

CHAPTER 276.

PARTITION.

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276.01 Partition actions; subject to life estate. (1) Joint tenants, or tenants in common of lands, may have partition thereof by action which may be commenced and proceeded in as other civil actions are except as otherwise provided in this chapter. Whenever any person has a life estate and is in possession any action for partition of estates in remainder or reversion shall be subject to such life estate.

(2) As used in this chapter "lien" includes "incumbrance;" and a widow's homestead estate and a widower's homestead estate shall be deemed estates for life.

See notes to 231.14, citing *Janura v. Fencl*, 261 W 179, 52 NW (2d) 144.

276.02 Complaint; parties. (1) The complaint in such action shall describe the lands to be partitioned, and the rights and titles of all persons interested therein, so far as the same are known to the plaintiff, and of every person who by any contingency, contained in any devise, grant or otherwise, or as having an inchoate right of dower may be or become entitled to any interest in the premises; but in case any such person or his share or interest be unknown to the plaintiff, or be uncertain or contingent, or shall depend upon an executory devise, or the remainder shall be a contingent remainder, those facts shall be stated in the complaint; but no person whose title or interest appears of record, or who is in the actual occupancy of any such lands, shall be proceeded against as an unknown owner.

(2) When the complaint does not pray partition of all the lands owned by the parties either of them may have the complaint so amended as to affect all the lands so owned. Every person having an interest, whether in possession or otherwise, and every person having an estate by the curtesy, or having a homestead right, in such premises or in any part thereof, may be made a party to such action.

276.03 Lienholders as defendants. The plaintiff need not but may make any lien owner a defendant. The complaint shall set forth the nature of such lien and specify the share to which it attaches. If partition is made such lien upon an undivided interest or estate shall thereafter be a charge only on the share assigned to the party against whom it exists, which share shall be charged with its just proportion of the costs in preference to such lien, but in no other case shall such partition affect or impair the lien.

276.05 Powers of court in actions for partition. In all actions for partition the court may try and determine all questions of conflicting or controverted titles, quiet title, remove clouds in titles, assign dower and homestead and estate by the curtesy, apportion encumbrances, adjust claims for improvements or for rents and profits; by its judgment invest

titles without the forms of conveyances, adjudge a sale either subject to or free from encumbrance, and order sales for the purpose of division in proper cases.

A cotenant in possession may, in a partition action, be reimbursed for expenditures for improvements made in good faith for the preservation and enhancement in value of the common property. Generally, a cotenant in possession is not held accountable for use and occupancy in the absence of ouster or agreement to pay rent, or unless the equities of the particular case require it. *Rainer v. Holmes*, 272 W 349, 75 NW (2d) 290.

276.08 Proceedings on failure to answer and on trial. In case any or all the defendants fail to answer the complaint proof shall be made of the allegations thereof, and if any issues are made, after trial thereof, the court, upon the proofs made in either case, shall determine the rights of the parties, and by order declare the rights, titles and interests of the several parties to the premises, and direct that partition be made between such of them as shall be proved to have any right, title or interest therein, according to such rights, titles and interests.

276.09 Judgment where the right of some does not appear. If the right or interest in such premises of any party who has not appeared or answered, whether known or unknown, shall not be made to appear by the proofs so taken the court shall order that partition be made, so far as the rights and interests of the parties who are known and who have appeared or answered have been ascertained, and the residue of the premises shall remain for the parties whose interests have not been ascertained, subject to partition among them at any future time.

276.10 Practicability of partition; reference. The order for partition may direct a proper person to inquire and to report whether the premises or any part of them are so circumstanced that partition among the parties interested cannot be made without great prejudice to the owners, and also to inquire and report whether the interest of the parties will be promoted by platting the premises sought to be partitioned or any part thereof.

276.11 Partition ordered; commissioners; platting. When the court shall be satisfied that partition of the premises can be made without great prejudice to the owners it shall, by order, appoint three disinterested freeholders commissioners to make the partition according to the interests of the parties as so ascertained; and in such order the part or shares, if any, which shall remain undivided shall be designated. If the court shall be satisfied that the interests of the parties will be promoted by platting the premises or any part thereof, it shall, by the same order direct such commissioners to make and acknowledge a plat of such premises or a part thereof, to be designated; which plat, when made, approved by the court and approved and recorded as other plats are required to be approved and recorded shall have the same effect and validity as if duly made by the parties to the action pursuant to chapter 236. When such plat is so made, approved and recorded partition or sale if ordered may be made in accordance therewith.

Defendant's proposal of a plan of partition is not proper; partition in accordance with statutory procedure should be ordered by the trial court. *White v. Tillotson*, 256 W 574, 42 NW (2d) 283.

276.12 Oaths, vacancy. Before proceeding to the execution of their duties the commissioners shall be severally sworn honestly and impartially to make partition as directed by the court, which oath shall be filed with the clerk of the court on or before the coming in of their report. Vacancies in the commission shall be filled by the court.

276.13 Partition, how made. In making partition the commissioners shall divide the real estate and allot the several portions to the respective parties, quality and quantity relatively considered, according to the respective rights and interests of the parties as declared in said order, marking the several portions by permanent monuments; and, if necessary, they may employ a surveyor with assistants to aid them in the discharge of their duties.

276.14 Partition; homestead; reversion; sale; conveyance. (1) In partition, a widow's and a widower's homestead under s. 237.02 (2) shall be deemed life estates. If part of the premises is subject to a life estate which has not been set off the commissioners shall first set off the same to the party entitled thereto and thereafter they shall, in dividing said real estate, include and partition the reversionary interest in the real estate which is subject to a life estate determining the value of such reversionary interest for the purpose of such partition, by deducting from the entire value of the land, the value of the life estate ascertained according to s. 314.06, and they may allot the whole or any part of such reversionary estate to any of the parties to the action in severalty, as the whole or as a part of his share. The provisions of this section shall also apply to the distribution of the surplus where the homestead is sold in probate court to pay mortgage indebtedness.

(2) If the court shall determine that partition of the premises cannot be made, without great prejudice to the owners, and if the person entitled to a life estate shall file with the

clerk of the court written consent therefor, signed, witnessed and acknowledged, so as to be entitled to record, the entire estate may be ordered sold, free and clear of such life estate, and the value of such life estate shall be ascertained as provided in subsection (1), and shall be paid to the owner thereof from the proceeds of the sale.

(3) In case the owner of any life estate in any part of the premises to be partitioned fails to file such written consent, or from minority or other incapacity cannot do so, and the court finds that the premises cannot be partitioned among the owners thereof according to their respective interests, and such life estate has not been set off, the court shall first appoint commissioners to set it off, which, when confirmed by the court, shall be final and conclusive between the parties, and upon all persons claiming under them. The court shall then direct the remaining premises, together with the reversionary estate in the lands so set off to tenants for life, to be sold as in other cases, and the proceeds of such sale to be divided among the owners thereof according to their respective rights, they giving such receipts or releases therefor as the court may direct.

(4) Any purchaser receiving a deed from the sheriff or other officer conducting such sale, shall be vested with all the estate, title and interest of all the parties to the action and those claiming under them, to all the real estate sold, subject only to the life estates therein set off as herein provided. And such purchasers shall be entitled to the possession of such real estate, except the real estate so set off to life tenants, of which the said purchaser shall be entitled to the possession at the termination of such life estate.

History: 1951 c. 727; 1957 c. 610.

276.15 Commissioners' report; expenses. All the commissioners must meet together in the performance of any of their duties, but the acts of a majority so met shall be valid. They shall report in writing, under the hand of any two of them, specifying the manner of executing their trust and describing the land divided and the shares allotted to each party, with convenient certainty, and the items of their charges. Their expenses, including those of a surveyor and assistants, shall be subject to the approval of the court and, with the compensation allowed by the court for their services, shall be paid by the plaintiff and allowed as part of the costs to be taxed.

276.16 Report may be set aside. On good cause shown the court may set aside the report and refer the case to the same, or appoint new, commissioners as often as may be necessary, who shall proceed in like manner as hereinbefore directed.

276.17 Confirmation of report; judgment conclusive. (1) Notice of the application to confirm said report shall be given to all the parties that have appeared, and upon confirmation thereof judgment shall be entered that the partition so ordered and made be firm and effectual forever, and such judgment shall be final and conclusive:

(a) On all the parties to such action and their legal representatives, except as hereinbefore provided and as provided in section 276.18.

(b) On all persons interested in the premises who may be unknown, who shall be served in such action as provided by law.

(c) On all persons claiming or to claim from such parties or persons or either of them, subsequent to the filing of the notice of the pendency of the action.

(2) A copy of such report and judgment, certified to be such in the manner required by law to make them evidence, shall be recorded in each county in which any part of the premises are situated, and the expense of such copy and record shall be taxed in the costs.

276.18 Whom judgment not to affect. Such judgment shall not affect any tenants or persons having claims as tenants by the curtesy, for life or for years in the whole of the premises; nor shall it preclude any person, except those mentioned in section 276.17 and not excepted in this section, from claiming any title to such premises or from controverting the title or interest of the parties between whom partition is made.

Cross Reference: For lis pendens see 281.03.

276.19 Possession under judgment, contempt. If any party or his legal representatives withhold possession of land from the party adjudged to be entitled thereto or his legal representatives he may be punished as for a contempt, and the court may order the sheriff to put such party or his legal representatives in possession thereof, which order shall be executed as if it were an execution.

276.20 Sale if partition cannot be made. If the court shall find that the land or any portion thereof is so situated that partition cannot be made without great prejudice to the owners, it may order the sheriff to sell the premises so situated at public auction. Such order shall direct the terms of credit which may be allowed for any of the purchase money, which the court shall think proper to direct to be invested, or is required to be invested for the benefit of any unknown owners, infants, nonresidents or tenants for life, years or by the curtesy.

The burden of proof to establish the necessary requisites to a sale rather than a partition in kind is on the party alleging the necessity and advisability of such sale, and the necessity must be clearly established. The question to be determined is whether, if the premises are partitioned, the value of the share of each owner will be materially less than his probable share of the purchase money in case the premises are sold. *White v. Tillotson*, 256 W 574, 42 NW (2d) 283. If the property is so situated that a di-

vision in kind is physically feasible, partition in kind must be had unless thereby the value of the share of each owner will be materially less than his probable share of the purchase money in case the premises are sold. The burden of establishing that the value of a share of real estate is materially less than the probable like share of purchase money is on the party asserting it. *Marshall & Ilsley Bank v. De Wolf*, 268 W 244, 67 NW (2d) 380.

276.21 Creditors to be parties. Before making such order of sale the court shall order every creditor having a lien upon the undivided interest of any of the parties made a party and in such order of sale shall direct the sheriff to pay to the clerk of the court the portion of the moneys arising from the sale of the interest to which such lien attaches, after deducting its proportion of the costs of sale, which proportion shall be fixed by the court.

276.22 What sold or withheld. Whenever an estate for life (other than a widow's homestead or an estate by the curtesy) or for years in the whole or any part or share of the premises exists at the time of the order for sale, and the owner of such estate is a party the court shall determine whether such estate ought to be excepted from such sale and may so provide in such order. If a sale of the premises, including such estate, is ordered such estate shall pass thereby, and the purchaser, his heirs and assigns shall have the same discharged from all claim by virtue of such estate.

276.23 Notice and method of sale; who not to buy. The sheriff shall give notice of such sale for the time and in the manner required for sales of real estate on execution. The terms of sale shall be made known at the time thereof, and if the premises consist of distinct lots or parcels they shall be sold separately. The sheriff shall not purchase at such sale or be interested directly or indirectly in any purchase and all sales made contrary to said prohibition shall be void.

276.24 Credits on sale, how secured. The purchase money for which credit shall be allowed shall be secured, at interest, by a mortgage of the premises sold, by the negotiable promissory note of the purchaser and by such other security as the court shall prescribe; and the sheriff may take separate mortgages and other securities for such convenient shares or portions of the purchase money as are directed by the court to be invested, in the name of the clerk of the court and for such shares as any owner shall desire to have so invested, in the name of such owner. Upon such sales being confirmed, the sheriff shall deliver such securities to the clerk or to the owner whose share was so invested.

276.25 Report and confirmation of sale. (1) The sheriff shall promptly report the sale to the court, with a description of the land sold to each purchaser, the name of such purchaser and the price bid by him, which report shall be filed in the court.

(2) If the sale is confirmed judgment shall direct the sheriff to execute conveyances pursuant thereto and also direct the application of the proceeds of such sale. Such judgment and conveyances are binding upon the persons named in section 276.17.

276.27 Costs, how paid. Unless the court otherwise direct the costs of every party to the action, with reasonable attorney's charges to be allowed by the court upon notice served personally, or by mail, on the parties who are known to be residents of this state, must be deducted from the proceeds of the sale and paid to his attorney; but the court may, in its discretion, direct the costs and expenses of any trial, reference or other proceeding in the action to be paid out of the share of any party in such proceeds or may render judgment against any party therefor.

276.28 Distribution of proceeds of sale. The proceeds of every sale shall be brought into court by the sheriff with his report, and, after deducting costs, shall be divided by order of the court among the parties in proportion to their respective rights.

276.31 Distribution; cancellation of liens. When the amount of the liens upon any undivided shares have been ascertained the court must order a distribution of the money pertaining to such shares to be made among the lien creditors according to the priority thereof, respectively; and the clerk of the court shall procure satisfaction thereof to be acknowledged as required by law and cause such lien to be duly satisfied of record, and the expenses thereof shall be paid out of the money realized on the sale of the share which was subject to the lien.

276.32 Proceedings not to affect whom. The proceedings to ascertain and settle the amount of encumbrances, as herein provided, shall not affect any other party in such action nor delay the paying over or investing the moneys to or for the benefit of any party upon whose estate in the premises there shall not appear to be any existing encumbrance.

276.33 Infant's share, how invested. The share of any ward shall be paid to his general guardian.

276.34 Investment of share of absentee. When a party whose interest has been sold is absent from the state, without legal representatives in this state and has not appeared in the action, or is unknown, or not named in the proceedings, the court shall direct his share to be invested in permanent securities, at interest, for his benefit until claimed by him or his legal representatives.

276.35 Shares of tenants invested. When the proceeds of a sale belonging to any tenant by the curtesy, for life or for years, shall be brought into court the clerk of the court shall act as the trustee thereof and the same shall be invested by him as provided by chapter 320 and the interest shall annually be paid to the party entitled to such estate during its existence, except as otherwise provided in section 276.36.

276.36 Gross sum in lieu of inchoate dower, life estates. Any party to the action who has a right of inchoate dower or is a tenant by the curtesy, for life or for years shall be entitled to receive from the proceeds of the sale a gross sum, to be fixed according to the principles of law applicable to annuities, in satisfaction of his or her estate or interest. The written consent, sealed, witnessed and acknowledged as a conveyance of such party to receive such gross sum, must be filed at or before the filing of the report of sale; otherwise the court shall direct that out of the proceeds of sale, in case of estates by the curtesy or for life the entire proceeds, or in case of an inchoate right of dower its proportionate value according to the principles of law applicable to annuities and survivorships, and in case of an estate for years such proportionate part thereof as fairly represents the interest of the holder of the estate, shall be invested for his or her benefit; and if any person entitled to any such estate is unknown the court shall provide for the protection of his rights in the same manner as if he was known and had appeared. In all cases the proper proportion of expenses shall be deducted from the proceeds of sale.

276.37 Security to refund. The court may, in its discretion, require all or any of the parties, before they shall receive any share of the moneys arising from such sales, to give security to the satisfaction of such court to refund the said share, with interest thereon, in case it shall thereafter appear that such party was not entitled thereto.

276.38 Securities, how taken. When any security is directed to be taken by the court or any investment to be made, or any security shall be taken by a sheriff or referee on the sale of any real estate, as heretofore directed, except where provision shall be made for taking the same in the name of any known owner, the bonds, mortgages or other evidences thereof shall be taken in the name of the clerk of the court in whose office the original complaint was filed and his successors in office, who shall hold the same by virtue of his office and shall deliver them to his successor.

276.39 Receipt and application of payments; account. Such clerk shall receive the interest or principal of any sums as they become due and apply or reinvest the same according to the circumstances of the case, as the court shall direct, and shall, once in every year, render to the court an account in writing and on oath of all moneys received by him and of the application thereof.

276.41 Collection of sum invested. Any person interested in any investment under this chapter may, with the leave of the court, prosecute an action to enforce the same in the name of the clerk.

276.42 Equalization of partition; improvements. Whenever partition shall be adjudged in any action, if it shall appear that it cannot be made equal between the parties without prejudice to the rights or interests of some of them, the court may provide in its judgment that compensation be made by one party to the other for equality of partition, according to the equity of the case; and where any party has, with the knowledge or assent of the others or any of them, made improvements upon lands partitioned the portion of such lands upon which such improvements have been made may be allotted to such party without computing in their value the value of such improvements.

276.43 Costs and charges. The judgment confirming the partition made shall adjudge that each of the parties, other than the plaintiff, pay to him a proportion of the costs and charges of the proceedings, to be ascertained by the court; and the proportion of such costs and charges adjudged to be paid by the unknown owners shall be adjudged to be a charge upon the part remaining undivided. Execution may issue for such costs as in other cases and may be levied upon the property of the parties respectively charged therewith, and a sale of the premises allotted to such unknown owner, upon such execution, shall be as valid as if he had been named in the proceedings and in such execution. If the complaint be dismissed or the action discontinued the plaintiff shall be adjudged to pay costs

as in other cases. He shall also pay the costs when the defendant does not appear, unless the complaint asks partition or sale of all the lands owned by the parties of which partition may be had or unless the defendant is personally served in the action.

276.45 Sale of interest of ward. Whenever any general guardian residing in or out of this state, shall apply in writing to the circuit court of the county in which the lands of his ward lie, stating that such ward owns interests in lands in such county which authorize such ward to bring an action for partition and that the interest of such ward or of any other person in such lands requires partition the court shall inquire into the circumstances; and after a hearing the court may authorize such guardian to agree upon a partition or a sale of the whole interest of such ward in such lands or of such part thereof as, in the opinion of the court, shall be capable of partition, or as shall be most for the interest of such ward to have sold. The application by a foreign guardian shall be accompanied with a certified copy of his appointment and bond.

276.46 Report by guardian; confirmation. Such guardian shall report to the court, on oath, the partition or sale so agreed to be made by him and the conveyances agreed to be made by the other parties interested to such ward, whereupon the court may, by order, if the interest of said ward will be promoted thereby, confirm such report and authorize such guardian to execute conveyances of the interest of such ward necessary to effectuate the sale or partition agreed upon and to receive from other persons conveyances agreed to be made by them.

276.47 Conveyance by guardian and security. Such conveyances by a guardian shall be as effectual to convey the share and interest of such ward as if the same had been duly executed by the ward, after arriving at full age, and of such incompetent person as if the same had been duly executed by him, when of sound mind. In case of the sale of real estate of a ward the court may make all necessary orders for securing, investing and applying the proceeds of the sale and for requiring security from his guardian for that purpose.

276.48 Partition when state part owner; service of process. When any lands shall be held by the state and by individuals as tenants in common proceedings for the partition thereof may be had against the state in the circuit court in the same manner as against individuals, and the like orders and judgments shall be had therein, and the proportion of the costs and expenses of such partition, adjudged to be paid by the state, shall be certified by the attorney general and paid out of the state treasury on the warrant of the secretary of state. The summons and all notices required to be served shall be served on the attorney general, who shall appear in behalf of the state and attend to its interests.

276.49 Statute of limitations not affected. This chapter shall not authorize the revival or prosecution of any claim to lands which would, or otherwise might, be barred by the statute of limitation or by the acquiescence of any party having any such claim.

276.50 Partition of water powers. In case of disagreement between owners of water power or of any rights or interests therein, respecting their rights as owners, or the use of the waters of such power, or the expense of repairs of dams or other structures required for the operation, maintenance or preservation of the same, or other necessary expenses incident to the care, management, maintenance or preservation of such water power either party may bring an action in the circuit court as provided in sections 276.50 to 276.54 for a determination of such matters of disagreement or for a partition of any property pertaining to such water power held by the owners as joint tenants or tenants in common.

276.51 How brought; commissioners. Such action shall be brought and the persons parties thereto shall be served with process therein as in proceedings under this chapter for the partition of lands, and when so served or having so appeared, upon its being shown to be necessary or expedient in order to determine the rights of the parties, the court may, by order, appoint one or more commissioners and empower and direct them to examine into any matters complained of, and upon reasonable notice to the owners or occupants of such water power to enter upon and take control of the mills, machinery, flumes, gates, wheels and other appurtenances of such water power and to exercise such reasonable control of the same for such reasonable time and in such reasonable manner as will enable them to ascertain the respective rights of the parties and to determine the manner of using, applying and preserving the same.

276.52 Oaths and duties of commissioners. (1) Said commissioners shall, before entering upon their duties, take and file in said court an oath to faithfully perform their duties as such; shall proceed with reasonable dispatch to investigate the matters referred to them by such order and take all competent, pertinent evidence offered by any parties to the action touching such matters; such evidence to be taken upon notice given to all parties to the suit as in ordinary cases of trial by referees, and apply such tests as the nature of the

case may require to ascertain and determine the rights of the parties and the manner of using and exercising such rights, interrupting as little as may be the operations of the owners or occupants of such water power in the use thereof; shall determine the rights of the parties and the manner of the use of such water power and apportion or determine the basis for the apportionment of such expenses between the persons or parties liable to contribute therefor; and shall report their determination with all the facts and a full statement of their experiments and the evidence taken by them to the court, which determination shall be binding upon the parties until changed or modified by the court.

(2) In investigating and determining the matters referred to them such commissioners may also, if so ordered by the court at the time of the appointment of said commissioners or at any time thereafter upon due notice, consider and act upon any and all data of experiments, observations and measurements relating to such water power, previously made by competent engineers and millwrights, reporting all such data considered and acted upon by them to the court as above provided.

276.53 Judgment; trial of issues of fact. (1) Upon the report of such commissioners and upon hearing the parties the court shall make such order and enter such judgment as the rights of the parties shall require, confirming or modifying the determination of said commissioners, or may continue such commissioners and upon reasonable notice, on the application of either party interested, order a re-examination of any of the matters complained of or the examination of any new matter, and from time to time modify its judgment until the rights of the parties and the manner of exercising the same shall be fully settled and defined. Any issue, properly triable by jury, may be so tried and the verdict shall have the same effect as in a common law action.

(2) If the place of trial of such action is changed and a judgment is rendered in any county other than that in which the water power is situate and the judgment roll therein or a certified copy thereof is afterwards transmitted to the clerk of the circuit court of the county wherein such water power is situate, all subsequent proceedings in the action may be had in the circuit court of the county wherein such water power is situate.

History: 1955 c. 652.

276.54 Orders for costs. The court may, from time to time, order payment of the commissions and the other costs and may apportion the same among the respective owners in the ratio of their respective interests.

276.55 Partition of riparian rights. In case of disagreement between riparian owners concerning their rights or interests in the water frontage and in any river or lake and the right to the use of such waters and the construction of docks therein, one or more of such owners, whether they own separately, jointly or as tenants in common, may bring an action in the circuit court under the declaratory judgments act, section 269.56, for a determination of any or all such matters of disagreement and for a determination of the respective riparian boundaries, and the amount of water frontage each owner is entitled to, and all owners that have water frontage and riparian rights on the same shore, may join as plaintiffs or be made parties defendant.

276.57 Reference. The court may order a reference to ascertain the respective rights of the parties, to water frontage and riparian boundaries. The referee shall proceed as in ordinary cases of trial by referee, and shall determine and report the rights of the parties, the water frontage, the riparian rights and lines, and locate the respective boundaries and lines between said shore owners from the shore to the established dock line, or termination of riparian right, and shall report his findings with all the facts and the evidence taken, to the court, which report shall be advisory.

276.58 Judgment; plat. Upon the report of the referee and upon hearing the parties, the court shall make such order and enter such judgment as the rights of the parties shall require, confirming or modifying the report, or for the purpose of more fully determining the rights of such parties may continue such reference, and upon reasonable notice on the application of other parties interested, order a re-examination of any of the matters complained of, or the examination of any new matter, and from time to time modify its judgment until the rights of the parties and the manner of exercising the same, shall be fully settled and defined. Any issue of fact in any such action, properly triable by jury, may be tried by jury with like effect as in other cases. In its judgment the court may order a plat to be made, showing its final determination on said matter, and the same may be filed with a copy of the judgment in the office of the register of deeds of the county in which the property is located.

276.59 Expenses. The court may from time to time make necessary orders for the payment of the referee and the other costs therein and may apportion the same among the respective owners in ratio of their respective interests.