

10/28/69

## Memorandum 69-140

Subject: Study 23 - Actions for Partition

This Memorandum provides background information on the status of Study 23 (Actions for Partition). Exhibit I sets forth the original statement requesting authority to study this topic. Exhibit II is an extract of the Commission's Minutes of the June, 1959 meeting which sets forth some of the problems that have been identified by persons experienced in handling partition proceedings.

Previous Action

In 1956, the Commission requested authority to study the provisions relating to the confirmation of partition sales. At that time, the Commission was concerned with two narrow questions:

(1) The determination of what Probate Code sections are incorporated into the law relating to partition actions by virtue of Code of Civil Procedure Section 775 which provides in part that, "the sale at private sale shall be conducted in the manner required in private sales of real property of estates of deceased persons."

(2) Whether the differences in probate law and civil partition law relating to the confirmation of sales were justified or whether they were the result of legislative oversight.

In 1958, a study of these narrow questions was prepared and tentative legislation conforming the partition law sales confirmation provisions to those in the Probate Code was drafted. The comments received indicated that the scope of the study was too narrow and that partition law should not be patterned after probate sales law because of the different nature of the problems in

partition proceedings. The comments received suggested revisions affecting 10 to 20 code sections. See Exhibit II. As a result of these comments, the Commission requested and received authority from the Legislature to study the entire subject of partition sales. From time to time since 1959, the Commission has determined that this topic should be continued on the agenda but that preparation of a research study on the topic should be deferred because other topics should be given priority.

#### Need for Reform

In approximately 79 code sections, the Code of Civil Procedure states the law relating to actions for the partition of real and personal property. According to persons experienced in handling partition actions, these numerous code sections provide incomplete guidance to attorneys, judges, and referees who have occasion to apply the infrequently invoked partition law.

Mr. J. D. Cooper, an Oakland attorney, made the following comments in response to the Commission's proposed legislation regarding partition sales:

There are not many partition actions filed and, therefore, few attorneys and fewer judges have much experience in this field. The referee in partition is usually a practicing attorney without any experience either in partition actions or as referee. The Code provisions being very sketchy, the referee can find no complete procedural outline to follow.

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The sections relating to actions for the partition of real property are cumbersome and unrealistic. There is a complete lack of uniformity in interlocutory decrees of partition and, the action being rather uncommon, few attorneys appreciate the operation and effect of the action.

Mr. R. E. Allen, a Los Angeles receiver and commissioner who was referee in practically all the partition proceedings (approximately 1,000) in the Superior Court of Los Angeles County between 1935 and 1959, agreed with Mr. Cooper that "the code sections on partition require numerous revisions."

A recent Stanford Law Review article has also found fault with the partition law:

Partition may be achieved by a division in kind or through a sale of the property. . . . Since the courts have stated a preference for division in kind, the party who desires to have the property sold must prove that division in kind would be impossible or would result in the value of the shares of the property being substantially less than what they would bring in a sale of the entire parcel. This allocation of the burden of proof seems unrealistic. . . . [18 Stan. L. Rev. 1428, 1429 (1966)]

Examination of these and other comments and the legal literature indicates that the law relating to partition actions could be improved if the Commission were to undertake a study of this topic. The Commission's 1959 decision to expand its study of this topic appears to have been sound and significant improvements have not been made since that time.

The question remains, however, whether the Commission should devote a portion of its limited resources to this topic at this time. This topic would require a substantial study of theory and practice relating to partition sales and would require an expenditure of \$1,500 to retain a research consultant to write the background research study (if a consultant willing to undertake this task can be found). If a consultant cannot be found, it would require the full time of a member of the legal staff for a number of months and would delay work on inverse condemnation or condemnation law and procedure--topics that the Legislature has requested be given priority.

Respectfully submitted,

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Statement requesting authority to study partition actions

## Topic No. 3:

A study of the provisions of the Code of Civil Procedure relating to the confirmation of partition sales and the provisions of the Probate Code relating to the confirmation of sales of real property of estates of deceased persons to determine (1) whether they should be made uniform and (2) if not, whether there is need for clarification as to which of them governs confirmation of private judicial partition sales.

Sections 752 to 801.15 of the Code of Civil Procedure provide for actions for partition of property. Section 784 deals with the confirmation of partition sales. Probate Code Sections 784 and 785 deal with the confirmation of private sales of real property of estates. These sections differ from Code of Civil Procedure Section 784 in three important respects. One difference is in the percentage by which an offer made in court must exceed the amount of the original bid.<sup>14</sup> Another difference is that under the Probate Code the original bid must equal 90 percent of the appraised value of the property,<sup>15</sup> whereas under Code of Civil Procedure Section 784 there is no such requirement. A third difference is that the Probate Code contains detailed provisions regarding real estate brokers' commissions,<sup>16</sup> whereas the Code of Civil Procedure is silent on this matter. It may be that there is little reason for these differences.

If it is found that some or all of these differences should be retained, the question of whether the Code of Civil Procedure or the Probate Code governs confirmation of private partition sales should be clarified. The Code of Civil Procedure provides that private partition sales shall be "conducted" in the manner required for private sales of real property of estates.<sup>17</sup> It is not clear whether this provision makes applicable to such sales the provisions of the Probate Code regarding the confirmation of sales, or whether, on the other hand, a private partition sale should be confirmed in the manner provided by Section 784 of the Code of Civil Procedure. The latter section deals with confirmation of partition sales but is ambiguous as to whether it applies to both public and private partition sales or only to public partition sales. The question is important because, as is shown above, the provisions of the Probate Code and the Code of Civil Procedure relating to confirmation are different; it will remain important if the two sets of provisions are not made uniform.

<sup>14</sup> CAL. PROB. CODE Section 785.  
<sup>15</sup> *Id.* Section 784.

<sup>16</sup> *Id.* Section 785.  
<sup>17</sup> CAL. CODE CIV. PROC. Section 775.

Extract of Minutes, June 1959, identifying defects in partition law.

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## III. CURRENT STUDIES

A. Study No. 21 - Confirmation of Partition Sales: The Commission had before it Memorandum No. 1 (6/9/59); Memorandum No. 1-A (6/17/59) and copies of two letters from Mr. R. E. Allen, of Los Angeles (dated 6/1/59 and 6/11/59) in reply to letter from the Assistant Executive Secretary soliciting Mr. Allen's views with respect to proposed revisions to the sections of the Code of Civil Procedure governing partition actions. At the invitation of the Commission Mr. Allen was present at this portion of the meeting and made the following suggestions and comments:

1. The provisions of Code of Civil Procedure Section 752a which make the provisions relating to partition of real property applicable to the partition of personal property raise many questions, are generally unsatisfactory and should be revised.

2. Specific provision should be included in the Code (1) requiring that in every case evidence of the recordation of lis pendens be filed with the court and (2) requiring that a title report, certificate, litigation report or similar document be filed with the court evidencing the interests of all parties in the property.

3. The provisions of section 761 and 762 with respect to the holding of hearings by a referee to determine the interests of lien holders are cumbersome and inappropriate; such questions should be determined directly by the court itself.

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4. The provisions of Section 763 with respect to the determination of whether property is "so situated that partition cannot be made without great prejudice to the owners" are ambiguous and should be clarified, particularly with respect to making it clear that the court may consider other factors than physical situation (e.g. that it may take into account that the property is mortgaged) in determining whether the property can be physically partitioned.

5. Section 763 should be clarified with respect to the number of referees to be appointed; three may be desirable in a case of a physical division but one should be sufficient in case of a sale.

6. Section 772, which authorizes the court to require lien holders to exhaust other securities is undesirable and should be revised or repealed.

7. Section 777 with respect to partition sales on credit is impractical and should be repealed or revised.

8. There is no necessity for the appointment of appraisers at any stage in the partition proceedings.

9. Real estate agents are unnecessary in partition sales and provisions with respect to their appointment and commissions should not be included.

10. The present provisions with respect to the conduct of partition sales and confirmation thereof are satisfactory. The holding of a "second auction" at the confirmation proceedings after an original public sale is, in Mr. Allen's experience most satisfactory in producing

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the best price for the property.

11. There is no valid reason why provisions with respect to the bonding of referees should not be added to the code.