

Book III.
Title XXXVII.

Concerning the ordinary actions of partition of property.
(Communit dividundo.)

Bas. 12.2.32.

Headnote.

This action was the ordinary action in partition between co-owners of property other than an inheritance as such (C. 3.36), but including that held in common between partners, for an action on partnership (C. 3.37) could deal only with reciprocal obligations, not with partition of property. D. 10.3; D. 17.2.43; D. 65.13. An agreement not to divide, except for a limited time, was invalid. D. 10.3.14.2. Property owned in common, and by later extension of the action, property held in common by perpetual lease, by surface or building lease, or as a usufruct or otherwise, could be partitioned (D. 10.2.10; D. 10.3.7.7; D. 18.1.8), but ordinary tenants, deposites, or persons without any right or title to property could not bring the action. D. 10.3.7.4. D. 7.11. Praedial servitudes, such as a water right, could be divided by measure or time, though the early opinion was to the contrary. D. 43.20.4; D. 10.3.19.4. The manner of division, and the rules as to income from, outlay on, or damage to, the property, on the part of one or more co-owners, were the same as in partitioning an inheritance. Obligations arising out of the common ownership might also in later law be enforced during the continuance thereof by an action analogous to the one here considered (D. 10.3.14.1 itp), and Marcus Aurelius provided for forfeiture of interest of a co-owner who failed to make reimbursement for repairs within four months. D. 17.2.52.10; C. 8.10.4 and note.

Co-owners were entitled to the income from the property according to their respective shares. D. 22.1.25. They could agree on the mode of enjoying it. D. 10.3.23. Each was free to dispose of his interest but could not burden it with a servitude. D. 8.1.2.¹

3.37.1. Emperor Antoninus to Lucianus.

If your brother sold the share of the estate belonging to him, he cannot recall the sale; but you must commence your action of partition against the person who thereafter became your co-owner of the property held in common. If in this action you become the purchaser at the best price, and the share of your associate has been paid to him, you become the sole owner, or if another has been the better bidder, you will receive our share of the purchase price. 1. If, however, division of the land (in kind) can be conveniently made without injury to anyone, then you will receive the (entire interest in the) portion within its boundaries adjudicated to you. It must, forsooth, be understood that no one can alienate even his own share, without the consent of his co-owners, after joinder of issue.²

Promulgated at Rome March 1 (213).

¹ Blume pasted this headnote over a previous headnote that he crossed out. The verso of the original page has notes penciled on it that have not been added here on the assumption they preceded the later, pasted note.

² [Blume] Transfer of property during litigation was forbidden. C. 8.36.

3.37.2. Emperor Alexander to Avius, a soldier.

If it is shown to the president of the province that your brother pledged vineyards owned in common by you and him, then, since he could not pledge the interest which you have therein, the president of the province will order your part, together with its income and profits, which the creditor received, to be restored to you. 1. The same president of the province will entertain an action to partition the vineyards between you and the creditor, and will order the latter, upon receiving what the president considers to be value of your brother's part, to turn such part received from your brother over to you, or (on the other hand) order your part to be transferred to the creditor of the brother, when the estimated value thereof, as valued by him, is paid to you.

Promulgated September 12 (222).

3.37.3. The same Emperor to Vercundianus.

The referee, who has been appointed to divide the property between you and your brother, has jurisdiction only as to property still held in common between you and him. For the property in which he sold his interest is held in common by you and the purchasers, and you must bring an action against each of them, if you do not want to continue to hold it in common with them. 1. If any field, or any one out of several, cannot be divided by metes and bounds, then it will be assigned to one of the co-owners after a just appraisalment is made, and if any party receives a property of greater value than the value of his share, he will, in order to equalize the shares, be condemned to pay the others the excess value of the property so assigned to him. Sometimes an outside purchaser will even be admitted, especially if one of the co-owners states that he cannot outbid the lowest bidder to the extent of paying a just price.

Promulgated May 3 (224).

3.37.4. Emperors Diocletian and Maximian and the Caesars to Herada.

If your sister over twenty-five years of age divided with you property held in common between you, the agreement must stand though the making of the division cannot be proven by any documents but can be shown by other proof.

1. But if she was a minor, and the time fixed for restitution of her rights has not passed, the president of the province will, after investigation, determine whether she should be restored to her former condition as to the division.

2. He will also make a division of property still held in common between you, and an account will be taken of the expenses which one of you may have incurred in connection with the common property, and of the increase thereof, as well as of fraud and negligence—all of which matters are properly considered in an action of partition—so that equality may be persevered in every respect.

Given February 6 (294).

Note.

The agreement of division was not binding unless followed by delivery of the property. C. 3.36.15; C. 3.38.8. The time for restitution of rights for minors is considered in C. 2.32.

3.37.5. The same emperors and caesars to Secundinus.

No one is compelled to remain unwillingly in association or partnership with another. Hence, if you go before the president of the province, he will take care that the property, which he finds is held in common between you and your sister, is divided.

Given August 25 (294).

Note.

The right of division was absolute, and an agreement not to divide at all was void. But an agreement not to divide for a certain time was valid, if the court thought it to the interests of the parties to enforce it. D. 10.3.14.2.