

No. XVII.

An Act to amend the Law relating to THE PARTITION.
Partition. [6th May, 1878.]

WHEREAS it is expedient to amend the law relating to Partition Preamble.
Be it therefore enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled and by the authority of the same as follows:—

1. This Act may be cited as "The Partition Act 1878."

Short title.

2. This Act shall apply to suits pending at the time of passing Application of Act.
of this Act as well as to suits commenced after the passing thereof and the Court shall have the same power and discretion and may make and give the same decrees orders and directions as the Court by virtue of this Act may make and give in regard to and in suits commenced after this Act.

3. In this Act the term "Court" means the Supreme Court of As to the term "The Court."
New South Wales.

4. In a suit for partition where if this Act had not been passed Power to Court to order sale instead of division.
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 circumstances 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 or on their behalf as hereinafter provided 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.

5. In a suit for a partition where if this Act had not been Sale on application of certain proportions of parties interested.
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 or some person or persons as hereinafter provided on his or their behalf 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.

6. In a suit for partition where if this Act had not been passed As to purchase of share of party desiring sale.
a decree for partition might have been made then if any party interested in the property to which the suit relates or some person on his behalf as hereinafter provided 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 or some person or persons on behalf of such party or parties respectively as hereinafter provided 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.

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Authority for parties interested to bid.

7. 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 may seem reasonable.

Application of "Trustee Act 1852."

8. Section twenty-eight of the "Trustee Act 1852" shall extend and apply to cases where in suits 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 otherwise the moneys to be paid to Master in Equity.

9. All money to be received on any sale 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 into the hands of the Master in Equity in the matter of the particular suit (describing the same by the names of the parties as accurately as may be for the purpose of distinguishing it) 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 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 and 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.

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

10. 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 to the receipt of the rents and profits of the land if the money had been invested in the purchase of land.

Until money can be applied to be invested and dividends to be paid to parties entitled.

11. Until the money can be applied as aforesaid the same shall be from time to time invested in Government securities of the Colony as the Court shall think fit and the interest and dividends of such 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.

Parties to partition to suits.

12. 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 for any defendant in the suit to object for want of parties. And at the hearing of the suit 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.

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

13. Where notice of the decree or order on the hearing of the suit cannot be served on all the persons on whom that notice is hereinbefore 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

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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 or the Master in Equity as may be directed by the Court 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 decree or order service whereof is dispensed with and thereupon the powers of the Court under the "Trustee Act 1852" shall extend to their interest in the property to which the suit relates as if they had been parties to the suit and the Court may thereupon if it thinks fit direct a sale of the property and give all necessary or proper consequential directions.

14. 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:—

Proceedings where service is dispensed with.

- (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 advertisement 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 distributions 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 *prima facie* right which ought to be so provided for although such right 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.

15. 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 shares of the other

Provision for case of successive sales in the same suit.

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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.

Request by married woman infant or person under disability.

16. 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 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.

Power to Court to direct sale of portion of property and partition of the remainder.

17. In any suit for partition where by this Act the Court is empowered to direct a sale of the property to which the suit relates the Court may if it thinks fit direct a sale of a portion of the property and a partition of the remainder.

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

18. 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.

Costs in suits for partition.

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

The jurisdiction and powers given by this Act to be exercised by primary Judge subject to appeal &c.

20. The jurisdiction and powers by this Act conferred and vested in the Supreme Court shall and may be exercised and discharged by the primary Judge thereof in Equity or by one other Judge acting as such in his absence or during his illness in the same manner as the ordinary equitable jurisdiction and powers of the Supreme Court are now exercised and discharged and subject in like manner to appeal rehearing and review.

Supreme Court may make rules for procedure and for regulating fees.

21. The Supreme Court or any three of the Judges forming that Court may and they are hereby required from time to time as shall be found necessary to make general rules and orders for carrying the purposes of this Act into effect and for regulating the times and forms and mode of procedure and generally the practice of the said Court in respect of the matters to which this Act relates and for regulating the fees and allowances to all officers of the said Court and solicitors thereof in respect to such matters and as far as may be found expedient for altering the course of proceeding hereinbefore prescribed in respect to the matters to which this Act relates or any of them and such orders may from time to time be rescinded or altered by the like authority and all such rules and orders shall take effect in general orders of the said Court.

Rules and orders to be laid before Parliament.

22. All general rules and orders made in pursuance of the powers contained in this Act shall immediately after the making and issuing thereof be laid before both Houses of Parliament of New South Wales within one calendar month after the making thereof if Parliament be then sitting or if Parliament be not then sitting within one calendar month after the commencement of the then next Session of Parliament Provided always that if either of the Houses of Parliament shall by any resolution passed within one calendar month after such rules or orders have been laid before such Houses of Parliament resolve that the whole or any part of such rules or orders ought not to continue in force in such case the whole or such part thereof as shall be so included in such resolution shall from and after such resolution cease to be binding.