

Warfield v. Warfield, 5 *H. & J.* 459. (l) I shall therefore, in the decree appointing the *commissioners to lay off and assign the plaintiff's dower in this property, leave sufficient lati-

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(l) *CORSE v. POLK*.—The bill, filed on the 10th of December, 1818, states, that Alexander Stewart, and Mary his wife, being seized of certain lands, in her right, by deed conveyed them to Warner Razin to hold in trust for the use of them and the survivor for life, remainder to their children; that they are both dead, leaving only three children the parties to this suit; that the defendants are infants. Prayer for a partition. The defendants Polk and wife made answer admitting the statement of the bill. Rebecca R. Stewart answered by guardian, also admitting the allegations of the bill. The trustee does not appear to have been made a party. On the 1st of April, 1819, an interlocutory decree to make partition was passed, and the usual commission was issued, and a return made thereon.

KILTY, C., 16th July, 1819.—Ordered that the return made by the commissioners under the interlocutory decree for partition be confirmed, unless cause shewn before the 1st day of September next; provided a copy of this order be served on the defendant, James Polk, and on the guardian of Rebecca R. Stewart, before the 15th day of August next.

The commissioners returned, that they had divided the lands as described, &c. and then say, "they do further certify and return, award and adjudge, that the said Unit Corse and Mary his wife, pay to Rebecca R. Stewart, the sum of one thousand and ninety-seven dollars and thirty-three and a third cents, and to James Polk and Ann Maria his wife, the sum of five hundred and thirty dollars and eighty-three and a third cents." The defendants filed objections to this return, because among other things, "the said lands are capable of a specific equal division, and ought to have been so divided among the respective claimants according to quantity and quality."

KILTY, C., 15th February, 1821.—An order was passed during the present term, to wit, on the 25th of January, 1821, for a hearing of the objections filed by James Polk at March Term next on notice; but the parties having since submitted them on notes in writing, they are now taken up for consideration.

I do not view the commission or any part of the proceedings as being ordered under the Act to Direct Descents; but under the provisions of the common law as to partition, which is exercised by the Chancery Court, and is recognized by the Act of 1794, ch. 60. Of course a sale could be ordered as suggested by the counsel of J. Polk, and a partition must in some way be made.

The parties have not had any further survey or taken proof under the order of December Term, 1819; the counsel for J. Polk relying on his objections, that the commissioners had not complied with their directions.

The objections drawn from the terms of the commission are not considered valid. An equal division may exist where the difference in quantity or quality is made up in money. The assignment of the several parts, although it has not been expressed in the commission, is included in the power to divide. It is conformable to the practice where the commissioners think proper so to do; and if they omit it, the assignment to each party is made by the Court by lot, for which however there is no express authority.

On this view of the case, I should deem it proper to confirm the return if an examination of the plot had been made according to the rule of the Court;