1896

Partition in New York

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PARTITION IN NEW YORK.

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THESIS PRESENTED FOR THE DEGREE OF BACHELOR OF LAWS.

BY

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CORNELL UNIVERSITY.

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INTRODUCTION.

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Partition in its primitive and technical import signified a division by coparceners, or co-heirs of lands which had descended by common law, or by custom; but the term has become equally applicable to a division of lands by joint tenants or tenants in common.

There were few more unfortunate contingencies arising from ownership at common law, than where co-tenants could no longer agree as to the use and management of their common property, or when one of the co-tenants took advantage of all the opportunities which the co-tenancy afforded of distressing his companions in interest, and thereby depriving them of their just benefits in the common property. Where the co-tenancy was not the result of agreement, purchase, or the act of the parties, it is clear that they were in no way responsible for its existence. The earliest partition known to law was in the aid of such co-tenants, providing a means by which either might terminate the co-tenancy and obtain an estate in severalty in lieu of an undivided interest.

Reeves in "The Law of England as it Existed Towards the End of the Reign of Henry III" (1272) states "that when

an inheritance descended to more than one heir, and they could come to no agreement among themselves concerning the division of it, a proceeding might be instituted to compell a partition. A writ was, for this purpose, directed to four or five persons who were appointed justices for the occasion, and they were to extend and appreciate the land by the oaths of good and lawful persons chosen by the parties, who were called extensors; and this extent was to be returned under their seal, before the King or his justices. When partition was made in the King's court, in pursuance of such extent there issued seisinam habere facias for each of the parceners to have possession." It would seem, or is likely of inference, from Mr. Reeves text, that proceedings of partition between parceners existed even prior to the time of Henry 111

The writ of partition could issue only at the instance of a co-parcener, but the person against whom issued might be either a coparcener or one who had succeeded to the interest of a coparcener.

Joint tenants and tenants in common became such by their own voluntary act. Their estate was always created by purchase, and whatever inconvenience, or hardship arose from

the co-ownership was considered as the result of a relation voluntarily assumed by the parties, and the law would grant no relief by way of compulsory partition. The only remedy, was to purchase the moiety of others, sell his own, or make voluntary partition with the other part owner.

The first step toward relieving the joint tenant, and tenant in common from the burden under which they suffered, in consequence of their inability to compel partition, was by statute of 31 Henry VII which provided. That tenants in common, and joint tenants of estates of inheritance held in their own right, or in that of their wives were compelled to make partition, "in like manner as parceners by the common law of the realm were compelled to do". As will be seen this statute applied only to joint tenancy and tenancy in common of estates of inheritance.

To ameliorate the condition of tenants of estates not of inheritance, the second statute of 32 Henry VII was enacted. It provided, "That all joint tenants, or tenants in common, and every of them which now hold, or hereafter shall hold, jointly, or in common, for the term of life, year or years, or joint tenants, or tenants in common, where one, or

some of them, have or shall have, estate, or estates for term of life, or years, with the other, that have, or shall have estate, or estates of inheritance, or freehold, in any manors, lands, tenements, or hereditaments shall and may be compelled from henceforth by writ of partition to be pursued out of the King's Court of Chancery upon his or their case, or cases, to make severance and partition of all such manors, lands, tenements and heraditaments which they hold jointly, or in common, for term of life or lives, year or years, or where one, or some of them hold jointly, or in common, for term of life or years, with other, or that have estates of inheritance or freehold.

It will be observed, by a comparison of dates, that three centuries elapsed, from the time when the right of coparceners to compel partition was clearly recognized, and before the right of partition was extended to other co-tenants.

Chancery without express legislative sanction, exercised jurisdiction of suits in partition as early as the reign of Elizabeth. This new jurisdiction was felt to be such an improvement upon the expensive, tedious, and ofttimes inadequate, writ of partition at law, that it rapidly grew

in favor. While the writ of partition at law passed into desuetude, and was finally abolished by statute of 3 and 4 William IV.

The first act authorizing the partition of estates held by joint tenants, tenants in common, and coparceners was passed by legislature of this state March 16th 1785. The preamble of the act recites the necessity of the passage of such statute, and the reasons which influenced the legislature in authorizing the partition of land. It declared "Whereas many tracts of lands in this state are held by divers persons, as joint tenants, tenants in common, and coparceners and such tracts cannot by law be divided by reason of the absence, infancy, or coverture of some of the proprietors, to the great detriment of the owners, and the prejudice of agriculture," therefore be it enacted etc. This act provided for actual partition of the estate only as between the parties, with the sale of certain part of tract set apart for defraying the expenses of the partition. Section four, of said act, authorized the commissioners to proceed and sell at public vendue, to the highest bidder, that part of said tract set apart to defray the expenses of partition,

"And their deed to the purchaser shall pass as good a title to such bidder, for the separate enjoyment of the same, as if all the patentees or proprietors of the said land had made and executed the same in due form of law". This act was revised in 1813. Section 5 of the revised act authorizes a sale in the same manner as the act of 1785. Section 16 of this act, authorizes the court of chancery in cases of partition to decree a sale of the premises in the same cases, in which a court of law had power to decree a sale, or where the ends of justice should require it, thus extending the power of the court to decree a sale in every case where it should deem the ends of justice to be promoted thereby. Section 17 declared that all sales and partitions, had in the court of chancery, should be firm and effectual forever, and the final decree for partition, or sale should be binding and conclusive on all parties named in the proceedings, or their representatives; and in like manner on all parties whose interests, were unknown, as if the said proceedings had taken place in a court of law, provided that when the parties interested were unknown, or their estates, or interests were unknown proper allegations were made in the complaint,

and notice was to be given to all such unknown persons, or parties. If such unknown persons, or parties did not appear by a day certain the bill was to be taken as confessed by them.

It will be observed, that the later acts are of the same general character as this early legislation, but considerably broader, and the detail rendered more specific and accurate so as to meet the needs of justice as between the parties.

Since 1880 the action of partition has been governed by the provisions found in the Code relating thereto.

It will be the purpose of this paper to treat of the sections, in so far as they relate to the questions as to who may have partition, in what cases, the parties, pleadings and final judgment.

VOLUNTARY PARTITION.

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The severance of the premises being the object of the parties a voluntary partition was possible at common law. So at present, if the parties are of full age and competent to contract they may make partition either by a deed, or parole followed followed by possession.

A parole partition between tenants in common, when followed by exclusive possession of the portion of the property allotted, the partition is binding. The exclusive possession of the share results in the severing of the unity of possession. The parole agreement alone cannot sever the unity of possession. (Taylor v Millard, 118 N.Y. 224)

The partition springs from the act of each tenant with the consent of the others, although practically a substitute for, it it is not equivalent to mutual conveyances, which would sever the unity of possession if not followed by actual possession. No title is transferred by a parole partition even when it is carried into effect, as it acts only upon the unity of possession, and by ending that accomplishes the object in view. It follows that the act of the

parties in carrying out a parole partition will bind them and all who claim under them. Where the parties acquiesce in such a partition all incidental rights such as curtesy or dower attach only to the portion set apart for the person as his share of the estate. Ferguson v Tweedy (56 Barb. 68)

So also tenants in common, by interchange of deeds, with or without the consent of their respective wives, may make a partition of lands which shall be binding as to the tenants, and their respective wives, and the right of dower then attaches to the shares assigned their respective husbands. The partition so made must be fair and just as to quality, and quantity, and free from any fraud as against the wives. Huntington v Huntington, (9 Civ.Pro. Rep.)
The principle underlying the cases seems to be, that partition is an absolute right to which inchoate dower rights are subordinate; that as it may be compelled by law, it may be done voluntarily, that as a judgment in partition only severs the unity of possession and does not confer any new title, so an amicable partition by deed or parole followed by possession, has the same effect, and as the husband's title is not affected, the wife's right depending on, and attached to that title is not affected.

PARTITION BY ACTION.

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By Whom and in What Cases.

Section 1532 provides that where two or more persons hold and are in possession of real property, as joint tenants or tenants in common, in which either of them has an estate of inheritance, or for life, or for years, any one or more of them may maintain an action for the partition of the property, according to the respective rights of the persons interested therein; and for a sale thereof, if it appears that a partition cannot be made, without great prejudice to the owners.

To which may be added Rule 65. Where several tracts or parcels of land lying within the state are owned by the same persons in common, no separate action for the partition of a part thereof only shall be brought, without the consent of all the parties interested therein, and if brought without such consent the share of the plaintiff may be charged with the whole cost of the proceeding, and when infants are interested the petition shall state whether the parties own any other lands in common.

We will defer the consideration of this rule and

consider it under the complaint.

Before the application of the Code it would seem, that partition could not be maintained where there was a subsisting adverse possession by a tenant in common or where the person in possession denied the joint tenancy. But it would seem that under the present extension of the Code the cases so deciding are no longer authority. The action may now be maintained, as the contention of the plaintiff in such case, is not only as to the share to which he is entitled, but as to whether he is entitled to any share of the property. This controversy includes the trial of the question of title which is now possible under the Code in an action of partition. Knapp v Burton (7 Civ. Pro. Rep. 452) Weston v Stoddard (137 N.Y. 119)

The"possession" referred to in the section is not to be understood as a strict pedis possessio, but a present right to the possession as distinguished from the cases in the next section where under certain circumstances the remainderman may bring the action.

Tenants by the entirety are not within the statute, unless the words joint tenants may be deemed in a general

sense to include such a tenancy. Strictly no. "It is not a joint tenancy in substance or form" Peckham, J iStelz v Schreck, (128 N.Y. 263) But they are within the equity of the statute, and since husband and wife may now make partition by deed, there seems to be no reason why a court of equity should not take jurisdiction where it is equitable to decree partition between them.

A wife owning lands as tenant in common with her husband may maintain an action for partition against him. Moor v Moor, (47 N.Y.407)

Tenants in common within the rule of this section need not be owners of life estates. A husband of a deceased heir holding her share as tenant by the curtesy, is a tenant in common with the other heirs holding in fee and may maintain partition. Tilton v Vail, (53 Hun 324).
A tenant by the curtesy cannot maintain partition. Reed v Reed, (107 N.Y.545) Though such tenant of an undivided share may have partition. Tilton v Vail, (supra)

In Baldwin v Baldwin, (74 Hun 415) it was stated that a partition, or sale, if necessary of property held in joint tenancy could be had, notwithstanding some of the joint

tenants objected.

Assignee in trust for the benefit of creditors of a tenant for life may have partition. Van Aresdale v Drake, (2 Barb. 299) Likewise an assignee in bankrupcy. Rutherford v Hewey, (59 How. 331) Although a receiver in supplementary proceedings cannot maintain partition. Debois v Cassidy, (75 N.Y. 298)

Partition of land obtained by action does not create title where none existed before. The sole effect can be to give title in severalty where before it was in common, and it establishes and settles the title between the parties to the action and their privies. It cannot have greater effect than a voluntary partition of the land by and between all the parties interested therein. Greenleaf v B. F. & C.I. R.R., (141 N.Y. 395)

(a) Partition by Remaindermen. Section 1533 provides - Where two or more persons hold as joint tenants, or as tenants in common, a vested remainder or reversion, any one or more of them may maintain an action for the partition of the real property to which it attaches according to their respective shares therein, subject to the interest of the per-

son holding the particular estate therein, but no sale of the premises in such an action shall be made, except by and with the consent in writing, to be acknowledged or proved and certified in like manner as a deed to be recorded, by the person or persons owning and holding such particular estate or estates; and if in such an action it shall appear in any stage thereof that partition or sale cannot be made without great prejudice to the owners, the complaint must be dismissed. The dismissal of the complaint, as herein provided shall not affect the right of any party to bring a new action, after the termination of such particular estate.

Prior to this section of the Code, there was no provision in the statutes by which remaindermen having undivided interests might institute an action for partition, and the existence of a life estate in possession in all the property, such as dower of the wife of the ancestor, precluded partition among remaindermen. Sullivan v Sullivan, (66 N.Y. 37)

Cases often arise where it is essential to the interest of the owner of an undivided share in reversion or remainder that his estate should be severed from that of his

co-tenants,if it is possible to do so without serious injury to other owners.

The enactment of this section was to settle the doubt that existed as to the right of such partition by remaindermen. The act provided for partition where such was possible,but a sale was not to be had, and it only remained for the court,where actual partition was impossible to dismiss the complaint. Prior v Hall, (13 Civ.Pro.Rep.33) Levy v Levy, (79 Hun 290)

The amendment of 1887 modified the section,in so far as to make a sale possible when the consent in writing of the person holding the particular estate has been obtained and the same must be acknowledged or proved and certified in like manner as a deed.

Under this section the life tenant is not a necessary party to the action, but the right to make him a party defendant is given by section 1539.

Remaindermen can have partition as between themselves notwithstanding a void devise in remainder limited on a valid life estate by joining the devisees and may have a sale if necessary, by getting consent of the devisee for life. Van Brunt v Van Brunt, (14 St. Rep. 887)

(b) Partition by Infant. Section 1534 provides - An action for the partition of real property shall not be brought by an infant, except by the written authority of the surrogate of the county in which the property, or a part thereof, is situated. The authority shall not be given, unless the surrogate is satisfied, by affidavit or other competent evidence, that the interests of the infant will be promoted by bringing the action. A judgment for a partition or sale shall not be rendered in such an action, unless the court is satisfied that the interests of the infant will be promoted thereby, and that fact is expressly recited in the judgment.

The requirement in this section that the consent of the surrogate shall be obtained, rather than that of the Supreme Court is for the reason that such officer is usually in a better position to inquire into the merits of the application. Besides as the court in which the action was brought is ultimately to determine the same question such requirement will secure two scrutinies of the case by different judges.

The application should be made by petition and is

on behalf of the infant by his general guardian, if he has one, and if not by a relative if the infant is under fourteen, or by the infant himself if over fourteen. It may be ex parte, but must be verified, it need not be entitled, and should set forth the facts showing that the infant is entitled to a partition, and generally the reasons why he applies for leave to bring suit, and whether the parties own any other lands in common. The court being satisfied that the interests of the infant require a partition will grant the order. Van Sanvoords Equity Practice, Vol 2.

Section 1535 provides that a guardian ad litem for an infant party in an action of partition can be appointed only by the court.

The object of this section is to restrict in this action the general provisions of section 472 of the Code as to the appointment of guardian ad litem.

As a general rule the guardian ad litem, under this section, can be appointed only by the court and an appointment, cannot be made in chambers. As an exception it was stated in Disbrow v Folger, (5 Abbott 53) That in the First District Court such order may be made by a judge at chambers

and it operates as an order of the court.

A general guardian cannot act for the infant; there must be the appointment of a guardian ad litem. Lansing v Gulick, (26 How. 250)

If no guardian is appointed, the decree is irregular and the error cannot be excused though the infant has come of age and tenders a release. Kohler v Kohler, (2 Edward's Ch. 69)

The appointment of a guardian ad litem, for infant, except as here noted is the same as in other actions and is regulated by sections 468-477 inclusive of the Code.

Section 1536 provides - The security to be given by a guardian ad litem for an infant party in an action for partition must be a bond, to the people of this state, executed by him and one or more sureties as the court directs, in a sum fixed by the court conditioned for the faithful discharge of the trust committed to him as guardian, and to render a just and true account of his guardianship in any court or place where thereunto required. The bond must be filed with the clerk before the guardian enters upon the execution of his duties, and it cannot be dispensed with

although he is the general guardian of the infant.

In Crogan v Livingston, (17 N.Y. 218) it was held, That if the guardian had failed to file the required bond the court might order it filed nunc pro tunc at any stage of the proceeding,even after judgment. The right of the infant is not complete until all the requirements of the statute have been fulfilled and a guardian ad litem has been appointed whi is capable of giving the required security. Lyle v Smith, (13 How. Pr. 104)

Bonds given by guardians ad litem for infants defendants ran to "the People of the State of New York....to be paid to the said infants etc." The infants were not previously named,but were named in the conditions of the bond,held that there was a substantial compliance with the provisions of the section of the code and a separate bond for each infant was not imperatively required.Crouter v Crouter,133 N.Y.55.

(c) Partition by Heir when Devise Claimed to be Void. Section 1537 provides - A person claiming to be entitled,as a joint tenant or tenant in common, by reason of his being an heir of a person who died, holding and in possession of real property, may maintain an action for the partition thereof, whether he is in or out of possession, notwith-

standing an apparent devise thereof to another by the decedent, and possession under such a devise. But in such an action, the plaintiff must allege and establish that the apparent devise is void.

This section of the Code when enacted as the act of 1853, created an essentially different action than any which before existed; prior thereto possession was a necessary ingredient to the maintenance of the action.

The Code so far changes the common law as to permit partition in a case where the plaintiff claims to be an heir of a person who died holding and in possession of real property, even if out of possession,notwithstanding an apparent devise by the person whose heir the plaintiff claims to be, provided he can establish the devise to be void.

In Hewlett v Wodd (62 N.Y. 78) Miller, J. said That an action of partition can be maintained to determine the validity of any devise or will of real estate,notwithstanding an adverse possession. The action is in the nature somewhat of an ejectment, but issues of fact are to be made up and tried by a jury, and when the legal title is established, a partition or sale may be granted upon application to the

court, as the relief demanded, after the main subject of the controversy has been determined by a jury.

It is obviously the intent and purpose of the act to provide a direct and prompt mode of determining the rights of the parties. To combine in the action of partition the former necessary action of ejectment to determine the title, and to give complete relief, even to the determination of conflicting claims to the title or possession of the property.

It is incumbent upon the plaintiff to allege and establish that the apparent devise is void. There is no limitation to the causes or reasons that may be alleged. It would seem to be necessary that all should be alleged that the party desires at any time to take advantage of. Best v Zeh (82 Hun 232)

All questions arising between the parties in regard to their respective titles, and rights of possession in real property may be determined, but the plaintiff cannot incorporate in his action, under this section, an issue, which if proved would have no tendency to show that the "apparent devise" is void. Ellerson v Westcott (148 N.Y. 149)

Parties to the Action.

(a) Who Must be Parties. Section 1538 provides - Every person having an undivided share in possession or otherwise, in the property, as tenant in fee, for life, by the curtesy, or for years; every person entitled to the reversion, remainder, or inheritance of an undivide share, after the determination of a particular estate therein; every person who, by any contingency contained in a devise, or grant, or otherwise, is or may become entitled to a beneficial interest in an undivided share thereof; every person having an inchoate right of dower in an undivided share in the property; and every person having a right of dower in the property, or any part thereof, which has not been admeasured, must be made a party to an action for a partition. But no person other than a joint tenant or a tenant in common of the property, shall be a plaintiff in the action. In a partition action, the executors or administrators and creditors of a deceased person, who, if living should be a party to said action, must be made parties defendant. And if the complaint in such action alleges, and it is made to appear by proof that there are unpaid debts of said deceased pay-

able out of his estate, the premises sought to be partitioned may be sold free from such debts, and the money produced by such sale shall be brought into court, and the same, or so much thereof as may be necessary, shall be used for the payment of such debts in the same manner as the debts of a deceased person are paid from the proceeds of sale of real estate in surrogate's court. And the court in which said action is brought may proceed to ascertain such debts and direct their payment from such proceeds; or such court may direct such money to be paid into the proper surrogate's court, and direct the same to be administered as if the sale of such interest in said land had been made on the decree of such surrogate.

The amendment of 1890 added the last three sentences making necessary parties, the executor or administrator, and creditors of a deceased person, who if living should be a party; and providing that the premises may be sold free from his debts; and regulating the payment of such creditors of deceased. Salis v Salis (19 N.Y. Sup. 246)

The provision in the section - That anyone is a necessary party who by any contingency contained in any devise

or grant or otherwise, is or may become entitled to a beneficial interest in an undivided interest in the property, must be construed as referring only to a case where the contingency is created by devise, grant, or other instrument. The essential importance of joining all parties, in the action that have any interest whatsoever in the estate, is apparent when a sale becomes necessary. An omission to have joined all the necessary parties in the action, affords the purchaser a valid excuse for relief from the sale and defeats the object of the whole proceedings. Jordan v Pillon, (77 N.Y. 518)

Under the section the husband, of one who has an interest in the property is not a necessary or proper party defendant where he has no interest or right therein. Barnes v Blake (59 Hun 37). The husband of a joint tenant who died intestate is a necessary party. Bogert v Bogert, (25 N. Y. State Rep. 373)

Prior to this section, it was held, that the wives of the parties while proper were not necessary; but they are now classed among those who must be joined. Knapp v Hungerford (7 Hun 588) The person in possession should be made

a party. Kapp v Kapp (15 St. Rep. 967)

Where the real estate is converted into personalty by will of the testator, and the whole title vests in trustees, the parties entitled to the fund are not necessary defendants. Cornell v Cornell (107 N.Y. 644)

The section, after naming the necessary parties declares, that no person other than a joint tenant or tenant in common of the property shall be a plaintiff in the action. This prohibition does not affect the right of a tenant by the curtesy of an undivided share of his deceased wifes share in land to bring partition. Tilton v Vail (42 Hun 638) Also where the plaintiff a tenant in common joined with himself as co-plaintiff his wife, who had an inchoate right of dower in his share. In so doing he did not violate the above provision. Foster v Foster (38 Hun 365)

Where the suit was commenced, by one under the section a proper party to the action, but not a joint tenant or tenant in common, and so not entitled to be plaintiff, it was held- That the defectwas not jurisdictional and a decree directing a sale, if erroneouswas not absolutely void, and where no appealwas taken the judgment is conclusive upon the

parties. Reed v Reed (107 N.Y. 545).

If upon the death of one of two or more plaintiffs, or one of two or more defendants, in an action for partition, the interests of the decedent in the property passed to a person not a party to the action, the latter may be made defendant by the order of the court and a supplemental summons may be issued to bring him in accordingly. Code, Section 1588.

(b) Who May be Parties. Section 1539 provides- That the plaintiff may, at his election, make a tenant by the curtesy, for life or for years, of the entire property or whoever may be entitled to a contingent or vested remainder or reversion in the entire property, or a creditor or other person having a lien or interest which attaches to the entire property a defendant in the action. In that case the final judgment may either award to such party his or her entire right and interest or the proceeds thereof, or where the right or interest is contingent, direct that the proceeds or share thereof be substituted for the property and invested for whoever may eventually be entitled thereto, or may reserve and leave unaffected his or her right and

interest or any portion thereof. A person specified in this section who was not made a party, is not affected by the judgment in the action.

The amendment of 1892 inserted the provision as to those entitled to a contingent or vested remainder or reversion in the entire property. The tenant in dower having been made a necessary party under section 1538 was omitted from this section by the same amendment of 1892. It would seem that under this section not only a person who actually has a lien or interest, but one who apparently has or claims to have, a lien or interest upon the entire property may be made a party. Best v Zeh (82 Hun 232)

Section 1540 provides - The plaintiff may, at his elecetion,make a creditor, having a lien on an undivided share or interest in the property, a defendant in the action. In that case, he must set forth the nature of the lien, and specify the share or interest to which it attaches. If partition of the property is made, the lien, whether the creditor is or is not made a party, shall thereafter attach only to the share or interest assigned to the party upon whose share or interest the lien attached; which must be

first charged with its just proportion of the costs and expenses of the action, in preference to the lien.

The provision, that where a partition of the property has been made, the lien of a creditor whether such creditor is or is not made a party, shall thereafter attach, only to the share, or interest assigned to the party upon whose share, or interest the lien attached, is intended to apply only to a case where an actual partition is made and not to the case of a sale. Jackson v Bradhurst (37 N.Y. Sup. 1068)

The people of the State may be made a party defendant to an action for the partition of real property, in the same manner as a private person. In such a case, the summons must be served upon the Attorney General, who must appear in behalf of the people. Code, Section 1594.

Section 1541 provides - Where a defendant having a share or interest in the property is unknown, or where his name or part of his name is unknown, and the summons is served upon him by publication, as prescribed in article 2nd of title 1st of chapter 5th of this act, the notice subjoined to the copy of the summons as published or served therewith,

must, in addition to the matters required in that article, state briefly the object of the action and contain a brief description of the property.

The statute as to notice and publication must be complied with and the record must show such facts before any steps can be taken to determine the rights of the unknown parties. Denning v Corwin (11 Wend. 647)

Pleadings.

Complaint. Section 1542 provides - The complaint must describe the property with common certainty, and must specify the rights, shares, and interests therein of all the parties, as far as the same are known to the plaintiff. If a party, or the share, right, or interest of a party, is unknown to the plaintiff; or if a share, right, or interest is uncertain or contingent; or if the ownership of the inheritance depends upon an executory devise; or if a remainder is a contingent remainder, so that the party cannot be named; that fact must also be stated in the complaint. To which may be added Rule 65 given on page 10;

Also Rule 66 - Where the rights and interests of the several parties, as stated in the complaint, are not

denied or controverted, if any of the defendants are infants, or absentees, or unknown, the plaintiff on an affidavit of the fact, and notice to such of the parties as have appeared, may apply at a special term for an order of reference to take proof of the plaintiff's title and interest in the premises, and of the several matters set forth in the complaint; and to ascertain and report the rights and interests of the several parties in the premises, and an abstract of the conveyance by which the same are held. Such referee shall in all cases be selected by the court.

The jurisdiction of the court is confined to the property set forth in the complaint; the proceedings being statutory and in rem. Crowithor v Griffing,(21 Barb. 9)

The rules of pleading in partition are broad by reason of the character of the relief sought, and given, and while it is required by the section, that the rights of the parties be stated so far as they are unknown to the plaintiff; where the interests are not known it may properly be described as a "claim." Townsend v Bogert (126 N.Y.370).

An error to state in the complaint correctly the interests and shares of the parties, or any omission to

state , what on motion, plaintiff might be compelled to insert, by way of amentment, will not render the decree irregular. Noble v Cromwell (26 Barb. 475)

The early decisions holding that an allegation of possession is necessary, are superceded, and it has been held under the revised statutes which is the basis of this section as unnecessary to aver that the parties or those from whom they derive title were ever in possession. Winman v Hampton (110 N.Y. 429)

If the plaintiff seeks to recover rents and profits, the facts entitling him to such profits must be alleged. Bulwinker v Ryker (12 Abb. Pr.311)

The plaintiff will be permitted to amend the complaint, where without fault on his part, he omitted to make certain parties defendants. Hall v Campbell (77 Hun 567)

In an action of partition, can unite with it other causes of action arising out of the same transaction, when the acts that give rise to such other causes of action create liens upon the real estate, if they be not declared invalid. Best v Zoh,(32 Hun 232)

It was not the purpose of Rule 65 to establish a

a rule of pleading, or to deny partition in any case, if all the lands owned by the parties as tenants in common, were not made the subject of partition in the pending suit. The object of the rule is to protect parties from the burden and annoyance of a multiplicity of suits when they are tenants in common of several tracts or parcels of land lying within the State. The last paragraph requiring, that when infants are interested and made parties, the complaint shall state whether or not, the parties owned other lands in common, was inserted for the purpose of having the fact appear on the face of the pleading. At most an omission to make an averment in compliance with the rule is a mere irregularity in procedure which cannot be taken advantage of by demurrer. Pritchard v Dratt (32 Hun 417).

Answer. Section 1543 provides - The title or interest of the plaintiff in the property, as stated in the complaint, may be controverted by the answer. The title or interest of any defendant in the property, as stated in the complaint, may also be controverted by his answer, or the answer of any other defendant; and the title or interest of any defendant, as stated in his answer, may be controverted

by the answer of any other defendant. A defendant, thus controverting the title or interest of a co-defendant, must comply with section five hundred and twenty-one of this act. The issues, joined as described in this section, must be tried and determined in the action.

The provision of section 521, referred to, requires that a defendant who seeks a determination, between himself and a co-defendant, must demand it in his answer and must at least twenty days before the trial, serve a copy of his answer upon the attorney of each of the defendants to be affected by the determination, and personally or as the court or judge may direct, upon the defendants so to be affected who have not appeared in the action.

The purpose of section 1543 was to confer upon the court in which an action of partition may be brought, authority to try and determine all disputes which may arise between the plaintiff and his co-tenants involving their respective titles and rights of possession to the property; thus avoiding circuity of procedure and a multiplicity of suits. Weston v Stoddard (137 N.Y.119)

The commissioners who framed this part of the code

stated it to be the intent of the section to extend the principle of section 1537 which provides for the trial of the most common, as well as the most difficult cases of disputed title, to all cases where the question of title is involved. Now that the distinctions in equity and at law are abolished, and an ample provision is made for the trial of questions of fact by a jury in equity actions, there is no sufficient reason for driving the plaintiff to a new action to try title where it is disputed in the answer.

An answer by the defendant, that another action is pending between the same parties will be a sufficient answer to the plaintiff's suit. But the pendency of an action for partition in which the summons had not been served on one of the defendants therein, is not a ground for the abatement of a subsequent action for the same cause brought by such defendant in the first action against the other parties. Warner v Warner, (27 N.Y. Sup. 160)

A defendant cannot demur to the answer of a co-defendant. Stuart v Blatchley (28 N.Y. Sup. 800)

Final Judgment.

What to Contain. Upon the confirmation, by the court of the report of the commissioners making partition, final judgment, that the partition be firm and effectual forever, must be rendered. Section 1557. Code.

The final judgment is a confirmation of the report of the commissioners , whether there has been an actual partition, or the property has been sold. It is also a final determination of the rights of the parties.

The decree should settle thr rights of all the parties to the proceedings, and not leave a portion of the property to be the subject of another proceeding in partition. Post v Post (65 Barb. 192)

The final judgment must also direct that each of the parties, who is entitled to possession of a distinct parcel allotted to him, be let into the possession thereof, either immediately, or after the determination of the particular estate, as the case requires. Section 1558, Code.

The final judgment must also award, that each defendant pay to the plaintiff his proportion of the plaintiff's costs, inclusing the extra allowance. The sum to be paid

by each must be fixed by the court according to the respective rights of the parties, and specified in the judgment. Section 1559, Code.

A plaintiff recovering in partition is entitled to costs, of course, and neither court nor referee has any discretion as to costs, nor can any portion of defendant's costs be charged upon the plaintiff. Davis v Davis (3 St. Rep. 163)

The court may, in the interlocutory or final judgment adjust the rights of one or more of the parties as against any other party or parties, by reason of the receipt, by the latter, of more than his or their proper proportion of the rents or profits of a share or part of a share, Section 1589, Code.

Where it appears that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights or interests of some of them, the final judgment may award compensation to be made by one party to another for equality of partition. But compensation cannot be so awarded against a party who is unknown, or whose name is unknown. Nor can it be awarded

against an infant, unless it appears, that he has personal property sufficient to pay it, and his interests will be promoted thereby. Section 1587, Code.

If a sale is confirmed by the court, a final judgment must be entered, confirming it accordingly; directing the officer making it to execute the proper conveyance, and to take the proper security, pursuant to the sale; and also directing concerning the application of the proceeds of the sale. Section 1577, Code. A purchaser at a partition sale takes all thr rights and interests of the parties. Beyer v Schieltz (54 N.Y. 312)

Who Bound by Final Judgment. A final judgment in an action of partition is binding and conclusive upon the following persons:

1. The plaintiff; each defendant upom whom the summons was served, either personally, or without the state, or by publication, pursuant to an order obtained for that purpose, as prescribed in chapter fifth of this act; and the legal representatives of each party, specified in this subdivision. So much of section four hundred and forty-five

of this act as requires the court to allow a defendant to defend an action, after final judgment, does not apply to an action for partition.

2. Each person claiming from, through, or under such a party, by title accruing after the filing of the judgment roll, or after the filing in the proper county clerk's office, of a notice of the pendency of the action, as prescribed in article ninth of this title,

3. Each person not in being when the interlocutory judgment is rendered, who, by the happening of any contingency, becomes afterwards entitled to a beneficial interest attaching to, or an estate, or interest in, a portion of the property, the person first entitled to which, or other virtual representative whereof, was a party specified in the first subdivision of this section. But this section does not apply to a party, whose right and interest are expressly reserved and left unaffected, as prescribed in section one thousand five hundred and thirty-nine of this act, or to a person claiming from, through, or under such a party. Section 1557, Code.

Where judgment is rendered after a sale such final

judgment is binding and conclusive upon the same persons, upon whom a final judgment for partition is made binding and conclusive by section one thousand five hundred and fifty-seven of this act; and it effectually bars each of those persons, who is not a purchaser at the sale, from all right, title, and interest in the property sold. Section 1577, Code.

The judgment is conclusive upon all parties, not only as to the matter actually determined, but as to every other matter which the parties might have litigated, and had decided as incident to, or essentially connected with the subject matter of the litigation within the perview of the action either as matter of claim, or defense. Jordan v Van Epps (85 N.Y. 427)

The only relief for error is by appeal, the judgment cannot be attacked collaterally, and if no appeal is taken the judgment is conclusive. Jordan v Van Epps, supra.

The lien of a creditor of the ancestor is not cut off by a sale in partition of the lands descended to the heirs; he may still apply for a sale of the property to pay the debts of the ancestor. Mead v Jenkins (27 Hun 570)

After sale has been confirmed by final judgment the

parties to the action are deprived of all objections to the regularity and legality of the proceedings. Reed v Reed, (107 N.Y. 545)

Where all the persons in esse having any estate present or future, vested or contingent are made parties, the judgment is conclusive as to the rights of all, and is sufficient to bar the future contingent interests of those not in esse, although no notice is published to bring in unknown parties, and though such future owners may take as purchasers under a deed or will, and not as claimants under any parties to the action. Brevoort v Brevoort,(70 N.Y.136) But this is so, only where the judgment provides for such parties by substituting the fund derived from a sale of the land in place of the land. Monarque v Monarque,(80 N.Y.320)

The judgment is not conclusive, as to one having a contingent remainder in the property, if not made a party. Moore v Appleby (108 N.Y. 237)

A final judgment is also a bar against each person, not a party, who has, at the time when it is rendered, a general lien, by judgment or decree, on the undivided share or interest of a party, if notice was given to appear before

the referee and make proof of liens, as prescribed in section fifteen hundred and sixty-two of this act, and also against each person made a party, who then has a specific lien on any such undivided share or interest; but a person having any such specific lien appearing of record at the time of the filing of the notice of the pendency of the action, who is not made a party, is not affected by such judgment. Section 1578, Code.