[HIGH COURT OF AUSTRALIA.]

JAMES BRAY . . . . . APPELLANT;
DEFENDANT,

AND

JOHN BRAY AND ANOTHER . . . RESPONDENTS.
PLAINTIFF AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1926.

SYDNEY, *Nov.* 8.

KNOX C.J., ISAACS, HIGGINS, POWERS AND RICH JJ.

Partition—Suit by one of two tenants in common for sale—No prayer for partition—Opposition of other tenant in common to sale—Right of plaintiff to order for sale—Costs—Partition Act 1900 (*N.S.W.*) (*No.* 24 *of* 1900), *secs.* 4, 17, 18.

Where by a suit under the *Partition Act* 1900 (N.S.W.) the plaintiff, one of two tenants in common, asks for a sale of the land and the defendant, the other tenant in common, does not ask for a partition but merely opposes a sale, the plaintiff is entitled as a matter of right to an order for sale.

Under sec. 18 of the *Partition Act* 1900 the Supreme Court of New South Wales may in its discretion order the defendant in such a suit to pay the costs of the plaintiff so far as they have been increased by the hearing of issues of fact raised by the defendant as to whether the time is opportune for a sale.

Decision of the Supreme Court of New South Wales (*Davidson* A.J.) affirmed.

APPEAL from the Supreme Court of New South Wales.

By an indenture of marriage settlement dated 14th June 1854, and made between Thomas Bray, Charlotte Squire Bray (his intended wife) and certain trustees, a parcel of land in Pitt Street, Sydney, was conveyed by Charlotte Squire Bray to the trustees upon trust (*inter alia*) after the death of Charlotte Squire Bray for such one or more of her children and in such shares as she should by deed or will appoint. The intended marriage took place on 29th June

1854. By her will dated 1st August 1911 Mrs. Bray devised the parcel of land to the use of her trustees upon trust for her sons John Bray and James Bray in equal shares. By a codicil dated 7th September 1915 Mrs. Bray appointed the Permanent Trustee Co. of New South Wales executor and trustee of her will. Mrs. Bray died on 16th July 1924, and her sons John Bray and James Bray survived her. Probate of her will was granted to the Company on 21st November 1924. On 10th October 1924 the Company was also appointed sole trustee of the indenture of marriage settlement. The parcel of land in Pitt Street had a frontage of 24 ft. 11 in. to that street and on it was erected a brick building of three storeys which was divided by wooden partitions into two shops, one having a frontage of 12 ft. 11 in. and a depth of 129 ft. and the other a frontage of 12 ft. and a depth of 80 ft. The building had been erected for about 45 years.

A suit was brought in the Supreme Court in its equitable jurisdiction by John Bray against James Bray and the Company, in which the plaintiff alleged that the property could not be suitably or profitably divided; that it was in the best interests of both co-owners that it should be sold; and that the defendant James Bray refused to agree to a sale. The plaintiff prayed (*inter alia*) that the land might be ordered to be sold out of Court, and that either of the parties interested might bid at any sale and become the purchaser of the property. The defendant James Bray by his defence admitted that he refused to agree to a sale, and alleged that a sale at the present time would be injurious to the best interests of the co-owners of the property. He did not ask for a partition.

The suit was heard by *Davidson* A.J., who held that the plaintiff was entitled under sec. 4 of the *Partition Act* 1900 (N.S.W.) to a sale unless the defendant James Bray showed good reason to the contrary, and that no such reason had been shown. He therefore made a decree by which (*inter alia*) he ordered that the property should be sold out of Court, that the defendant Company should have the conduct of the sale, that both the plaintiff and the defendant James Bray should be at liberty to bid at the auction or buy otherwise than at auction, that the share to which the party so purchasing was entitled might be set off against the purchase-money, and that the

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defendant James Bray should pay the costs of the plaintiff so far as they had been increased by the hearing of the issues of fact which had been raised by James Bray.

From that decision the defendant James Bray now appealed to the High Court.

Bonney, for the appellant. In a suit for partition, which this is (sec. 17 of the *Partition Act* 1900), the plaintiff who asks for a sale is not absolutely entitled to a sale. If the defendant only opposes a sale at that time, the contest is then not between partition and sale, but between sale and leaving things as they are. The Act, in giving the parties by sec. 4 the benefit of a sale as an alternative to partition, recognizes that where a partition is not asked for or is not possible there is still a question whether there should or should not be a sale. [Counsel referred to *Porter* v. *Lopes* (1); *Pemberton* v. *Barnes* (2).]

[ISAACS J. referred to *Wilkinson* v. *Joberns* (3).

[HIGGINS J. referred to *Pitt* v. *Jones* (4).]

The learned Judge was in error in directing the defendant James Bray to pay the costs of the issues of fact raised by him. The principle upon which he should have acted is that, where there is a fair subject of discussion and a reasonable ground for asking for the decision of the Court, no costs should be given on either side (*Porter* v. *Lopes* (5); *Belcher* v. *Williams* (6); *Cremen* v. *Mimna* (7)).

Flannery K.C. and *S. A. Thompson*, for the plaintiff respondent, were not called on.

KNOX C.J. In this case I am of opinion that the decree should stand. The main question raised on the appeal is as to the meaning of sec. 4 (1) (*b*) of the *Partition Act*, which provides that in a suit for partition "if parties interested collectively to the extent of one moiety or upwards . . . request the Court to direct a sale of

(1) (1877) 7 Ch. D. 358, at p. 364.
(2) (1871) L.R. 6 Ch. 685.
(3) (1873) L.R. 16 Eq. 14, at p. 16.
(4) (1880) 5 App. Cas. 651.
(5) (1877) 7 Ch. D., at p. 367.
(6) (1890) 45 Ch. D. 510.
(7) (1924) 25 S.R. (N.S.W.) 1.

the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court shall, unless it sees good reason to the contrary, order a sale of the property accordingly." In this case it is admitted that neither party desires a partition—that, in fact, partition of the property would be both inexpedient and impracticable. In these circumstances the plaintiff comes, in a suit which is a suit for partition under the Act, and says " I want a sale." The defendant says " I do not want a partition, but I do not want a sale at the present time because the property will probably realize more later on, and I oppose the sale." The question which arises on that position is whether, even assuming that the defendant makes out his allegation that it would be an inconvenient time for a sale, that would be an answer to the suit. So far as I can see, the object of the Act was to provide an alternative remedy to partition. Recognizing the absolute right of a tenant to partition, and seeing that it might be disastrous for all parties to have a partition, Parliament provided by sec. 4 (1) (*a*) that if any person interested requested a sale instead of a partition and if it appeared to the Court that a sale would be more beneficial than a partition the Court might order a sale accordingly. By sec. 4 (1) (*b*) it was provided that if parties interested to the extent of a moiety or upwards should request the Court to direct a sale instead of a division of the property, the Court should, unless it saw good reason to the contrary, order a sale accordingly. Another provision was made by sec. 4 (1) (*c*) for buying out the interest of a person who requested a sale. I think that it is clear that under sec. 4 (1) (*b*) what the Court has to consider is which is the better course for all parties between two alternatives, namely, is it better that there should be a partition or that there should be a sale, and the onus of showing that partition is better, where the owners of more than one half of the property desire a sale, is upon the person opposing a sale. In that view the decision of the learned Judge was clearly right.

The only other point raised by Mr. *Bonney* was as to costs. I think that his contention is answered by the Act, which provides by sec. 18 that the Court shall have a discretion as to costs. In the exercise of that discretion the learned Judge thought that the

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defendant should pay the costs of the issues of fact raised by him. For my own part I think that he exercised his discretion wisely. The appeal should be dismissed.

ISAACS J. I agree that the appeal should be dismissed for the reasons which have been given by the Chief Justice, and I have nothing further to add.

HIGGINS J. In concurring with the decision I desire to add that I regard a sale as an alternative to a partition and not to the *status quo*. Partition is a right, however inconvenient, unless the provisions of sec. 4 (1) are applicable, and subject to the modifications provided in the other sections of the Act. The case for the appellant has been argued very well by Mr. *Bonney*, but I see no escape from our conclusion.

POWERS J. I agree that the appeal should be dismissed.

RICH J. I also agree, for the reasons given by the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellant, *Robson & Cowlishaw*.
Solicitors for the respondent John Bray, *Norton Smith & Co.*

B. L.