

Date of Meeting: June 19-20, 1959
Date of Memo: June 9, 1959

Memorandum No. 1

Subject: Study #21 - Confirmation of Partition Sales

Attached is a copy of a letter which we have received from Mr. R. E. Allen commenting on the proposed legislation with respect to partition sales which we sent to him for his views prior to the May meeting. We have invited Mr. Allen to attend one of the sessions of the June meeting to discuss his views with the Commission.

Since the May meeting Clark Bradley has introduced Assembly Concurrent Resolution No. 135 to broaden the scope of the partition study as suggested by Mr. Cooper and approved by the Commission. The operative language of the Resolution is the following:

RESOLVED . . . That the California Law Revision Commission is authorized to make a study to determine whether the various sections of the Code of Civil Procedure relating to partition should be revised.

At last report (May 28) this resolution had been adopted in the Assembly and referred to the Senate Committee on Rules. I believe we can assume, therefore, that it either has been or will be adopted.

With this considerable broadening of the partition study it would appear that the next step is to "go back to the drawing board" for a research study covering all of the problems relating to partition actions which may require legislative attention. You will recall that Mr. J. D. Cooper's letter of May 8 to Mr. Stephens (which was distributed

at the May meeting) made several suggestions for legislation in this area. Mr. Allen, too, has indicated his interest in stating his views on other aspects of partition actions than those touched upon by the proposed legislature on which he has commented.

Under the circumstances, it would appear that our discussion with Mr. Allen at the meeting should be centered primarily on obtaining his views with respect to what subjects an expanded study should cover and what general objectives new legislation should attempt to achieve. Thus, we have sent him a copy of Mr. Cooper's suggestions with the thought that the Commission would be interested in his views on them. We will probably also want to quiz Mr. Allen a bit on some of the views expressed in the attached letter. To put us in a better position to do this, we have sent a copy of Mr. Allen's letter to Mr. Cooper. Glen Stephens is planning to talk to Mr. Cooper next week and will ask him for his thoughts concerning the views expressed by Mr. Allen. What we learn should be helpful in determining how to go forward with the expanded study.

After Mr. Stephens has talked to Mr. Cooper we may prepare a supplemental memorandum suggesting specific questions for discussion at the meeting.

It seems likely that after the June meeting this matter will go off the meeting calendar, so to speak, for some time until a new research study can be prepared. One question which we should consider at the meeting is whether the new study should be done by a member of

the staff or whether we should try to put it in the hands of research consultant.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

#21

R. E. ALLEN
Receiver and Commissioner
1557 West Beverly Boulevard
Los Angeles 26, California

June 1, 1959

Glen E. Stephens
Assistant Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Dear Mr. Stephens:

I am, of course, pleased by your letter of May 6, 1959 in which you state that, at the suggestion of the California Law Revision Commission, you solicit my views with respect to certain proposed revisions of the "civil procedure sections governing partition proceedings".

As I do not profess any extraordinary learning at the law, I take it that I can serve here but as an opinion witness. Perhaps, therefore, I should qualify myself. For the past 34 years I have served as a referee in 90%, I would say, of all the partition proceedings in the Superior Court of Los Angeles County. I estimate that I have so served about 1,000 times. I recall only three or four cases in which the subject property was divided. In all the rest, so far as I can recall, the property was sold and the proceeds of sale divided.

I have read the memoranda, Subject: Study 21, Confirmation of Partition Sales, dated 5/5/59 and 5/6/59, the latter containing proposed legislation.

I am gratified by the information conveyed by your letter of May 21, that the Commission may consider other provisions than those at present proposed. For it is my opinion that the code sections on partition require numerous revisions, but not in connection with the subject matter of the present proposals. These I do not regard as desirable. I am sorry if I differ with the learned members of the Commission and its staff, but I take it I must express the opinion to which my experience has led me.

In this letter I will attempt to comment only upon the legislation at present proposed. I reserve the privilege of addressing to you, later, another of perhaps two or three letters, on revisions that seem to be called for. This is a matter in which I take a great interest.

It seems to me that the present proposals are in the pattern of making partition provisions the same as those of the probate code, in the area under consideration. This approach is correct only if the situations to be covered

in the two codes are almost exactly the same, and if the provisions of the probate code are the best possible. I submit that the situation dealt with in probate and in partition proceedings differ so much that what might be the best possible probate proceedings, could well be undesirable in partition proceedings, and that, in fact, however admirable the provisions of the probate code may or may not be for their purposes, they are not suitable for partition proceedings.

I will point out the critical difference in the situations dealt with. In partition proceedings, the property of living persons is being sold under such circumstances that any part owner or group of part owners, or any encumbrancer may become the purchaser, and have credit against the purchase price in a sum equal to his or her interest in the net proceeds of sale. CCP 786.

In probate proceedings, property of a deceased person is being sold. True, legal title is vested in heirs or devisees, but the situation is not one in which these vestees can do much in their own behalf by reason of advantage in bidding capacity.

The operative effect of this difference is tremendous. In at least 80% of the partition cases in Los Angeles County, I would say, the purchasers are from among the litigants, and competitive bidding eventually winds up with only parties litigant still in the field. This is natural enough, as a result of two factors, I think: the inclination of owners of property to value it higher than others do, and the ability of parties litigant to purchase with less cash than is required of an outsider.

I have had no extraordinary experience in probate proceedings. I do not think I have served more than 30 times as an administrator, and in few of the cases in which I have served have there been sales. But it has been my observation that the cases in which heirs or devisees have any particular advantage in bidding are rare, if there are any at all, and that almost always, an outsider is the purchaser at a probate sale.

The only connection I can see between the law of probate sales and that of partition sales is the circumstance - which I regard as unfortunate - that the Code of Civil Procedure (Section 775) requires a private partition sale to be "conducted in the manner required in private sales of real property of estates of deceased persons". This attempt to prescribe procedure in one proceeding by incorporation by reference, of procedure provided for a different proceeding in a different code, seems to me an example of slovenly drafting.

At least, so far as I can see, it is a cause of much time being spent by your Commission on the subject matter of the memoranda you have sent me. Except for this, I doubt very much if your Commission would be so engaged.

It is interesting to observe how differently a public auction sale is treated in Section 775, CCP. It provides that such a sale must be made "upon notice given in the manner required for the sale of real property on execution". I cannot help but think that, had the drafter repeated the same formula, when referring to private sales, and required simply that they be conducted "upon notice" given in the manner required for the sale of real property out of the estates of deceased persons, a great deal of uncertainty would have been obviated. While, in general, I feel that it is loose drafting to legislate by incorporation by reference from other codes, at least the matter of giving notice is one so simple that a provision so worded could hardly cause any difficulty.

I therefore applaud the first sentence of proposed CCP 775.1, the last sentence of proposed CCP 775.1, the first sentence of proposed CCP 775.2 and the last sentence of proposed CCP 775.2, less the phrase starting "or may be filed in the office of the clerk, etc.". I advise that this material be substituted for the last sentence of present CCP 775, the elimination of which I also applaud, rather than written into new sections with fractional numbers. Perhaps it would be better still simply to change the wording of the last sentence of present 775 to provide that a private sale shall be conducted "upon notice" such as is required in the case of sale of real property from the estates of deceased persons.

I recommend that the balance of proposed Section 775.1 and 775.2 and all of proposed 775.3, 775.4, 775.5 and 775.6 be abandoned. You will see that I am not in favor of the proposal for appraisal or for payment of commissions. I owe it to you and to the Commission, of course, to attempt to justify my position.

I gather the impression that this legislation is proposed because of a desire to make the probate and partition proceedings uniform. I see no merit in this as a reason for doing anything at all. Perhaps the probate code provisions for appraisal and payment of commissions are provident for probate procedure. I am not asked for an opinion as to probate procedure. I think them improvident for partition cases.

Let us consider, first, the matter of appraisal. I cannot see what useful purpose an appraisal can serve in partition. An appraisal is only an opinion of value. But the property must be sold. The only opinion of value that means anything is the opinion of the most eager prospect that can be found among the buying public. Suppose a parcel is appraised at \$20,000.00, and no one offers \$20,000.00 for it. In the probate court, a reappraisal is ordered, and the appraiser, as we all know, comes out with a new opinion that the property is worth not more than the highest offer at hand, plus about 11% - or there is no sale. No sale of this particular parcel may be a satisfactory solution in probate proceedings, although I never heard of a situation turning out that way. For the administrator or executor can

perhaps sell something else to meet the needs of the case. But in a partition case, it is this property that must be sold if the court's judgment is not to be defeated. It can be sold only to a buyer, and only at a price the buyer will pay. An over-appraisal must result in a new appraisal tailored to meet the ideas of some buyer; an under-appraisal may derogate the value of the property and add to the referee's burden.

The real problem is to make contact with the person who will pay the highest price for the property. All procedure should be directed to that end. As I will try to show later herein, the present procedure, adequately used, is admirable for that purpose. I cannot see that the opinion of some appraiser, who is not going to buy anything in any event, adds anything to the situation. And if an opinion were of any value at all, I wonder how good an opinion we think we are going to get for the fee allowable for appraisers by the statute. As I compute it, it comes to \$20.00 for a \$20,000.00 evaluation.

Now let us consider the business of paying commissions. I take it for granted that any legislation in this field will be designed for the best interest of litigants, and not to serve the interests of real estate men. In my experience, I have found their services helpful in very few instances - in fact, I cannot, at this time, remember an instance. I can recall many in which the proposed legislation would have been costly to the litigants.

I fully recognize the usefulness of real estate brokers and salesmen in private transactions; I express no opinion as to their usefulness in a probate sale; I say only that their services are not called for in a partition sale.

First, it is to be remembered that, in the great majority of partition cases, the purchasers are from among the litigants themselves. It could hardly be thought that a real estate man could earn a commission in such a sale. You can take it from me, though, that if the proposed legislation is adopted, about so many litigants will drag a broker into the picture. Some try it even in the present procedure. Only when an outside bidder is brought in should a commission even be thought of, I would suppose.

Outsiders buy in partition cases when no parties to the proceedings can raise the comparatively small amount of cash required to become a purchaser at a price higher than the outsider will pay. The owner invariably wishes to bid higher than any outsider would. For the outsider wants a bargain sale, and the insider does not - unless he himself is the purchaser.

There are cases in which one of the insiders can bid and the rest of them cannot. Here the competition of an outsider is necessary to prevent the capable insider from acquiring property at too low a price, to the prejudice of the other litigants.

The trick is to get one or more outsiders interested and before the court at confirmation proceedings. If no insider can bid a satisfactory price, it is necessary to get two or more outsiders there. For under the present procedure, which I consider admirable when competently used, every sale, whether public or private, becomes an auction sale before the court itself at confirmation proceedings.

The nature of the situation is such that a broker is of little or no use in procuring such attendance at confirmation proceedings. The best sales result when the referee, after either a private or a public sale, reports a low bid. He then starts a campaign by advertising for an offer 10% higher than the reported offer. If that figure is low enough, in relation to the real value of the property, human greed can be depended upon to bring bidders to the confirmation proceedings. All the referee needs to do is to provide inquirers with the information as to time and place. After all these years, I am still amazed at how far and fast the word spreads that a bargain is in the offing. I used to advertise in the newspapers for a 10% raise. I do not do that any more. I find that a simple sign on the premises, with a sifter there a few hours, is enough. Let the reported price be low enough and there will inevitably be from two to seven persons in court at the confirmation proceedings, each eager to be the first to get his foot out of his mouth and bid the 10% raise. Then they are off. Each bidder, by his bid, persuades the other that this is a bargain. The results are always good, and sometimes almost unbelievable.

I think that I would like to tell you and the members of the Commission an illustrative story. It is typical, I assure you. I select this one because one of the principals is a lawyer, Mr. Lee Combs, well known, I am sure, to the Los Angeles members of the commission, at least.

On May 20, 1959, I was in Department 46 of the Los Angeles Superior Court as referee in Combs vs. Hughes, for confirmation of a sale on a reported bid of \$27,000.00 by the Defendant Hughes. Mr. Combs, the Plaintiff, was there. He did not feel justified, by the value of the property as he saw it, to make a bid of \$29,700. Or, at least he did not have to, for I had put on the standard low pressure campaign with the result that three bidders were there in court. The property was stricken off at \$31,600.00, which sum was not subject to the payment of any commission. It seems to be manifest in this case that a price was obtained even higher than either of the parties to the action thought was the value of the property, for neither of them put any bid in at all at the confirmation proceedings.

It amuses me to recall that in this very case a broker, by telephone, asked my office for permission to cover up my sign while he showed the property to a client. We said "no", but we think we have reason to suspect he did it anyway.

In all of this, so far as I can see, the real estate broker is of no use. Plenty of prospects for the purpose are recruited by a simple selling campaign, based upon human cupidity.

Brokers do move in on these cases, sometimes. I always tell them that their clients can condition a bid upon payment of a commission and, that if the offer is accepted, the commission will be paid as a part of the contract of sale, but that net bids will be compared. For it is a practice in Los Angeles County to compare net bids at confirmation proceedings. So here is a standard situation:

I have reported a sale at \$25,000.00 and solicited an offer of \$27,500.00 before the court. The value of the property is such that \$27,500 seems to be a sufficient bargain. The original bidder is one of the parties to the action. None of the other parties is able to compete. At court, the original bidder and two outsiders begin bidding against each other. One of the outsiders is brought in by a broker. Net bids are compared. The broker's client goes to \$36,000.00. This will net the estate \$34,200.00. A bid of \$35,000.00, free of commission, is a higher bid and the insider bids that much. The outsider without a broker bids \$35,500.00. No one else bids higher and the property is stricken off at \$35,500.00 and that is what the litigants get. Under the proposed legislation, the \$36,000.00 offer would have been accepted and the litigants would have had \$34,200 instead of \$35,500.00.

If there were difficulty in raising competition, the services of a real estate man might be useful. But in practice, it is rarely difficult to raise competitive bidding, and the cases in which it is difficult are such that no broker could help. I think that the proposed legislation, which would be applicable in every case, is too high a price for anything it could do in rare situations, for the benefit of litigants.

In private transactions, the broker serves the high and useful purpose of bringing buyer and seller to concessions that finally result in the striking of a bargain. Or, perhaps, the seller decides not to sell. It is this freedom on the part of the seller that makes bargaining possible. The seller in a partition case - the referee - cannot decide not to sell. So he has no bargaining position. His function is to create a situation in which the highest price any buyer will pay, will be obtained. For the function of getting into the pockets of each litigant the highest possible number of dollars, the present procedure is so well designed that observers have often asked me if I could tell them how to get their own property into a partition action. The so-called "double auction" is of its very essence. If to me were assigned the duty to start from scratch and design a procedure to sell the property of litigants rapidly and for the best possible price, I do not think I could dream up anything better.

It is my testimony that it has at least one very high merit. It works. No commission at all is paid in 95% of the cases in which I serve.

In the memorandum of May 5, 1959, legislative history of the probate sections is discussed. This discussion is relevant, I submit, only upon the proposition that it is necessary to make procedure in probate and in partition uniform, and that the probate provisions are so good as to warrant making them the uniform procedure.

The object of the inquiry seems to be to determine if it were the intent of the legislature to make the same rules apply to confirmation of private and public sales. Whatever conclusion may be reached as to that, it seems to me it has no bearing on partition sections. They are tied to the probate sections only by one awkward provision, which ought to be modified. Otherwise, it seems to me that the partition sections are sufficiently definitive to raise no need for a study of legislative intent as to probate sales.

I now revert to the memorandum dated May 6, 1959, setting forth proposed legislation, and in particular to proposed amendment of Section 784 CCP. In the light of the position I take as to the preceding proposals, I recommend:

That in the first sentence, between the words "to be sold" and "the referee must" there be inserted the words "whether by public or private sale", in order to remove, definitely, and as I see it, correctly, any doubt as to the applicability of the subsequent verbiage to sales of both kinds;

That from the first sentence there be stricken the words "and in the case of a private sale, the appraised value of the property";

That at the end of the 13th line on Page 9 of the memorandum the word "and" be inserted, that all of line 15 be stricken and that all of line 16 be stricken except the last two words, to wit, "or in";

That the balance of proposed Section 784 be stricken;

That all of proposed 784.5 be stricken.

This is, so to speak, my testimony on direct. I shall be pleased to submit myself to cross-examination at the session of the Commission in Los Angeles, June 19 and 20, 1959.

For the time you have spent in reading this lengthy letter, I thank you. I enclose a few copies for your convenience in communicating its contents to others of the staff or members of the Committee, if you desire to.

Sincerely,

S/ R. E. Allen

R. E. Allen

REA:ek
Encl.