

CHAPTER 668
PARTITION OF REAL ESTATE

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Note

As to procedural statutes superseded by the rules of court, see note preceding Title 32.

Cross References

Uniform partition of heirs property act, see chapter 668A.

Rules of Court

Applicability of Hawaii Rules of Civil Procedure, see HRCPC rule 81(b)(3).

" **§668-1 Actions for partition.** [*Section effective until December 31, 2016. For section effective January 1, 2017, see below.*] When two or more persons hold or are in possession of real property as joint tenants or as tenants in common, in which one or more of them have an estate in fee, or a life estate in possession, any one or more of such persons may bring an action in the circuit court of the circuit in which the property or some part thereof is situated, for a partition of the property, according to the respective rights of the parties interested therein, and for a sale of the same or a part thereof if it appears that a partition cannot be made without great prejudice to the owners. The several circuit courts shall have power, in any action for partition, to proceed according to the usual practice of courts of equity in cases of partition, and according to this chapter in enlargement thereof. [L 1923, c 178, §1; RL 1925, §2761; am L 1929, c 170, §1; RL 1935, §4740; RL 1945, §12450; RL 1955, §337-1; HRS §668-1; am L 1972, c 90, §11(a)]

§668-1 Actions for partition. [*Section effective January 1, 2017. For section effective until December 31, 2016, see above.*] When two or more persons hold or are in possession of real property as joint tenants or as tenants in common, in which one or more of them have an estate in fee, or a life estate in possession, any one or more of such persons may bring an action in the circuit court of the circuit in which the property or some part thereof is situated, for a partition of the property, according to the respective rights of the parties interested therein, and for a sale of the same or a part thereof if it appears that a partition cannot be made without great prejudice to the owners. Except as provided in chapter 668A, the several circuit courts shall have power, in any action for partition, to proceed according to the usual practice of courts of equity in

cases of partition, and according to this chapter in enlargement thereof. [L 1923, c 178, §1; RL 1925, §2761; am L 1929, c 170, §1; RL 1935, §4740; RL 1945, §12450; RL 1955, §337-1; HRS §668-1; am L 1972, c 90, §11(a); am L 2016, c 260, §2]

Rules of Court

Joinder of parties plaintiff, see HRCP rule 20(a).

Case Notes

Once decree entered discontinuance of suit is not allowable against objection. 9 H. 389 (1894).

Where same issues, ejectment, res judicata. 29 H. 482 (1926); 30 H. 323 (1928).

Pedigree. 30 H. 116 (1927), explained 49 H. 273, 295, 414 P.2d 925 (1966); 49 F.2d 24 (1931).

Trial of title dispute is enlargement of usual powers in a partition suit. 48 H. 92, 96, 395 P.2d 620 (1964).

Where State claims absolute title, it cannot be sued without its consent. 48 H. 92, 395 P.2d 620 (1964).

"Usual practice of courts of equity" includes the partition in kind of common property. 57 H. 510, 559 P.2d 739 (1977).

Read in pari materia, this section and §668-14, relating to the partition of real property, vest the circuit court with equitable discretion in judicial sales of such property, to reopen bidding after public auction but before confirmation of the public auction bid, and the court's rejection of confirmation of the highest bid submitted at a public auction does not require a showing that inadequacy of the bid amounted to fraud. 104 H. 119, 85 P.3d 644 (2004).

As chapter allows actions to be brought only for partition of real property held in joint tenancy or tenancy in common, and not for estates held by the entirety, property owner was not authorized to sever husband's alleged interest in property from wife's interest and thereby convert wife's interest into a tenancy in common with property owner. 92 H. 228 (App.), 990 P.2d 126 (1999).

Cited: 37 H. 74, 97 (1945).

See 30 H. 860 (1929); 35 H. 262 (1939).

" **§668-2 Necessary parties; unknown owners.** [(a)] Subject to the rules of court and section 668-8.5, plaintiff shall join as a party every person having or claiming to have, as far as known to the plaintiff, any legal or equitable right, title, or interest in the property described in the complaint or any part thereof or any lien or other claim with respect thereto. Such

persons shall be named in the complaint as far as known to the plaintiff.

[(b)] All persons interested or who may claim any interest in the premises who cannot be identified or whose names are unknown to the plaintiff, shall be made parties as provided by the rules of court. [L 1923, c 178, §2; RL 1925, §2762; am L 1929, c 83, §1; RL 1935, §4741; RL 1945, §12451; RL 1955, §337-2; HRS §668-2; am L 1972, c 90, §11(b); gen ch 1985]

Case Notes

Petition to partition equitable title allowed without joining trustees who held legal title under trust for execution of mortgage, since discharged. 10 H. 487 (1896).

Intervening minor. 30 H. 323 (1928).

Unborn heirs. 31 H. 517 (1930).

State not "person" having interest; no waiver of sovereign immunity. 48 H. 92, 96, 395 P.2d 620 (1964).

Cited: 35 H. 262, 292 (1939).

" **§668-3 Complaint.** The complaint shall particularly describe the property sought to be partitioned, and shall set forth the title and rights of all parties interested therein and the extent of their respective interests, as far as known to the plaintiff. In case any person or persons interested are unknown to the plaintiff so that they cannot be named, or if the plaintiff does not know the share or quantity of interest of any party, or if any share or interest is uncertain or contingent or dependent upon some executory devise or provision, so that the same cannot be stated by the plaintiff, the facts shall be stated in the complaint and, if required by the rules of court, a supporting affidavit shall be furnished. [L 1923, c 178, §3; RL 1925, §2763; RL 1935, §4742; RL 1945, §12452; RL 1955, §337-3; HRS §668-3; am L 1972, c 90, §11(c)]

Rules of Court

Unidentified defendants, see HRCP rule 17(d). Pleading under the Hawaii Rules of Civil Procedure, see HRCP rules 8(a), (e), 10.

Case Notes

Cited: 33 H. 745, 762 (1936); 35 H. 262, 292 (1939).

" **§668-4 Pleadings; substitution of heirs in case of death.**
[(a)] Each party shall allege the source or derivation and

devolution of the party's title, right, interest, or claim. The answers of the defendants shall state, among other things, the precise nature and extent of their respective interests or claims.

[(b)] If any suggestion of death of any party is made to the court, the court shall upon ascertainment of the identity of the heirs or devisees of the decedent, order them joined as parties as provided by the rules of court. [L 1923, c 178, §4; RL 1925, §2764; RL 1935, §4743; RL 1945, §12453; RL 1955, §337-4; HRS §668-4; am L 1972, c 90, §11(d); gen ch 1985]

Cross References

Abatement and revival, see chapter 634, pt V.

Rules of Court

Substitution of parties, see HRCP rule 25.

Case Notes

After issue framed by amended petition and answer, petition should not be dismissed without hearing on merits. 41 H. 504 (1956) (prior to adoption of the Hawaii Rules of Civil Procedure).

" **§668-5 Summons, service.** The summons shall be directed to all persons named in the complaint or joined as provided by the rules of court, and may be directed generally to all persons unknown having or claiming to have any interest in the premises described in the complaint, subject to section 668-8.5. Unknown persons and any known persons who do not reside within the State[,] or cannot for any reason be served with process within the State, shall have notice of the action as provided by sections 634-23, 634-24, and 634-26. If the summons has been directed generally to all persons unknown as above provided, and if service has been made upon persons known and unknown as required, the court shall have jurisdiction to proceed as though all persons interested in the premises were in being and personally served, but any adjudication shall, as regards a defendant served as provided by sections 634-23, 634-24, and 634-26, affect only the property which is the subject of the action except as provided by section 634-23. [L 1923, c 178, §5; RL 1925, §2765; RL 1935, §4744; RL 1945, §12454; RL 1955, §337-5; HRS §668-5; am L 1972, c 90, §11(e)]

Cross References

Publication of summons, how made, see §601-13.
Guardians ad litem, see §551-2.

Rules of Court

Summons, service, see HRCF rule 4. Unidentified defendants, see HRCF rule 17(d).

Case Notes

Guardian ad litem. 34 H. 854 (1939); 35 H. 262 (1939).

" **§668-6 REPEALED.** L 1972, c 90, §11(s).

" **§668-7 Powers of the court.** [(a)] The court shall have power, subject to section 668-8.5:

- (1) To hear, investigate, and determine any and all questions of conflicting or controverted titles or claims either as to the whole of the property or as to any share or interest therein, either with or without the intervention of a jury, as hereinafter provided;
- (2) To remove clouds upon the title of the property or any share or interest therein;
- (3) To vest titles by judgments, without the form or necessity of conveyance by minors or unknown or absent owners;
- (4) To cause the property to be equitably divided between the parties according to their respective proportionate interests therein, as the parties agree, or by the drawing of lots;
- (5) To set apart any particular portion or portions of land to any particular party or parties who by prior occupation or improvement or otherwise may be equitably entitled thereto, and make any proper adjustment or equalization thereof by the sale of other portions and the application of the proceeds for such purpose, or as a condition of any such particular allotment to require payment by the parties of any value of the portion set apart to them in excess of their proportionate interest in the value of the whole property;
- (6) To divide and allot portions of the premises to some or all of the parties and order a sale of the remainder, or to sell the whole, where for any reason partition in kind would be impracticable in whole or in part or be greatly prejudicial to the parties

interested, and by judgment or judgments to invest the purchaser or purchasers with title to any property sold, and use the proceeds to equalize the general partition; [and]

- (7) To exercise any other power pertaining to a circuit court in a civil action.

[(b)] When partition of two or more separate tracts or parcels of land is sought, the whole share of any party in all of them may be set apart to the party in any one or more of the tracts or parcels. Any plan for a subdivision shall, before approval of the court, be subject to approval by the planning department of any county having laws and regulations covering subdivisions, applicable thereto. If action by the planning department on the proposed subdivision is unreasonably delayed, the court may order the planning department to appear and show cause why the subdivision should not be approved by the court. [L 1923, c 178, §7; RL 1925, §2767; RL 1935, §4746; am L 1939, c 242, §9; RL 1945, §12456; am L 1949, c 222, §12; RL 1955, §337-7; HRS §668-7; am L 1972, c 90, §11(f) to (j); gen ch 1985]

Cross References

Demand for jury trial when title controverted, see §668-8.

Rules of Court

Enforcement of judgment, see HRCF rule 70.

Case Notes

Improvements made by one of the cotenants considered. 10 H. 662 (1897).

Sale of land, power to order. 37 H. 74 (1945), aff'd 158 F.2d 122 (1946).

Right of allotment of grantee of cotenant where grantee has made improvements. 48 H. 92, 97, 395 P.2d 620 (1964).

Power of court to order sale of property. 56 H. 171, 532 P.2d 657 (1975).

Allotment of a parcel to a cotenant other than that which the cotenant occupied and improved upheld. 57 H. 510, 559 P.2d 739 (1977).

Partition of real property in kind upheld. 57 H. 510, 559 P.2d 739 (1977).

Where trial court applied its equitable power in finding that property should be consolidated and subdivided into two lots, it did not disregard paragraph (4); this section does not require a trial court to partition property according to each parties'

proportionate interest because a party so requests. 106 H. 501, 107 P.3d 430 (2005).

A court in equity, in a partition action not involving ouster or agreement, has the discretionary authority to allow an apportioned defensive rental offset against maintenance-related and improvement-related contributions, to the extent that the "reasonable rental value of the use of the property by the cotenant in possession of property has exceeded his or her proportionate share of ownership". 123 H. 301 (App.), 234 P.3d 683 (2010).

Cited: 31 H. 817, 819 (1931).

See 34 H. 686 (1938); 35 H. 262 (1939).

" **§668-8 Trial of title.** Whenever the legal title of any particular share or interest in the property is controverted, the issue shall be triable of right by a jury; provided that as to any such particular controversy, where no other share or interest in the property is affected thereby, the court may set apart to the disputants collectively such a portion or portions of the property or of the proceeds of sale thereof as they or the real owner or owners among them would be entitled to receive were the ownership of the share or interest not in dispute. In each case the portion or portions set apart shall thereafter alone be the subject of the controversy between the disputants, leaving the remaining interests and parties unaffected thereby. The court may then proceed with the general partition accordingly; and the dispute, as transferred to the separate portion of the land or share of proceeds allotted therefor in the general partition, shall thereafter be heard and determined and a supplemental decree or decrees entered accordingly. [L 1923, c 178, §8; RL 1925, §2768; RL 1935, §4747; RL 1945, §12457; RL 1955, §337-8; HRS §668-8; am L 1972, c 90, §11(k)]

Rules of Court

Demand for jury trial, see HRCF rule 38. Partial summary judgment, see HRCF rule 56(d). Judgment upon multiple claims, see HRCF rule 54(b).

Case Notes

Right to trial by jury of title dispute. 30 H. 860 (1929).
Trial of title dispute is enlargement of usual powers in a partition suit. 48 H. 92, 96, 395 P.2d 620 (1964).
Cited: 35 H. 213, 215 (1939).

" **§668-8.5 Adverse claimants.** Unless the action is combined with an action under chapter 669, a person who has not appeared and who claims to hold by title paramount to that under which the plaintiff claims as a cotenant shall not be concluded by the judgment, but may maintain an action asserting that person's title against any or all of the parties, or persons holding under them, within the time in which that person might have brought the action if the action for partition had not been filed. [L 1972, c 90, §11(1); am L 2016, c 55, §48]

" **§668-9 Unknown and absent owners.** The court shall in all cases provide for the protection of the interests of all unknown owners and other owners served under [section] 634-23 or 634-24 who do not appear in the action, in the same manner as far as may be as if they were known and had appeared in the action. In every case their rights must appear to the satisfaction of the court, but the court may consider them together in the action without considering them separately. The ascertained share of any such owner in any proceeds of sale shall be paid into court for the owner's benefit, subject to disposition according to law. If there are any unknown owners of any share or interest, or any other owners served under sections 634-23 or 634-24 who do not appear in the action, the court shall have power in making the general partition to allot and set apart for such share such a portion or portions of the property as the owners thereof would respectively be entitled to receive in the partition were they known and had appeared in the action. The portion so set apart for such share shall thereafter alone be the subject of ownership by such owner if the owner has been served. The remaining portions of the property shall be regarded as belonging to the other parties interested therein. [L 1923, c 178, §9; RL 1925, §2769; RL 1935, §4748; RL 1945, §12458; RL 1955, §337-9; HRS §668-9; am L 1972, c 90, §11(m); gen ch 1985]

Case Notes

Although this section vests the trial court with authority to designate that portion of the property as to those "owners who do not appear in the action" such as defendants, it does not mandate that the trial court exercise that power in every case; where trial court did not specifically partition the common interests of defendants, the fact that it chose not to do so did not mean that in exercising its discretion in subdividing the property into two rather than three lots, it violated this section. 106 H. 501, 107 P.3d 430 (2005).

" **§668-10 Allotments for shares under unproved ownership.**

In any case where the legal title of a claimant to any particular share or interest has not been shown to the satisfaction of the court but the claimant has color of title thereto and the claim is not controverted, the court may in the general partition allot and set apart, for the benefit and account of the legal owner or owners of the share when ascertained, such a portion or portions of the property as the legal owner or owners of the share would be entitled to receive, to be finally disposed of as hereinafter provided; or similarly, the court may set aside a corresponding portion of the proceeds of any sale thereof, for like disposition thereafter. In either case the court may then proceed with partition of the remainder as herein otherwise provided. [L 1923, c 178, §10; RL 1925, §2770; RL 1935, §4749; RL 1945, §12459; RL 1955, §337-10; HRS §668-10]

Cross References

Disposition, where title in doubt, see §668-15.

" **§668-11 Liens and incumbrances.** Where partition is made of any property which is subject as a whole to any lien or incumbrance, the court may with the consent of the incumbrancer apportion the incumbrance against the separate portions as partitioned to the parties, or if the property is sold and the incumbrancer's claim is due and may be discharged by payment the court may discharge the same out of the proceeds. Otherwise, unless the incumbrancer consents to receive payment, the court may without disturbing or then making any adjudication as to the incumbrance, sell, subject to the incumbrance, the property affected thereby; or if any lien or incumbrance is only upon the undivided share or interest of any particular party the court may by its decree make the same a lien and charge only upon the parcel of land partitioned to the party or a charge against the party's share of the proceeds of sale thereof. In every case the property sold shall first be charged with its just proportion of the costs of the partition in preference to the lien or charge. Any party holding a lien or incumbrance and also having other securities, may in the court's discretion be required to exhaust such others before a distribution of the proceeds of sale in partition, or the court may order a just deduction to be made from the amount of the lien on the property on account of such other security. [L 1923, c 178, §11; RL 1925, §2771; RL 1935, §4750; RL 1945, §12460; RL 1955, §337-11; HRS §668-11; gen ch 1985]

" **§668-12 Estates for life and years, and contingent estates.** If an estate for life or years is found to exist as to any part of the property or if any estate in dower or by curtesy exists with respect thereto, and the person interested has been served, the estate shall after partition relate only to the share set apart in partition and corresponding in severalty to the undivided interest theretofore subject thereto; and likewise as to any estate or interest dependent upon any contingency or executory provision, or inchoate right of dower. If the property is sold, the proceeds of sale of the share or interest theretofore subject thereto shall be subject to the same estate in lieu of the property sold. If the parties interested in any fund subject to any estate for life or years or any estate in dower or by curtesy do not agree upon a sum in gross to be paid and accepted as the equivalent thereof, the court shall direct the fund to be invested and the income thereof paid and the corpus eventually transferred to the parties entitled thereto, as they shall respectively be or become entitled. If any such fund represents the proceeds of sale of any share theretofore subject to any contingent estate or right therein or to any executory provision, or inchoate right of dower, the fund involved shall be held by the court or suitably placed in trust and invested upon the same terms and conditions as to the vesting or enjoyment thereof as before existed with respect to the share or interest sold. [L 1923, c 178, §12; RL 1925, §2772; am L 1929, c 83, §1; RL 1935, §4751; RL 1945, §12461; RL 1955, §337-12; HRS §668-12; am L 1972, c 90, §11(n)]

Case Notes

See 35 H. 262 (1939); 35 H. 349 (1940).

" **§668-13 Commissioners in partition.** The court shall have power in its discretion to appoint a commissioner or commissioners to act under the directions and subject to the approval of the court, and may invest them with power to investigate and report to the court as to the practicability of partition of the property in whole or in part, and where partition is deemed practicable to prepare a plan for division of the property into lots or parcels, including provision for any necessary roads or rights-of-way, and making of maps and surveys, and for appraisements, or any other matters, referred to them by the court, with their recommendations as to the division or allotment of the parcels among the parties interested. The commissioners shall have power, as and when directed by the court, to make deeds of partition or of sale of the property. Before making any sale the commissioners shall

each give security approved by the court conditioned for the faithful discharge of their duties. Upon the filing of any report by commissioners in partition the parties may have such time as the court may allow to file any objections thereto or to any part thereof, and if any objections are filed the court shall upon notice hear and determine the same. [L 1923, c 178, §13; RL 1925, §2773; RL 1935, §4752; RL 1945, §12462; RL 1955, §337-13; HRS §668-13; am L 1972, c 90, §11(o)]

Case Notes

Report of commissioners on partition of lands is in nature of decision of judge without a jury and should not be set aside unless evidence clearly shows error. 9 H. 417 (1894).

Appointment of commissioner to subdivide land and set off to parties according to their interests, interlocutory. 34 H. 686, 693 (1938). Compare 9 H. 389 (1894), order of sale in partition final.

Order appointing commissioner and directing appraisal and sale is an interlocutory order. 43 H. 243 (1959).

" **§668-14 Sales; auction, notice.** All sales of any property in partition shall be made at public auction, after publication of notice with a brief description of the property to be sold, in at least one newspaper published in the State and having a general circulation in each circuit within which the property is situated, at least once in each of four successive weeks, the first publication to be not less than thirty days prior to the date of sale. The notice otherwise shall be in accordance with the direction or order of the court. All sales shall be subject to the approval of and confirmation by the court, and shall be promptly and fully reported by the commissioners to the court. [L 1923, c 178, §14; RL 1925, §2774; RL 1935, §4753; RL 1945, §12463; RL 1955, §337-14; HRS §668-14; am L 1972, c 90, §11(p)]

Cross References

Publication, how made, see §601-13.

Case Notes

Read in pari materia, §668-1 and this section, relating to the partition of real property, vest the circuit court with equitable discretion in judicial sales of such property, to reopen bidding after public auction but before confirmation of the public auction bid, and the court's rejection of confirmation of the highest bid submitted at a public auction

does not require a showing that inadequacy of the bid amounted to fraud. 104 H. 119, 85 P.3d 644 (2004).

" **§668-15 Conveyances and payments in partition; possession and guaranty.** The title of every claimant to any share or interest in the property shall be shown to the satisfaction of the court before any conveyance in partition is made to the party of the portion or portions of the land allotted to the share or interest, or before payment to the party of the corresponding portion of the proceeds of sale thereof; provided that in any case where the legal title of a claimant to any particular share or interest has not been shown to the satisfaction of the court but the claimant has color of title thereto and the claim is not controverted, and the court has in the general partition made an allotment of a portion or portions of the land, or in case of a sale in partition has allotted a part of the proceeds in respect of the share, for the benefit and account of the legal owner or owners of the share under section 668-10, the court may authorize the claimant to enter into and take possession of the portion or portions of land so allotted on account of the share, or to receive such share of proceeds, upon the claimant first giving security in such form and amount as is satisfactory to the court that in the event that any other person or persons prosecute any adverse claim thereto in the action within ten years after the filing of the court's order (of which order a certified copy shall be recorded in the bureau of conveyances in Honolulu) and prove such adverse claim, the claimant as the possessory holder, or the claimant's heirs or assigns, will surrender the possession of the land to the legal owner or owners thereof and account and make restitution for the rents, issues, and profits thereof, or, as to such fund that the claimant or the claimant's heirs, or personal representatives will refund and repay the same to the court or to its order with legal interest thereon. In either case, if no claim to the land or fund is made by any other party within the ten years, and successfully established, the title and right of the possessory holder shall become absolute as by prescription, subject to any legal suspension or extension of the prescriptive period in favor of any person under any legal disability as in other cases of prescription. [L 1923, c 178, §15; RL 1925, §2775; RL 1935, §4754; RL 1945, §12464; RL 1955, §337-15; HRS §668-15; am L 1976, c 200, pt of §1; gen ch 1985]

" **§668-16 Default.** All parties who have failed to plead or otherwise defend as provided by the rules of court shall, when that fact is made to appear, be deemed to be in default, and their default shall be entered. Such parties shall be deemed to

have consented to such partition or other disposition of the property as may be decreed in accordance with this chapter. [L 1923, c 178, §16; RL 1925, §2776; RL 1935, §4755; RL 1945, §12465; RL 1955, §337-16; HRS §668-16; am L 1972, c 90, §11(q)]

Rules of Court

See HRCP rules 54(c), 55.

Case Notes

See 34 H. 232 (1937); 35 H. 262 (1939).

" **§668-17 Costs.** All costs of the proceedings in partition shall be paid by the plaintiff in the first instance, but eventually by all of the parties in proportion to their interests, except such costs which may be occasioned by contests as to particular shares or interests, which shall be charged against the particular shares or interests involved and be paid as determined by the result of the trial of the particular issue. In addition to costs of the proceeding the judge may allow any fee or fees for legal services rendered by the attorneys for any of the parties, and apportion the same for costs for payment by and between the parties or any of them, all as to the judge shall seem equitable in the light of the services performed and the benefits derived therefrom by the parties, respectively. When more than ten defendants are named in a complaint for partition, no greater payment for costs shall be required of the plaintiff than would be required if there were but ten defendants. [L 1923, c 178, §17; RL 1925, §2777; am L 1929, c 179, §1; RL 1935, §4756; RL 1945, §12466; RL 1955, §337-17; HRS §668-17; am L 1972, c 90, §11(r)]

Case Notes

Applies to attorney's fees and costs in a quiet title action required for a partition. 68 H. 429, 717 P.2d 516 (1986).

Award of fees premature. 4 H. App. 584, 671 P.2d 1025 (1983).

See 34 H. 686 (1938); 34 H. 854 (1939); 35 H. 262 (1939); 35 H. 682 (1940); 35 H. 779 (1941).