

CHAP. II.

AN ACT to provide for Partition of Real Estates.

[Royal Assent given by Message.]

Preamble.

WHEREAS in many cases much inconvenience is experienced from the want of some Court competent to order the Partition of Lands held in Joint Tenancy, Tenancy in Common, and Co-parcenary:—*Be it therefore enacted* by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of Great Britain, entitled "An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's Reign, entitled 'An Act for making more effectual provision for the Government of the Province of Quebec, in North America,' and to make further provision for the Government of the said Province," and by the authority of the same, That all Joint Tenants, Tenants in Common, and Co-parceners of any Estate or Estates, in Lands, Tenements or Hereditaments, within this Province, may be compelled to make or suffer Partition of such Estate or Estates in manner hereinafter prescribed, and that when such Estate or Estates is or may be situated in two or more Districts, the proceedings under this Act shall be heard before the Court of King's Bench, and where such Estate or Estates is or may be situated in one District only, the proceedings may be had before the District Court or Court of King's Bench.

Proceedings for the Partition of Real Estate may be had before King's Bench or District Court.

Petition may be presented to King's Bench or District Court, praying that Partition be made.

II. *And be it further enacted by the authority aforesaid*, That any person being a Joint Tenant, Co-parcener, or Tenant in Common of any such Estate or Estates, or the Executor, Administrator, Guardian or Agent of any such person, may file his or her Petition in the Court of King's Bench or District Court, as the case may require, praying that Partition of such Estate or Estates may be made, which Petition shall set forth the nature of the Title or Claim of the Demandant, the Tract or Tracts of Land, the Tenements or Hereditaments of which Partition is demanded, and also the name and place of residence of each Joint Tenant, Co-parcener and Tenant in Common, with such Demandant, if they shall be known to such Demandant, and if on examination it shall appear that the Demandant has a good and legal right and title to any part or proportion of such Estate or Estates, then the Court shall proceed at the term in which such Petition may be filed, to order and direct a Partition to be had and made; in the manner prescribed by the provi-

sions of this Act: *Provided*, it shall appear, that the notice required by this Act hath been sufficiently and legally given, and no sufficient reason shall appear why the prayer of the Petitioner should not be granted, otherwise the Court shall order and direct notice of such demand of Partition to be given, either by publication in one or more Newspapers printed in this Province, when the parties concerned reside out of this Province, or by personal notice to be served at least forty days before the ensuing Term, if the party or parties concerned reside within this Province: *Provided always*, that when the person or persons of whom Partition is demanded, reside out of this Province, and have an Agent or Attorney residing within this Province, personal notice of such demand or Partition shall be given to such Agent or Attorney, as is required in the case of Resident Proprietors.

Notice of the Petition to be given to parties interested.

Notice on Agent sufficient when party resides out of the Province.

III. *And be it further enacted by the authority aforesaid*, That if at the first or succeeding Term (in case a continuance hath been granted) after the filing of such Petition, it shall appear to the Court that due notice hath been given, and if no sufficient reason shall appear why Partition should not be made, the Court shall proceed to order such Partition, and shall issue their Writ, directed to the Sheriff of the District in which the Estate or Estates shall or may lie, or to the Sheriff of either of the Districts in which the Estate or Estates shall or may lie, in case such Estate or Estates is or are in more than one District, commanding him by the Oaths of three judicious and disinterested Freeholders of the vicinity, to be appointed by said Court and named in said Writ, who are not of kin to any of the said parties concerned, to cause to be set off and divided to the Demandant in said Petition, such part or proportion of such Estate or Estates as the Court shall have ordered and directed; and in making such Partition, it shall be the duty of said Freeholders to view and examine such Estate or Estates, to set apart the same in such Lot or Lots as will be most advantageous and equitable, having due regard to the improvements, situation and quality of the different parts of such Estate or Estates, and if the bounds or title of any Tract or Tracts, or any part thereof shall be controverted, it shall be the duty of the said Freeholders to separate the same from the uncontroverted part, and to make Partition of the Estate or Estates in such manner, that a due proportion of the controverted as well as the uncontroverted part may be allotted to the Demandant.

After due notice hath been given, Court may order Partition.

Writ to be directed to the Sheriff of the District or Districts where the Lands lie, commanding him, by the oaths of three Freeholders, to make Partition.

How Freeholders to proceed.

IV. *And be it further enacted by the authority aforesaid*, That when the facts alleged in any Petition, for Partition hereafter to be preferred in consequence of this Act, are controverted by any of the Tenants in Com-

Disputed points to be decided as other Issues of Law or fact

by the Court or Jury, as the case may be.

mon, Co-parceners, or Joint Tenants, the answer or objection to the Petition shall be made in writing, in the form of a Plea, to which the Petitioner may reply or demur, to the end that the matter in dispute may be reduced to an issue in Law or fact, and receive a determination by the Court or a Jury in the manner other issues are determined; and in case the issue be determined in favor of the Petitioner, Judgment shall be entered by the Court, that Partition be made by disinterested Freeholders as aforesaid, and the Court shall proceed to appoint them accordingly: *And also*, that the Petitioner recover against the adverse party the Costs attending the Trial, and Execution may issue for said costs in the form prescribed by Law, as in other cases; but if on such pleading it shall be determined that the Petitioner holds a less share or proportion in the common and undivided property than he has in his Petition alleged, the adverse party shall recover against the Petitioner his reasonable costs; but notwithstanding, Judgment may be rendered in favor of the Petitioner, to have an assignment of such parts of the Real Estate in severalty, as he in fact held in common and undivided.

Costs to be awarded to the successful party.

Parties consenting to Partition may appoint Arbitrators to make Partition, and if they do not agree on the persons to be named, the Court may name them.

V. *And be it further enacted by the authority aforesaid*, That if at any time after the filing of a Petition as aforesaid, and before a Writ shall have issued to the Sheriff, the Person or Persons, Joint Tenants, Co-parceners or Tenants in Common, of whom Partition is demanded, shall appear by him or themselves, or by his or their Attorney, and shall pay their proportion of the Costs which have occurred on such Partition, and shall consent to a Partition of such Estate or Estates, then Partition shall be made of such Estate or Estates, by such person or persons as said Joint Tenants, Co-parceners, or Tenants in Common shall agree upon, and in case they do not agree upon any person or persons to make such Partition before the end of the Term, then a Writ shall issue to the Sheriff as is hereinbefore provided.

Course of proceeding when Partition cannot be made without spoiling the whole Estate.

VI. *And be it further enacted by the authority aforesaid*, That when any Writ of Partition shall issue as aforesaid, if the Freeholders who are directed to make such Partition shall be of opinion that the Estate or Estates cannot be divided according to the demand of the Writ, without prejudice to, or spoiling the whole; the Freeholders shall then make and return to the Court a true valuation and appraisement of such Estate or Estates, whereupon, if the said Court shall approve the said return, and if any one or more of the parties shall elect to take the said Estate or Estates at the appraised value, the same shall be adjudged to him or them, he or they paying or securing to be paid to the other parties their proportion of the appraised value, according to their respective rights, and the Sheriff shall, according to the order of the Court, make and execute

conveyances to the party or parties electing to take the same, subject nevertheless to a lien thereon, in favor of the others of the said parties, until payment be made to them of their respective shares of the money as aforesaid; and in case the said parties shall not agree who shall take the said Lands and Tenements on the terms aforesaid, then the said Court shall or may, at the instance of the Demandant in the said Partition, make an order for the Sale of the said Lands and Tenements at Public Auction by the Sheriff, who shall have holden the said inquisition, or his successors in office, after due and fair notice of the time and place of such Sale, by advertisements published and set up in the several Districts where the Lands lie; and also, in such public Newspaper as shall be most likely to give fair and full notice of such Sale to all parties concerned and others, which public notice shall be given at least twenty days before the time of Sale, in cases where the Lands all lie in the same District, and at least sixty days when the Lands lie in different Districts, and the said Sheriff is hereby authorised, empowered and ordered to execute Deeds to the purchasers of the Lands and Tenements so as aforesaid sold, on receiving payment of the consideration money, or taking sufficient security therefor to the satisfaction of the Court, which money or security shall be brought into Court before or at the time of the said Sheriff's acknowledging the Deed, in open Court to be distributed and paid by order of the said Court, amongst the several parties entitled to receive the same, in lieu of their respective parts and proportion of the said Lands and Tenements, according to their just rights and proportions.

Lands may be sold
in certain cases.

VII. *And be it further enacted by the authority aforesaid,* That when any Writ of Partition shall issue, or when the parties interested shall agree on some person or persons to make Partition, it shall be the duty of the inquest or persons so agreed on, to make a true and accurate plan or map, and field book of such Lands as may be so divided; and to describe particularly the metes and bounds of all Tenements so divided and aparted, which plan or map, field book and description, the persons or inquest shall sign, and send under seal to the next Court having cognizance of the same, and after the division and return thereof shall be made to the Court, it shall be examined by the Court, and if found justly and accurately made, the Clerk shall record such return, which record shall be deemed valid and effectual in Law for the Partition of such Lands, Tenements or Hereditaments, and thereupon the party or parties shall have and hold the Shares or Parcels to them respectively allotted in severalty.

When Partition made,
the same shall be
described by metes
and bounds, and a
Plan shall accompany
the return to the
Court having cogni-
zance thereof.

Partition, when ap-
proved of, to be re-
corded by the Clerk.

Record to be deemed
an effectual Partition.

VIII. *And be it further enacted by the authority aforesaid,* That the Court before whom any Partition shall be had, shall tax the costs and expences which may accrue on such proceedings, and shall issue Execu-

Costs to be taxed, and Execution to issue therefor on a final determination of the Partition.

New Partition may be awarded, if the ends of Justice shall seem to require it.

Guardians may act for infants.

Parties out of the Province may, within three years, apply to the Court for redress, if they conceive themselves aggrieved, and a new Partition may be awarded.

tion therefor against such Person or Persons, their Goods, Chattels, Lands, Tenements and Hereditaments, interested in such Partition, as shall not have paid their proportion of the costs and expenses so taxed: *Provided always nevertheless*, that it shall be in the power of the Court in which any such proceeding for Partition is depending, to award a new Partition by another Jury, when it shall appear necessary for the ends of Justice, in the same manner and for the same causes as new trials are now grantable by Law, but that no new Partition shall be granted when all the parties interested are resident within the Province, unless the same is applied for before the end of the Term next after that in which the former verdict has been rendered.

IX. *And be it further enacted by the authority aforesaid*, That the Guardians of all Minors are hereby respectively authorized and empowered on behalf of their Wards, to do and perform any act, matter or thing respecting the Partition of Land under this Act, and the same shall be deemed valid and effectual in Law, to every intent and purpose, as if the same had been done by such Minor after his arrival at full age.

X. *And be it further enacted by the authority aforesaid*, That if any Partner shall have a larger share set off than is such Partners true and real interest, or if any share set off should be more than equal in value to the proportion it was set off for, then and in every such case, upon complaint to the Court, which caused such Partition to be made, within three years of the making thereof, by any aggrieved Partner or Partners, who at the time of making such Partition were out of the Province, and not notified thereof agreeably to the Provisions of this Act, the said Court shall cause Partition thereof to be made anew, and in such new Partition, so much and no more shall be taken off from any, than as such share shall be adjudged more than the proportion of the whole it was designed for, estimating such Lands or Real Estate as in the state they were in when first divided, and in case any improvements shall be made on the part that may by such new Partition be taken off as aforesaid, the Partner or his Assigns who made such improvements, shall have reasonable satisfaction made him by the Partner or Partners to whose share the same shall be added by the estimation of the Freeholders employed in making such new Partition, or the major part of them; and the same Court who ordered Partition, are also empowered to issue Execution for such satisfaction, and for costs in such new Partition, the same being first taxed and allowed by the said Court.