

Messrs.

Date of Meeting: May 15-16, 1959
Date of Memo: May 6, 1959

Memorandum No. 2

Subject: Study #21 - Confirmation of Partition Sales

Attached are two memoranda dealing with this subject.

The first is addressed to the question, raised by Mr. Balthis at the April meeting, whether Probate Code Section 785 applies to public sales of property of decedent's estates. The second memorandum sets forth proposed new sections of the Code of Civil Procedure to govern the conduct and confirmation of partition sales, drafted pursuant to action taken at the April meeting.

Copies of these memoranda are being sent to Messrs. R. E. Allen of Los Angeles, California, Joseph D. Cooper of Oakland, California; and Probate Commissioners Howard Benson of Alameda County, Otho Lord of Los Angeles County, and Eugene H. O'Donnell of San Francisco County, with a request that they review the proposed legislation and let us have their views, hopefully in time for consideration at the May meeting.

Respectfully submitted,

Glen E. Stephens
Assistant Executive Secretary

5/5/59

Memorandum

Subject: Study No. 21 - Confirmation of Partition Sales

At its April meeting the Commission concluded that by virtue of the last sentence of Code of Civil Procedure Section 775 Probate Code Sections 760, 761, 761.5, 780, 782, 783, 784 and 785 are applicable to private partition sales. It was decided that the present ambiguity on this matter should be eliminated by deleting the last sentence of Code of Civil Procedure Section 775 and putting in the Code of Civil Procedure provisions similar to those sections of the Probate Code which the Commission concluded are applicable to private partition sales.

In this connection Mr. Balthis called the Commission's attention to the fact that there exists some question as to whether Probate Code Section 785 applies to both private and public sales or only to private sales. This, of course, would have a bearing on the language which should be used in the parallel provisions to be inserted in the Code of Civil Procedure. Accordingly, this memorandum is directed to the question raised by Mr. Balthis.

Probate Code Section 784, by its terms, applies only to private sales of real property, beginning "No sale of real property at private sale shall be confirmed by the court unless" The provisions of Section 785, however, do not

specifically indicate whether that Section applies only to private sales or to public auction sales as well; it begins merely "Upon the hearing the court must examine into. . . ." It might be argued that a literal reading would indicate that the two sections should be considered as a unit, the scope of which is limited to private sales by the terms of Section 784. This construction is buttressed somewhat by the fact that no reason is immediately apparent why the requirements of Section 784 should be applicable to private but not to auction sales if the requirements of Section 785 are applicable to both types of sales; that is, the same reasons for so restricting Section 784 appear to apply to Section 785. Indeed, the provisions found in Section 785 for the acceptance of higher bids made to the court seem less appropriate for the confirmation of auction sales than of private sales, since as a practical matter this would result in a "second auction" at the hearing.

However, a review of the legislative history of Sections 784 and 785 of the Probate Code leads to the conclusion that Section 785 applies to both private and auction sales of real property. Sections 784 and 785 were derived from former Code of Civil Procedure Sections 1550, 1552 and 1554. As these sections were codified into the Code of Civil Procedure in 1872 they read:

1550. No sale of real estate at private sale shall be confirmed by the Court, unless the sum offered is at least ninety per cent of the appraised value thereof, nor unless such real estate has been appraised within one

year of the time of such sale. If it has not been so appraised, or if the Court is satisfied that the appraisal is too high or too low, appraisers must be appointed, and they must make an appraisal thereof in the same manner as in case of an original appraisal of an estate. This may be done at any time before the sale or the confirmation thereof.

1552. The executor or administrator, after making any sale of real estate, must make a return of his proceedings to the Probate Court, which must be filed in the office of the Clerk, at any time subsequent to the sale, either in term or vacation. If the sale is made at public auction, and the return is made and filed on or before the first day of the next term thereafter, no notice is required of such return or of the hearing thereof, but the hearing may be had upon the first day of the term, or any subsequent day to which the same may be postponed. If the sale be not made at public auction, . . . the Court or Judge must fix the day for the hearing, of which notice of at least ten days must be given by the Clerk, . . . and must briefly indicate the land sold, the sum for which it was sold, and must refer to the return for further particulars. Upon the hearing, the Court must examine the return and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appear that a sum exceeding such bid at least ten per cent, exclusive of the expenses of a new sale, may be obtained, the Court may vacate the sale and direct another to be had, . . . if an offer ten per cent more in amount than that named in the return be made to the Court in writing, by a responsible person, it is in the discretion of the Court to accept such offer and confirm the sale to such person or to order a new sale. (emphasis added)

1554. If it appears to the Court that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, and that a greater sum, as above specified, cannot be obtained, or if the increased bid mentioned in Section 1552 be made and accepted by the Court, the Court must make an order confirming the sale, and directing conveyances to be executed. . . .

Note that the provisions similar to those now found in Probate

Code Section 785 with respect to sales at higher bids were then found in Section 1552. The provisions of that Section with respect to notice of hearing make it quite clear that that Section applied to both private and public auction sales. Subsequently, in 1880, the second and third sentences of that Section were deleted and a new sentence substituted which read:

A hearing upon the return of the proceedings may be asked for in the return or by petition subsequently, and thereupon the Court or Judge must fix the day for the hearing of which notice of at least ten days must be given by the Clerk, by notices posted in three public places in the county, or by publication in a newspaper, or both, as the Court or Judge shall direct, and must briefly indicate the land sold, the sum for which it was sold, and must refer to the return for further particulars.

This change would not appear to affect the application of the Section to both private and auction sales.

In 1931 Sections 1550, 1552 and 1554 were consolidated and rephrased to form Probate Code Sections 784 and 785. These read:

784. When the executor or administrator makes a return of his proceedings, the notice of hearing hereinbefore provided for must briefly indicate the land sold, and must refer to the return for further particulars. No sale of real property at private sale shall be confirmed by the court unless the sum offered is at least ninety per cent of the appraised value thereof, nor unless such real property has been appraised within one year of the time of such sale. If it has not been so appraised, or if the court is satisfied that the appraisement is too high or too low, a new appraisement must be had, as in the case of an original appraisement of an estate. This may be done at any time before the sale or confirmation thereof.

785. Upon the hearing the court must examine into the necessity for the sale, or the advantage, benefit and interest of the estate in having the sale made, and must examine the return and witnesses in relation to the sale; and if it appears to the court that good reason existed for the sale, that the sale was legally made and fairly conducted, and complied with the requirements of the previous section, that the sum bid is not disproportionate to the value, and it does not appear that a sum exceeding such bid at least ten per cent exclusive of the expenses of a new sale may be

obtained, the court shall make an order confirming the sale and directing conveyances to be executed; otherwise it shall vacate the sale and direct another to be had, of which notice must be given and the sale in all respects conducted as if no previous sale had taken place. But if a written offer of ten per cent more in amount than that named in the return is made to the court by a responsible person, and the bid complies with all provisions of the law, it is in the discretion of the court to accept such offer and confirm the sale to such person or to order a new sale.

A reasonable reading of these sections indicates that only the second and third sentences of Section 784 are limited to private sales. Each section appears to refer back to Probate Code Section 755, also codified in 1931, which read (and still reads):

Except as provided by Sections 770 and 771 of this code, all sales of property must be reported to the court and confirmed by the court before the title to the property passes. The report must be verified. Such report and a petition for confirmation of the sale must be made within thirty days after each sale. The clerk shall set the petition for hearing by the court and give notice thereof for the period and in the manner required by Section 1200 of this code.(emphasis added)

In 1935 the first sentence of Section 784 was eliminated so that the entire section now clearly applies only to private sales. It is not reasonable to assume, however, that by eliminating the first sentence of Section 784 the Legislature intended to restrict the scope of Section 785. Thus it must be concluded that Sections 784 and 785 continue independently to refer back to Section 755 and that the requirements of Section 785 are therefore not limited to private sales.

It should also be pointed out that Probate Code Section 756.5, which provides for the acceptance of higher bids made to the court at the hearing of a petition for confirmation of sales of personal property, specifically exempts personal property which has been sold at ~~public~~

public auction. The fact that Section 785 contains no such specific exception may give rise to an inference that the Legislature intended Section 785 to apply to both public and private sales. Also, it should be noted that Code of Civil Procedure Section 784, which contains provisions similar to Probate Code Section 785, is not restricted by its terms to private sales and, indeed, under the construction given to it by the Commission could apply only to partition sales at public auction. This would appear to be additional evidence that the Legislature does not regard confirmation of public auction sales as anomalous.

It should be noted, however, that sound arguments exist to the effect that the purposes and advantages of conducting a public auction sale are at least in part defeated if the results of such an auction are to be subject to subsequent bidding at the time of the confirmation hearing. It may well be that potential buyers might not attend and make their highest bids at a public auction if the hearing on confirmation of the sale is to be in the nature of a second auction in court.

The Committee on Probate Law and Procedure of the Los Angeles Bar Association has recently adopted resolutions recommending legislation to specifically provide that Probate Code Section 785 applies only to private sales. It appears that these resolutions were adopted by the Conference of State Bar Delegates in October, 1958.

Questions to be Resolved

The following questions should be resolved by the Commission:

1. Should the provisions of the Code of Civil Procedure with respect to bids and sales at the confirmation hearing be restricted to private

sales? The matter should be clarified one way or another.

2. If this is done, should corresponding changes be recommended in the Probate Code even though this would go beyond the literal scope of the Commission's assignment in this matter?

Minutes
5/6/59

MEMORANDUM

Subject: Study #21 - Confirmation of Partition Sales
Proposed Legislation

The following draft of proposed legislation follows the Commission's conclusion at its April meeting that the last sentence of Code of Civil Procedure Section 775 should be eliminated and new provisions be placed in the Code of Civil Procedure similar to Probate Code Sections 760, 761, 761.5, 780, 782, 783, 784 and 785.

The suggested new provisions follow closely the language of corresponding Probate Code sections, with some changes which appear necessary to make them appropriate to private partition sales.

It appears that Probate Code Section 785 is applicable to the confirmation of both private and public auction sales from decedent's estates (See accompanying memorandum.). On the assumption that the corresponding provisions of the Code of Civil Procedure should also apply to both kinds of sales, Code of Civil Procedure Section 784 has been amended to incorporate the appropriate language of Probate Code Section 785; since the reference to Probate Code provisions in Code of Civil Procedure Section 775 has been eliminated, amended Section 784 applies to all partition sales of real property.

Proposed new Section 784.5 of the Code of Civil Procedure is substantially identical with Probate Code Section 784. Insertion of this

Section necessitates some provision for an appraisal of property which is to be sold at private sale; thus proposed new Section 775.3 has been added. In an effort to further parallel Probate Code procedures, it provides for an appraisal to be made by an inheritance tax appraiser. Provisions of the Probate Code requiring an oath by the appraiser (§ 608) and authorizing appointment of three appraisers under certain conditions (§ 605) were not included, however, since it was thought that such procedures are unnecessary in the case of partition sales.

PROPOSED LEGISLATION RE. PARTITION SALES

1. Amend Code of Civil Procedure § 775 as follows:

All sales of real property made by referees under this chapter must be made at public auction to the highest bidder, upon notice given in the manner required for the sale of real property on execution unless in the opinion of the court it would be more beneficial to the parties interested to sell the whole or some part thereof at private sale; the court may order or direct such real property, or any part thereof, to be sold at either public auction or private sale as the referee shall judge to be most beneficial to all parties interested. If sold at public auction the notice must state the terms of sale and if the property or any part thereof is to be sold subject to a prior estate, charge or lien, that must be stated in the notice. ~~If the sale is ordered made at either public auction or private sale, the sale at private sale shall be conducted in the manner required in private sales of real property of estates of deceased persons.~~

2. Enact new Code of Civil Procedure Sections 775.1, 775.2, 775.3, 775.4, 775.5, 775.6 as follows:

775.1. In the case of a private sale of real property, notice of such sale must be published pursuant to Section

(parallels
Probate
Code Sec-
tion 780)

6063a of the Government Code in a newspaper published in the county in which the land or some portion thereof lies, if there is one so published; if none, then in such paper as the court or judge may direct, prior to the day on or after which the sale is to be made.

When, however, it appears from the appraisement that the value of the property to be sold does not exceed \$500 the referee may in his discretion dispense with the publication, and in lieu thereof post a notice of the sale at the court house of the county in which the land or some portion thereof lies for two weeks before the day on or after which the sale is to be made. The property proposed to be sold must be described with common certainty in the notice.

(parallels
Probate
Code Sec-
tion 782)

775.2. In the case of a private sale of real property, the notice must state a place where bids or offers will be received, at a day on or after which the sale will be made, which day must be at least 15 days from the first publication or posting of the notice, and the sale must not be made before that day, but must be made within one year thereafter; but if it is shown that it will be for the best interests of the parties, the court or judge may, by an order, shorten the time of notice, which shall not, however, be less than one week, and may provide that the sale may be made on or after a day less than 15 but not

less than eight days from the first publication or posting of the notice, in which case the notice of sale and the sale may be made to correspond with such order. The bids or offers must be in writing and may be left at the place designated in the notice or delivered to the referee personally, or may be filed in the office of the clerk of the court where the proceedings are pending, at any time after the first publication or posting of the notice and before the making of the sale.*

775.3. If the sale is ordered made at either public auction or private sale and the referee determines that the sale shall be made at private sale, he must cause the property to be appraised and shall petition the court to appoint an appraiser for such purpose. The court must appoint one of the inheritance tax appraisers provided for by law to make the appraisement, but no person shall be

* At its April meeting, the Commission concluded that Probate Code Section 783 also applies to private partition sales. Upon closer examination, however, this section appears to be appropriate only to public auction sales. If the Commission feels otherwise, however, language largely identical to Probate Code § 783 could be inserted:

If, at the time appointed for the sale, the referee deems it for the interest of all persons concerned therein that the same be postponed, he may postpone it from time to time, not exceeding in all three months. In case of a postponement, notice thereof must be given by a public declaration at the time and place first appointed for the sale.

appointed who is disqualified from acting as an appraiser under the provisions of the Probate Code.*

Upon confirmation of the sale such appraiser shall receive from the proceeds of the sale, as compensation for his services, a commission to be computed in the same manner as provided in Probate Code Section 609. In addition thereto he is entitled to receive his actual and necessary expenses, to be allowed by the court; and he must file with the court a verified account of his disbursements.**

* Probate Code §§ 605 and 606 read as follows:

605. To make the appraisement, the court or judge must appoint one of the inheritance tax appraisers provided for by law; or, upon the request of the executor or administrator or of any person interested in the estate, may, in its discretion, appoint three persons, one of whom must be an inheritance tax appraiser, in which case any two of them may act provided one of them be the inheritance tax appraiser.

606. No clerk of the court or deputy clerk, or partner or employee of the judge, or person related to the judge or to his wife within the third degree, or who is married to a relative of the judge within the third degree, shall be competent to act as appraiser.

** 609. Each appraiser shall receive from each estate appraised by him as compensation for his services commissions upon the total amount of the inventory and appraisement and supplemental inventory and appraisement as follows: For the first \$5,000 or fraction thereof, a fee of five dollars; for the next \$495,000 a fee one-tenth of one per cent thereof; for all over \$5000,000 a fee of one twentieth of one per cent thereof. In addition to the fee herein provided each appraiser is entitled to receive his actual and necessary expenses, to be allowed by the court; and he must file, with the inventory, a verified account of his disbursements.

(parallels
Probate
Code
Section
760)

775.4. The referee may enter into a written contract with any bona fide agent or broker, or multiple group of agents or brokers, to secure a purchaser for any real property ordered by the court to be sold under this chapter, which contract may provide for the payment to such agent out of the proceeds of a sale to any purchaser secured by him of a commission to be fixed by the court. Upon confirmation of the sale, the court shall fix and allow such commission in such amount as the court, in its discretion, finds will be a reasonable compensation for the services of the agent. By the execution of any such contract no personal liability shall be attached to the referee and no liability of any kind shall be incurred unless an actual sale is made and confirmed by the court.

(parallels
Probate
Code
Section
761)

775.5. In case of sale on an increased bid made at the time of confirmation to a purchaser not procured by the agent holding the contract, the court shall allow a commission on the full amount for which the sale is confirmed. The agent whose bid was returned to the court for confirmation shall be paid one-half of the commission on the original bid and the balance of the commission on the purchase price shall be paid to the agent, if any, who procured the purchaser to whom the sale is confirmed. If the successful bidder is not produced by a bona fide agent, then the agent holding the contract shall be allowed a full commission on the amount of the original bid returned by him.

(parallels
Probate
Code
Section
761.5)

775.6. Where an original bid is made by a purchaser direct to the referee and thereafter at the time of hearing the return of sale containing the original bid, an increased bid is made by a bona fide agent which results in the confirmation and sale of the property at such increased bid, the court shall allow a commission to the agent who procured the increased bid, which commission shall be fixed by the court at such amount as the court, in its discretion, finds will be a reasonable compensation for the services of the agent.

3. Amend Code of Civil Procedure Section 784 as follows:

(revised to
parallel
Probate
Code
Section
785)

784. After completing a sale of property, or any part thereof ordered to be sold, the referee must report the same to the court, with a description of the different parcels of land sold to each purchaser; the name of the purchaser; the price paid or secured; the terms and conditions of the sale and the securities, if any, taken; and in the case of a private sale, the appraised value of the property. The report must be filed in the office of the clerk of the county in which the action is brought.

Thereafter any purchaser, the referee, or any party to the action, may, upon 10 days' notice to the other parties who have appeared therein, and also to the purchaser if he be not the moving party, move the court

to confirm or set aside any sale or sales so reported.

Upon the hearing, the court must examine the return and report and witnesses in relation to the same, ~~and if the proceedings were unfair, or the sum bid disproportionate to the value;~~ and if it appears that the sale was legally made and fairly conducted and complied with the requirements of law and that the sum bid is not disproportionate to the value and it does not appear that a sum exceeding such bid at least 10 percent ~~exclusive of a new sale may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given, and the sale conducted in all respects as if no previous sale had taken place.---If an offer of 10 percent more in amount than that named in the return be made to the court, in writing, by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale~~ on the first ten thousand dollars bid and 5 percent on the amount of the bid in excess of ten thousand dollars, exclusive of the expenses of a new sale, may be obtained, the court shall make an order confirming the sale and directing conveyances to be executed; otherwise, it shall vacate the sale and direct another to be had, of which notice must be given and the sale in all respects conducted as if no previous sale had taken place.

But if a written offer in an amount at least 10 percent more on the first ten thousand dollars bid and 5 percent

more on the amount of the bid in excess of ten thousand dollars is made to the court by a responsible person, and the offer complies with all provisions of the law, the court shall accept such higher offer, confirm the sale to such person and fix a reasonable compensation for the services of the agent, if any, producing the successful bidder, or, in its discretion order a new sale. If more than one written offer in an amount at least 10 percent more on the first ten thousand dollars bid and 5 percent more on the amount of the bid in excess of ten thousand dollars is made to the court by responsible persons, the court shall accept the highest such increased bid which complies with all the provisions of the law, confirm the sale to the person making such increased bid, and fix a reasonable compensation for the services of the agent, if any, producing the successful bidder or, in its discretion, order a new sale. The compensation of the agent producing the successful bidder shall not exceed one-half of the difference between the amount of the bid in the original return and the amount of the successful bid, but such limitation shall not apply to any compensation of the agent holding the contract with the referee.

For the purposes of this section the amount of a bid shall be determined by the court without regard to any commission on the amount of such bid to which an agent may be entitled by virtue of a contract with the referee.

It shall be determined without regard to any condition of the bid that a certain amount thereof be paid to an agent, but notwithstanding that a bid contains such a condition, only such compensation to an agent as is proper under the preceding provisions of this section shall be allowed, and acceptance of the bid by the court binds the bidder though the compensation so allowed is less than the compensation to which the agent would be entitled had the condition been observed.

4. Enact new Section 784.5 as follows:

(parallels
Probate
Code
Section
784)

784.5. No sale of real property at private sale shall be confirmed by the court unless the sum offered is at least 90 percent of the appraised value thereof, nor unless such real property has been appraised within one year of the time of such sale, which value must be the appraised value of such real property within one year prior to the date of such sale. If it has not been so appraised, or if the court is satisfied that the appraisement is too high or too low, a new appraisement must be had. This may be done at any time before the sale or confirmation thereof. Such new appraisement may be made by the appraiser who made the original appraisement without further order of court or further request for the appointment of a new appraiser. In the case of the death, removal or other disability to act of the original appraiser, or if for just cause a new appraiser is to be appointed, proceedings for his appointment shall be had as provided in Section 775.3 of this Code.