

Chapter 46.

Partition.

Article 1.

Partition of Real Property.

§ 46-1. Partition is a special proceeding.

Partition under this Chapter shall be by special proceeding, and the procedure shall be the same in all respects as prescribed by law in special proceedings, except as modified herein. (1868-9, c. 122, s. 33; Code, s. 1923; Rev., s. 2485; C.S., s. 3213.)

§ 46-2. Venue in partition.

The proceeding for partition, actual or by sale, must be instituted in the county where the land or some part thereof lies. If the land to be partitioned consists of one tract lying in more than one county, or consists of several tracts lying in different counties, proceedings may be instituted in either of the counties in which a part of the land is situated, and the court of such county wherein the proceedings for partition are first brought shall have jurisdiction to proceed to a final disposition of said proceedings, to the same extent as if all of said land was situate in the county where the proceedings were instituted. (1868-9, c. 122, s. 7; Code, s. 1898; Rev., s. 2486; C.S., s. 3214; Ex. Sess. 1924, c. 62, s. 1.)

§ 46-2.1. Summons.

(a) In partition proceedings initiated under this Chapter, the period of time for answering a summons is provided in G.S. 1-394.

(b) Written notice shall be included in the petition in a manner reasonably calculated to make the respondent aware of the following:

- (1) That the respondent has the right to seek the advice of an attorney and that free legal services may be available to the respondent by contacting Legal Aid of North Carolina or other legal services organizations.
- (2) That pursuant to G.S. 6-21 the court has the authority, in its discretion, to order reasonable attorneys' fees to be paid as a part of the costs of the proceeding. (2009-362, s. 3.)

§ 46-3. Petition by cotenant or personal representative of cotenant.

One or more persons claiming real estate as joint tenants or tenants in common or the personal representative of a decedent joint tenant, or tenant in common, when sale of such decedent's real property to make assets is alleged and shown as required by G.S. 28A-17-3, may have partition by petition to the superior court. (1868-9, c. 122, s. 1; Code, s. 1892; Rev., s. 2487; C.S., s. 3215; 1963, c. 291, s. 2; 1985, c. 689, s. 16.)

§ 46-3.1. Court's authority to make orders pending final determination of proceeding.

Pending final determination of the proceeding, on application of any of the parties in a proceeding to partition land, the court may make such orders as it considers to be in the best interest of the parties, including but not limited to orders relating to possession, payment of secured debt

or other liens on the property, occupancy and payment of rents, and to include the appointment of receivers pursuant to G.S. 1-502(6). (1981, c. 584, s. 1.)

§ 46-4. Surface and minerals in separate owners; partitions distinct.

When the title to the mineral interests in any land has become separated from the surface in ownership, the tenants in common or joint tenants of such mineral interests may have partition of the same, distinct from the surface, and without joining as parties the owner or owners of the surface; and the tenants in common or joint tenants of the surface may have partition of the same, in manner provided by law, distinct from the mineral interest and without joining as parties the owner or owners of the mineral interest. In all instances where the mineral interests and surface interest have thus become separated in ownership, the owner or owners of the mineral interests shall not be compelled to join in a partition of the surface interests, nor shall the owner or owners of the surface interest be compelled to join in a partition of the mineral interest, nor shall the rights of either owner be prejudiced by a partition of the other interests. (1905, c. 90; Rev., s. 2488; C.S., s. 3216.)

§ 46-5. Petition by judgment creditor of cotenant; assignment of homestead.

When any person owns a judgment duly docketed in the superior court of a county wherein the judgment debtor owns an undivided interest in fee in land as a tenant in common, or joint tenant, and the judgment creditor desires to lay off the homestead of the judgment debtor in the land and sell the excess, if any, to satisfy his judgment, the judgment creditor may institute before the clerk of the court of the county wherein the land lies a special proceeding for partition of the land between the tenants in common, making the judgment debtor, the other tenants in common and all other interested persons parties to the proceeding by summons. The proceeding shall then be in all other respects conducted as other special proceedings for the partition of land between tenants in common. Upon the actual partition of the land the judgment creditor may sue out execution on his judgment, as allowed by law, and have the homestead of the judgment debtor allotted to him and sell the excess, as in other cases where the homestead is allotted under execution. The remedy provided for in this section shall not deprive the judgment creditor of any other remedy in law or in equity which he may have for the enforcement of his judgment lien. (1905, c. 429; Rev., s. 2489; C.S., s. 3217.)

§ 46-6. Unknown or unlocatable parties; summons, notice, and representation.

(a) If, upon the filing of a petition for partition, it be made to appear to the court by affidavit or otherwise that there are any persons interested in the premises whose names are unknown to and cannot after due diligence be ascertained by the petitioner, the court shall order notices to be given to all such persons by a publication of the petition, or of the substance thereof, with the order of the court thereon, in one or more newspapers to be designated in the order. The notice by publication shall include a description of the property which includes the street address, if any, or other common designation for the property, if any, and may include the legal description of the property.

(b) Before or after such general notice by publication if any person interested in the premises and entitled to notice fails to appear, the court shall appoint some disinterested person to represent the owner of any shares in the property to be divided, the ownership of which is unknown or unlocatable and unrepresented. (1887, c. 284; Rev., s. 2490; C.S., s. 3218; 2009-512, s. 1.)

§ 46-7. Commissioners appointed.

The superior court shall appoint three disinterested commissioners to divide and apportion such real estate, or so much thereof as the court may deem best, among the several tenants in common, or joint tenants. Provided, in cases where the land to be partitioned lies in more than one county, then the court may appoint such additional commissioners as it may deem necessary from counties where the land lies other than the county where the proceedings are instituted. (1868-9, c. 122, s. 1; Code, s. 1892; Rev., s. 2487; C.S., s. 3219; Ex. Sess. 1924, c. 62, s. 2.)

§ 46-7.1. Compensation of commissioners.

The clerk of the superior court shall fix the compensation of commissioners for the partition or division of lands according to the provisions of G.S. 1-408. (1949, c. 975; 1953, c. 48.)

§ 46-8. Oath of commissioners.

The commissioners shall be sworn by a magistrate, the sheriff or any deputy sheriff of the county, or any other person authorized to administer oaths, to do justice among the tenants in common in respect to such partition, according to their best skill and ability. (1868-9, c. 122, s. 2; Code, s. 1893; Rev., s. 2492; C.S., s. 3220; 1945, c. 472; 1971, c. 1185, s. 8.)

§ 46-9. Delay or neglect of commissioner penalized.

If, after accepting the trust, any of the commissioners unreasonably delay or neglect to execute the same, every such delinquent commissioner shall be liable for contempt and may be removed, and shall be further liable to a penalty of fifty dollars (\$50.00), to be recovered by the petitioner. (1868-9, c. 122, s. 10; Code, s. 1901; Rev., s. 2498; C.S., s. 3221.)

§ 46-10. Commissioners to meet and make partition; equalizing shares.

The commissioners, who shall be summoned by the sheriff, must meet on the premises and partition the same among the tenants in common, or joint tenants, according to their respective rights and interests therein, by dividing the land into equal shares in point of value as nearly as possible, and for this purpose they are empowered to subdivide the more valuable tracts as they may deem best, and to charge the more valuable dividends with such sums of money as they may think necessary, to be paid to the dividends of inferior value, in order to make an equitable partition. (1868-9, c. 122, s. 3; Code, s. 1894; 1887, c. 284, s. 2; Rev., s. 2491; C.S., s. 3222; 1995, c. 379, s. 14(b).)

§ 46-11. Owelty to bear interest.

The sums of money due from the more valuable dividends shall bear interest until paid. (1868-9, c. 122, s. 8; Code, s. 1899; Rev., s. 2496; C.S., s. 3223.)

§ 46-12. Owelty from infant's share due at majority.

When a minor to whom a more valuable dividend shall fall is charged with the payment of any sum, the money shall not be payable until such minor arrives at the age of 18 years, but the general

guardian, if there be one, must pay such sum whenever assets shall come into his hands, and in case the general guardian has assets which he did not so apply, he shall pay out of his own proper estate any interest that may have accrued in consequence of such failure. (1868-9, c. 122, s. 9; Code, s. 1900; Rev., s. 2497; C.S., s. 3224; 1971, c. 1231, s. 1.)

§ 46-13. Partition where shareowners unknown or title disputed; allotment of shares in common.

If there are any of the tenants in common, or joint tenants, whose names are not known or whose title is in dispute, the share or shares of such persons shall be set off together as one parcel. If, in any partition proceeding, two or more appear as defendants claiming the same share of the premises to be divided, or if any part of the share claimed by the petitioner is disputed by any defendant or defendants, it shall not be necessary to decide on their respective claims before the court shall order the partition or sale to be made, but the partition or sale shall be made, and the controversy between the contesting parties may be afterwards decided either in the same or an independent proceeding. If two or more tenants in common, or joint tenants, by petition or answer, request it, the commissioners may, by order of the court, allot their several shares to them in common, as one parcel, provided such division shall not be injurious or detrimental to any cotenant or joint tenant. (1868-9, c. 122, s. 3; Code, s. 1894; 1887, c. 284, ss. 2, 4; Rev., ss. 2491, 2511; C.S., s. 3225; 1937, c. 98.)

§ 46-14. Judgments in partition of remainders binding on parties thereto.

Where land is conveyed by deed, or devised by will, upon contingent remainder, executory devise, or other limitation, any judgment of partition rendered in an action or special proceeding in the superior court authorizing a division or partition of said lands, and to which the life tenant or tenants, and all other persons then in being, or not in being, take such land as if the contingency had then happened, are parties, and those unborn being duly represented by guardian ad litem, such judgment of partition authorizing division or partition of said lands among the respective tenants and remaindermen or executory devisees, will be valid and binding upon all parties thereto and upon all other persons not then in being. (1933, c. 215, s. 1; 1959, c. 1274, s. 1.)

§ 46-15. Repealed by Session Laws 1959, c. 879, s. 14.

§ 46-16. Partial partition; balance sold or left in common.

In all proceedings under this Chapter actual partition may be made of a part of the land sought to be partitioned and a sale of the remainder; or a part only of any land held by tenants in common, or joint tenants, may be partitioned and the remainder held in cotenancy. (1887, c. 214, s. 1; Rev., s. 2506; C.S., s. 3227.)

§ 46-17. Report of commissioners; contents; filing.

The commissioners, within a reasonable time, not exceeding 90 days after the notification of their appointment, shall make a full and ample report of their proceedings, under the hands of any two of them, specifying therein the manner of executing their trust and describing particularly the land or parcels of land divided, and the share allotted to each tenant in severalty, with the sum or

sums charged on the more valuable dividends to be paid to those of inferior value. The report shall be filed in the office of the superior court clerk: Provided, that the clerk of the superior court may, in the clerk's discretion, for good cause shown, extend the time for the filing of the report of said commissioners for an additional period not exceeding 60 days. This proviso shall be applicable to proceedings now pending for the partition of real property. (1868-9, c. 122, s. 5; Code, s. 1896; Rev., s. 2494; C.S., s. 3228; 1949, c. 16; 2009-362, s. 1.)

§ 46-17.1. Dedication of streets.

Upon motion of any party or the commissioners appointed to make division, the clerk may authorize the commissioners to propose and report the dedication of such portions of the land as are necessary as a means of access to any share, or is otherwise advisable for public or private highways, streets or alleys, and such proposal shall be acted upon by the clerk as a part of the report and, if approved, shall constitute a dedication. No interest of a minor or other person under disability shall be affected thereby until such dedication is approved by a judge of the superior court. (1969, c. 45.)

§ 46-18. Map embodying survey to accompany report.

The commissioners are authorized to employ the county surveyor or, in his absence or if he be connected with the parties, some other surveyor, who shall make out a map of the premises showing the quantity, courses and distances of each share, which map shall accompany and form a part of the report of the commissioners. (1868-9, c. 122, s. 4; Code, s. 1895; Rev., s. 2493; C.S., s. 3229.)

§ 46-19. Confirmation and impeachment of report.

(a) If no exception to the report of the commissioners is filed within 10 days, the same shall be confirmed. Any party after confirmation may impeach the proceedings and decrees for mistake, fraud or collusion by petition in the cause: Provided, innocent purchasers for full value and without notice shall not be affected thereby.

(b) If an exception to the report of commissioners is filed, the clerk shall do one of the following:

- (1) Confirm the report;
- (2) Recommit the report for correction or further consideration;
- (3) Vacate the report and direct a reappraisal by the same commissioners; or
- (4) Vacate the report, discharge the commissioners, and appoint new commissioners to view the premises and make a partition of them.

(c) Appeal from the clerk to superior court of an order of confirmation of the report of commissioners is governed by G.S. 1-301.2 except that the judge may take only the actions specified in subsection (b) of this section and may not adjudge a partition of the land different from that made by the commissioners. (1868-9, c. 122, s. 5; Code, s. 1896; Rev., s. 2494; C.S., s. 3230; 1947, c. 484, s. 2; 1999-216, s. 11.)

§ 46-20. Report and confirmation enrolled and registered; effect; probate.

Such report, when confirmed, together with the decree of confirmation, shall be enrolled and certified to the register of deeds and registered in the office of the county where such real estate is

situated, and shall be binding among and between the claimants, their heirs and assigns. It shall not be necessary for the clerk of court to probate the certified papers required to be registered by this section. (1868-9, c. 122, s. 6; Code, s. 1897; Rev., s. 2495; C.S., s. 3231; 1965, c. 804.)

§ 46-21. Clerk to docket owelty charges; no release of land and no lien.

In case owelty of partition is charged in favor of certain parts of said land and against certain other parts, the clerk shall enter on the judgment docket the said owelty charges in like manner as judgments are entered on said docket, persons to whom parts are allotted in favor of which owelty is charged being marked plaintiffs on the judgment docket, and persons to whom parts are allotted against which owelty is charged being marked defendants on said docket; said entry on said docket shall contain the title of the special proceeding in which the land was partitioned, and shall refer to the book and page in which the said special proceeding is recorded; when said owelty charges are paid said entry upon the judgment docket shall be marked satisfied in like manner as judgments are cancelled and marked satisfied; and the clerk shall be entitled to the same fees for entering such judgment of owelty as he is entitled to for docketing other judgments: Provided, that the docketing of said owelty charges as hereinbefore set out shall not have the effect of releasing the land from the owelty charged in said special proceeding: Provided, any judgment docketed under this section shall not be a lien on any property whatever, except that upon which said owelty is made a specific charge. (1911, c. 9, s. 1; C.S., s. 3232.)