it is doubtful whether such speculative evidence was in the mind of the framers of the partition acts when they provided that a sale should be had in partition cases only in the event that actual partition would occasion great prejudice to owners. The draughtsmen probably had in mind some physical defects in the lands which would prevent a fair division, or that the tolls of a particular mill could not be alternately allotted, or that the chambers of a particular house were insufficient for all the tenants in common. Such were the factors, then, of difficulty and prejudice in partition proceedings, and to them the acts referred and not to mere comparative values in case of a sale or a partition.

That an unnecessary judicial sale in a partition action may be a means of working an injury to co-owners, may be perceived from an illustration. A farmer seised of a homestead farm and little else dies intestate, leaving a widow and children surviving, some of whom are minors. The farm has furnished for generations an adequate maintenance for successive families. Formerly the wife's dower would have been set-off,² and the estate and family kept together, and the latter educated and maintained from the farm, until the dower estate terminated, or tenants in common were of an age to convey their interests by ordinary deed of conveyance. Now that the widow has become by statute, not only a proper, but a necessary, party to a partition,³ and provision is made for a sale of her title of dower in the partition action,⁴ a sale has become a matter of course. In fact, all things now point to a sale in a partition action, and even infant tenants in common may again bring partition,⁵ contrary to the former practice.⁶ What is the result of the practice of selling farms on the case in point? The farm is either sacrificed at the judicial sale or the proceeds are most likely lost or wasted by those uninitiated in the secrets of a wise investment of money. The adult children take their several shares and drift away. The

¹ *Clason v. Clason* (1837) 6 Paige 541; aff'd 18 Wend. 369.

² She was not a proper party to a partition proceeding. *Bradshaw v. Callaghan* (1809) 5 Johns. 80; *Rosekrans v. Rosekrans* (1873) 7 Lans. 486.

³ 2 R. S. 318 sec. 6; Secs. 1538, 1570 Code Civ. Pro. *Letson v. Evans* (1900) 33 Misc. 437.

⁴ Secs. 1567, 1568, Code Civ. Pro.

⁵ Secs. 1534-6, Code Civ. Pro., founded on Chap. 277, Laws of 1852.

⁶ *Postley v. Kain* (1847) 4 Sandf. Ch. 508.

home is broken up, and the widow and the infants, deprived of their abode, have recourse to the precarious pursuits of a town. In such cases, it may be affirmed that easy judicial sales in partition proceedings usually produce bad economic results. Had the old rule, that a farm was always deemed capable of partition without great prejudice, prevailed in our particular case for illustration, or had the speculative evidence of comparative valuations to show great prejudice been rejected, it may well be thought that the result would have harmonized better with sound economic principles of government. Many other such illustrations will no doubt occur to those who have an extended professional experience in sales in partition actions.

How far the modern practice of judicial sales in most partition actions may be influenced by that anomalous class of so-called partition actions where it is alleged in the complaint that the premises are incapable of partition,¹ may, perhaps, be difficult to ascertain. But certainly *partition actions*, in which it is asked by the plaintiff that a partition be *not* decreed, stand in need of reform. The sales in such cases should be relegated to a class of actions designed expressly to bring about judicial sales in anomalous cases, and not masquerade as sales in "actions for partition," as they now do.

Enough has been said to show that the modern partition action has a vastly wider range than formerly.² Now, that defendants may try a title by adverse possession, and the plaintiff may try the invalidity of a devise in the same action, it must be also obvious that the once harmless action of partition offers great opportunities for protracted and involved litigation. Whether the legislation which tolerates such conditions is altogether wise economically and consistent with the security which a title to landed property ought always to afford in a rich and conservative State, is another question. Certainly the legislation denoted has gone about as far as possible in the direction of partibility of estates and compulsory sales.

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¹ See *Smith v. Smith* (1843) 10 Paige 470; *Townsend v. Bogert* (1891) 126 N. Y. 370.

² *Weston v. Stoddard* (1813) 137 N. Y. 119, 126; *Biglow v. Biglow* (1899) 39 App. Div. 103, 106; *Satterlee v. Kobbe* (1903) 173 N. Y. 91; *Dresser v. Travis*, (1902) 39 Misc. 358.