

VICTORIA.



ANNO QUINQUAGESIMO QUARTO

VICTORIÆ REGINÆ.

No. MCXC.

An Act to amend the Law relating to Partition.

[19th December, 1890.]

BE it enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows:—

1. This Act may be cited as the *Partition Act* 1890.

Short title.

2. In this Act the term "the Court" means the Supreme Court of Victoria.

As to the term "the Court."

3. In an action for partition where if this Act had not been passed a judgment 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 action 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.

Power to Court to order sale instead of division.
31 & 32 Vict. c. 40
s. 3.

4. In an action for partition where if this Act had not been passed a judgment for partition might have been made, then if the party or parties interested individually or collectively to the extent of one moiety or upwards

Sale on application of certain proportion of parties interested.
Ib. s. 4.

upwards in the property to which the action relates request the Court to direct a sale of the property and a distribution of the proceeds instead 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.

As to purchase of
share of party
desiring sale.
31 & 32 Vict. c. 40
s. 5.

5. In an action for partition where if this Act had not been passed a judgment for partition might have been made, then if any party interested in the property to which the action 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 among 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.

Authority for parties
interested to bid.
Ib. s. 6.

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 seem reasonable.

Application of
Trusts Act 1890.
Ib. s. 7.

7. Section thirty-two of the *Trusts Act 1890* shall extend and apply to cases where in actions for partition the Court directs a sale instead of a division of the property.

Court may appoint
trustees to receive
and apply moneys
arising from sales.
*Vide Real Property
Act 1890 s. 87.*

8. All money to be received on any sale effected under the authority of this Act may (if the Court shall think fit) be paid to any trustees of whom it shall approve or otherwise the same shall be paid to the credit of the Master-in-Equity of the Court *ex parte* the applicant in the matter of this Act, and in either case such money shall be applied as the Court shall from time to time direct to some one or more of the following purposes (namely) :—

The payment of the costs and expenses of and incidental to such sale which have not been otherwise specially dealt with or reserved to be dealt with under section sixteen of this Act; or

The discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid, or affecting any other hereditaments subject to the same uses or trusts; or

The purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid; or

The payment to any person becoming absolutely entitled.

9. The

9. The application of the money in manner aforesaid may (if the Court shall so direct) be made by the trustees (if any) without any application to the Court or otherwise upon an order of the Court upon the petition of the person who would be entitled to the possession or the receipt of the rents and profits of the land if the money had been invested in the purchase of land.

Trustees may apply moneys in certain cases without application to the Court.

Vide Real Property Act 1890 s. 88.

10. Until the money can be applied as aforesaid the same shall be from time to time invested in Government debentures or any other debentures upon which trust funds may legally be invested, or any public securities granted or issued or to be granted or issued by the Government of Victoria, or on first mortgage of real property in the colony of Victoria as the Court shall think fit, and the interest and dividends of such debentures or securities shall be paid to the person who would have been entitled to the rents and profits of the land if the money had been invested in the purchase of land.

Money until it can be applied to be invested and dividends to be paid to the parties entitled.

Ib. s. 89.

Vide Act No. 763 s. 32, and Act No. 586 s. 65.

Vide Trusts Act 1890 s. 90.

11. Any person who if this Act had not been passed might have maintained an action for partition may maintain such action 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 action 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 action shall be served with notice of the judgment on the hearing and after such notice shall be bound by the proceedings as if they had been originally parties to the action and shall be deemed parties to the action, and all such persons may have liberty to attend the proceedings and any such person may within a time limited by rules of Court apply to the Court to add to the judgment. Provided always in case it appears to the Court that notice of the judgment on the hearing of the cause cannot be served on all the persons on whom that notice is by this Act required to be served, or cannot be so served without expense disproportionate to the value of the property to which the action 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 the 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),

Parties to partition actions.

31 & 32 Vict. c. 40 s. 9.

Power to dispense with service of notice of judgment in special cases.

39 & 40 Vict. c. s. 3.

disability), shall be bound by the proceedings in the action as if on the day of the date of the order dispensing with service they had been served with notice of the judgment service whereof is dispensed with, and thereupon the powers of the Court under the *Trusts Act* 1890 shall extend to their interests in the property to which the action relates as if they had been parties to the action, 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 where
service is dispensed
with.
39 & 40 Vict. c. 17
s. 4.

12. 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 ascertained or not) who may appear from the evidence before the Court to have any *primâ 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

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.

13. Where in an action 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 shares 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 action.
39 & 40 Vict. c. 17
s. 5.

14. In an action 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 authorized by order in lunacy) or other person authorized 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.
Ib. s. 6.

15. For the purposes of this Act an action for partition shall include an action for sale and distribution of the proceeds, and in an action 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.

Action for partition to include action for sale and distribution of the proceeds.
Ib. s. 7.

16. In an action for partition the Court may make such order as it thinks just respecting costs up to the time of the hearing.

Costs in partition actions.
31 & 32 Vict. c. 40
s. 10.

17. Sections twenty-three and twenty-four of the *Supreme Court Act* 1890 relative to the making of rules of court shall have effect as if they were repeated in this Act and in terms made applicable to the purposes hereof.

As to rules of court under this Act.
Supreme Court Act 1890.

18. The County Courts shall have and exercise the like power and authority as the Supreme Court in actions for partition (including the power and authority conferred by this Act) in any case where the property to which the action relates does not exceed in value the sum of five hundred pounds and the same shall be had and exercised in like manner and subject to the like provisions as the power and authority conferred by section one hundred and twenty-one of the *County Court Act* 1890.

Jurisdiction of County Courts in partition.
31 & 32 Vict. c. 40
s. 12.

MELBOURNE:

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