

## Memorandum 73-94

Subject: Study 23 - Partition Procedure

## BACKGROUND

Pursuant to the Legislature's directive to study the California law on partition and to determine whether or not revision of that law is advisable, the Commission selected Garrett H. Elmore as a consultant and asked him to prepare a background study. A copy of this study (which includes as an appendix a draft for a proposed revision of the law on partition) is attached.

## COMPREHENSIVE OR PIECEMEAL REVISION OF THE PARTITION LAW

A major policy question which the Commission must decide is whether to recommend a comprehensive revision of the present law, updating its language and structure, or whether the basic form of the old law should be preserved with needed revision being accomplished by individual, piecemeal amendments directed at specific flaws or omissions. The consultant recommends the former approach as he found the present statutory scheme to be poorly arranged, difficult to understand, and in need of substantive revision in several areas. The consultant believes that a new statute is badly needed if we are to adequately meet the demands and problems of a modern partition action. See pages 3-4 of the study memorandum.

Whichever approach is selected, the consultant recommends the following as essential changes in existing law:

(1) An optional procedure permitting one or more co-owners to acquire an undivided share at a value fixed by a referee and confirmed by the court

The consultant believes that the primary goal of a partition action should be to protect the interests of all co-owners. Allowing the co-owners

under specific conditions to have the first opportunity to purchase the property minimizes the risk of loss for all co-owners which can result if a sale is ordered and a third party makes the highest bid, and this alternative procedure also provides important tax benefits. (See study memorandum pages 4-6, and draft text Sections 777.10-777.70.)

(2) A new procedure for the partition of successive estates

The consultant recommends that cases which involve only successive estates (i.e., no current undivided interest in the property) be removed from the general partition provisions and be given special treatment. He believes there is a need for a more comprehensive and fairer treatment of this subject, and one which vests the court with authority to make various dispositions of the estates according to the circumstances and equities of the particular case. (See study memorandum pages 6-9 and draft text Sections 770.10-770.50.)

(3) New sales procedures granting the trial court broader powers to prescribe the procedures applicable to particular partition sales

In order to maximize the return to co-owners in the event of a sale, the consultant recommends a more flexible approach authorizing the court to mold the procedures to fit the circumstances of each individual sale. He believes the present "mechanical," fixed statutory approach which treats all sales alike is unrealistic and harmful to the interests of partitioning co-owners. (See study memorandum pages 9-11 and also draft text Sections 764.10-768.50.)

(4) A clearer and more detailed statement of the powers and duties of the trial court

To eliminate possible uncertainty and the need for litigation, the consultant recommends that many of the powers of the trial court be made express.

For example, the present statute does not provide a procedure for overseeing the referee in the exercise of his duties. Yet the courts routinely do this, but not uniformly. (See study memorandum pages 11-12 and draft text Sections 780.10-780.50.)

(5) Greater protection for the interests of third parties who provide services in the partition

The consultant recommends more effective provisions to protect third parties who render services as the present statute gives no assurance of reasonably prompt payment or adequate security; it seems to provide enforcement by execution as the only remedy. He proposes instead to create an inchoate lien for the value of these services and to vest the court with authority to enforce this lien before or after judgment, leaving execution as an alternative. (See study memorandum pages 12-14 and draft text Sections 785.10-785.40.)

STAFF RECOMMENDED PROVISION

In addition to the substantive changes recommended by the consultant, the staff believes that it is advisable after Pine v. Tiedt, 232 Cal. App.2d 733, 43 Cal. Rptr. 184 (1965), to clarify the fact that a co-owner's right to partition is absolute; there should be no equitable defenses to the right to partition. Express or implied in fact agreements not to partition should not be specifically enforced. Instead, other co-owners should be compensated for damage caused by breach of the agreement not to partition. As a matter of policy, the staff believes the law should never compel an unhappy co-owner to remain bound. A statute is needed to reach this result and to provide compensation for breach of agreements not to partition. Such a statute is set out as Exhibit I to this memorandum.

UNIFORMITY IN CONFIRMATION PROCEDURES UNDER THE GENERAL PARTITION LAW  
OF THE CODE OF CIVIL PROCEDURE AND UNDER THE PROBATE CODE

The Legislature also directed the Commission to determine whether the confirmation procedures for a partition sale in the Code of Civil Procedure and those in the Probate Code should be made uniform. The consultant was also asked to review this question, and he concluded that uniformity is not required nor is it desirable. In his opinion, the circumstances surrounding the two types of sales are so different that separate procedures are warranted. For example, the probate rule that sales cannot be made for less than 90 percent of appraised value should not be adopted for the general partition law as appraisal is an expensive process and requires much delay and, while it is necessary anyway in most probate situations for other reasons besides partition (e.g., to fix the statutory commissions of attorneys, and for state inheritance tax purposes), it is not a usual element of partition. To require appraisal in a partition sale would only cause delay and unnecessary expense. For more discussion of this and related points, see study memorandum pages 14-22.

The consultant does recommend a simple clarifying amendment to Section 775 of the Code of Civil Procedure to insure that the courts will not read that section as incorporating by reference probate confirmation procedure into the general partition law of private partition sales. A discussion of this point and the text of the proposed amendment are found in the study memorandum pages 21-24.

ORDER OF BUSINESS

The staff recommends a section by section analysis of the consultant's draft text as the best approach to the issues surrounding partition.

Respectfully submitted,

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Graduate Legal Assistant

EXHIBIT I

§ 753.00. Right to partition (staff proposal)

753.00. Any person entitled to partition under Section 753.10 has an absolute right to partition according to the provisions of this chapter except that the party seeking partition shall fairly compensate the other co-owners for losses caused by breach of an express or implied in fact promise not to partition.

Comment. The provision that co-owners and others entitled to partition have an absolute right to do so restates existing law. DeRoulet v. Mitchell, 70 Cal. App.2d 120, 160 P.2d 574 (1945). However, the courts have created an exception to this right where there is an express or implied agreement not to seek partition, Pine v. Tiedt, 232 Cal. App.2d 733, 43 Cal. Rptr. 184 (1965). A better solution in the case of such an agreement is found in the Uniform Partnership Act Section 38(2)(a) I-II. A co-owner should always be permitted to partition if he adequately compensates the other co-owners for breach of his express or implied in fact promise not to partition. It is not a wise public policy to compel unhappy co-owners to remain bound to each other. Moreover, the task of the courts is much reduced if equitable defenses are made expressly irrelevant to partition actions. See, Equitable and Contractual Defenses to Partition, 18 Stan. L. Rev. 1428 (1965).

## REVISION OF THE PARTITION LAW\*

\*This study was prepared for the California Law Revision Commission by Garrett H. Elmore. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study, and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

## REVISION OF THE PARTITION LAW

The California Legislature directed the Law Revision Commission to study whether or not the provisions of the Code of Civil Procedure relating to partition should be revised. In addition, the study is to include consideration of whether the provisions of the Code of Civil Procedure relating to confirmation of partition sales of real property should be made uniform with Probate Code provisions on this subject and, if not, whether there is need for a clarification as to which of these governs in the case of private sales made in the partition action.<sup>1</sup>

Part I of this report considers the general problem of revising California's partition statute, and a suggested new statute, in draft form with Comments by sections, is included as an appendix. Part II considers the questions of uniformity and need for clarification of the present partition statute, and recommends a simple amendment to the Code of Civil Procedure which will resolve any ambiguity which may be thought to exist.

### Part I. Revision of the General Partition Law

Found in that part of the Code of Civil Procedure entitled "Civil Actions" and in a division headed "Actions in Particular Cases," the California partition law has firm foundations. The common law legal remedy for severing undivided estates in real property, the writ of partition, as extended by the Statutes 31 and 32, Henry VIII, to cover joint tenants, tenants in common,

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1. Authorized by Cal. Stats. 1959, Res. Ch. 218, at 5792; see also Cal. Stats. 1956, Res. Ch. 42, at 263; 1 Cal. L. Revision Comm'n Reports, 1956 Report at 21 (1957).

and estates of inheritance became part of the common law recognized in California.<sup>2</sup> Moreover, in the Practice Act of 1851, the Legislature provided a comprehensive statutory proceeding for the judicial partition of real property. Based on in rem concepts, the procedure was designed to determine the shares of co-owners, to adjudicate the validity of encumbrances and determine the amounts due on them, to settle adverse claims to the property, and to protect minors, incompetents, and those who held vested or contingent future interests.<sup>3</sup> The nature of the statutory proceeding was early determined. In 1868 the California Supreme Court held that the statutory procedure was intended to reflect more the principles of equity, than rules of law.<sup>4</sup> Because of its comprehensive and flexible nature, the partition proceeding became a valuable procedural means of determining rights, settling interests, and providing for partition of large land holdings.<sup>5</sup>

Provisions of the Practice Act were carried forward into the Code of Civil Procedure in 1872.<sup>6</sup> During the last one hundred years, the statutory provisions have been amended with comparatively rare frequency. The relatively small body of case law interpreting the statute speaks well of its essential framework, and of the ability of trial courts, counsel and others concerned to apply its provisions to modern problems.

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2. *Gunn v. Gunn*, 102 Cal. App. 606, 607-608, 283 P. 80, 81 (1929); see also Schnebley, Power of Life Tenant or Remaindermen to Extinguish Other Interests by Judicial Process, 40 Harv. L.Rev. 30-31 (1928), and 59 Am. Jur.2d Partition 823 and cases cited.
  3. Cal. Practice Act, Cal. Stats. 1851, Ch. 5, §§ 264-308, as amended, Actions for Partition of Real [and Personal] Property, Cal. Code Civ. Proc. §§ 752-801 (West 1955)[hereinafter referred to as the "Partition Act"].
  4. *Gates v. Salmon*, 35 Cal. 576, 95 A.D. 139 (1868); *Akley v. Bassett*, 189 Cal. 625, 647, 209 P. 576, 585 (1922).
  5. E.g., *Gates v. Salmon*, 35 Cal. 576, 95 A.D. 139 (1868)(the partition of 25,000 acres by the statutory proceeding).
  6. Cal. Code Civ. Proc. §§ 752-801 (West 1955).

Nevertheless, this author believes that a restatement and revision of the California partition law is advisable. By modern-day standards, the statute is poorly arranged, lacks detail in some respects, and contains an overabundance of detail in other respects. Moreover, in the author's opinion, the statute should be revised, first, to provide different standards and greater detail when the only undivided estates are successive estates-- typically, when title to the property is held in the form of a legal life estate in a living person, and contingent remainder, and, second, to provide an optional procedure whereby, under the supervision of the court, one or more co-owners may acquire the interests of one or more other co-owners at a valuation fixed by a referee. Also, the trial court needs a more specific statement of its powers so that it is better equipped to deal with special cases and with problems which arise in modern-day real estate transactions.

It is to be recognized that, in a restatement and revision, the risk exists of inadvertently creating uncertainty and, thereby, the opportunity for litigation, particularly where valuable real property is involved. On balance, however, this author believes that, after proper study and full opportunity for comment by title insurance companies and other interested persons, this risk is outweighed by the many advantages to be gained from a better arranged and worded statute, which also will incorporate the two quasi-substantive changes mentioned. To start the process of restatement and revision, a Draft Text of a new act has been prepared and appears in an appendix to this report.

Generally, the recommended changes fall into five categories and will be discussed in this manner. Additionally, a new structure is proposed, with many minor refinements or clarifications which appear in the Draft Text.

Since Comments are given after each section therein, this report will discuss only the more substantive changes. The reader is directed to the appendix for a more complete statement of suggested changes.

A. An optional procedure should be provided for acquisition of an undivided share or shares by one or more remaining co-owners. (For Draft Text and Comments, see Article 8, Sections 777.10-777.70--Appendix!) A procedure for the acquisition by a co-owner or co-owners of the undivided interest of other co-owners desiring partition at a value fixed by a referee and confirmed by the court is an expeditious and effective means of terminating differences between co-owners. Necessarily, the procedure must be optional, i.e., dependent upon the agreement of the parties. When used, the procedure avoids the problems of whether property can be divided in kind and, if so, in what manner. More importantly, it avoids the risk of loss of the property by all co-owners when a sale is ordered, and thereby furthers the desirable social policy of maximum fairness to all co-owners who must undergo a partition. Furthermore, if a sale is ordered and a third person is the successful bidder, an income tax liability may result to the co-owners by reason of the sale. The suggested procedure, as to the "acquiring" co-owners, does not have this result.<sup>7</sup>

For reasons of workability, the suggested procedure should be limited to situations where (1) the undivided interests are undisputed or have been finally adjudicated, (2) the interests are held in absolute ownership, and (3) all co-owners agree to the procedure by writing in required form to be

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7. See 3 Rabkin & Johnson, Federal Income, Gift and Estate Taxation § 43.01 (a partition sale will normally be a taxable disposition by all the owners but, if the purchase is by some of the owners, it is treated as an acquisition of the other's interest, and the continuing owners have no taxable gain or loss).

filed with the court and to be subject to its approval under stated criteria. Furthermore, an appraisal referee or referees would be appointed by the court to make the required findings as to values and to report these findings. Then proceedings to confirm or vacate the report would be initiated, and the court, in proper cases, would order the transfer of the interests being acquired to the acquiring parties subject, of course, to the receipt of payment of the acquisition price and a proper share of partition expenses, and to the receipt of security for the unpaid balance, where this is involved.

In some jurisdictions, partition statutes provide for an "assignment" of interest by one co-owner to another who is willing to accept it. A referee or commissioner fixes the compensation according to a statutory standard.<sup>8</sup> Generally, the procedure applies only when the property cannot be divided in kind; however, the present proposal is not so limited. It may be noted that former Sections 1680 and 1681 of the California Code of Civil Procedure-- which were based on the Probate Act of 1851 and were in effect until adoption of the California Probate Code in 1931--were of the "assignment" type. Under those sections, where real property was to be distributed in probate in undivided interests to two or more heirs or devisees and the commissioner or referee found the property could not be divided without great prejudice, the court was authorized to assign "the whole" upon payment of the "true value" and subject to final confirmation by the court to one or more of the co-owners who would accept it. Another aspect of the former probate law provided for the allotment of a single tract of land which could not be equitably divided

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8. E.g., 1 Ore. Rev. Stats. § 105.20 (1971); *Billings v. Billings*, 114 Vt. 543, 49 A.2d 176, 169 A.L.R. 855 (1946); see 68 C.J.S. Partition 276-279 and cases cited.

to any of the co-owners who would accept it and pay or secure to the other co-owners such sums as the commissioners determined would "make the partition equal."<sup>9</sup>

It may be suggested that giving co-owners this alternative is largely unnecessary because the co-owners may not accomplish the same result by voluntary submission to arbitration. However, in the opinion of this author, there are significant advantages in the proposed procedure. The proceeding takes place in a pending action in which title matters are usually before the court. The proceeding is under the supervision of the trial court in the appointment of a referee or referees for valuation and in all subsequent steps, including consummation, where this action is proper. Statutory guidelines are given for the parties and the court. On the other hand, in an arbitration proceeding, the trial court has a very limited power of review, and statutory guidelines for proceedings subsequent to the arbitrators' award are meager.

B. A new and more detailed procedure should be provided for partition of property held solely in successive estates, but one which gives greater discretion to the court. (For Draft Text and Comments, see Article 5, Sections 770.10-770.50--Appendix.) In 1927, by three companion measures, the Partition Act was extended to property held only in successive estates, e.g., in life estate to one person with remainder over.<sup>10</sup> Section 752 as amended permitted the life tenant to sue for partition, and Section 763 provided that, where the property is subject to a life estate and the remainder is a

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9. Cal. Code Civ. Proc. §§ 1680-1681 (enacted 1872), as amended Cal. Prob. Code §§ 1100-1106 (West 1955).

10. See Cal. Stats. 1927, Chs. 755-757.

contingent remainder, the court must order a sale of the property.<sup>11</sup> Furthermore, Section 781 as amended provided that, in the case of a life estate with remainder over, the court may direct the entire proceeds of the sale of the interests to be paid to a trustee appointed by the court, to be invested and the income to be paid to the life tenant, and the corpus, upon termination of the life estate, to be distributed to the persons entitled thereto, as determined by the court.

The purpose of the 1927 amendments was to provide a means of "unfreezing" property held only in successive legal estates so as to recognize changed conditions.<sup>12</sup> This purpose was laudable; however, a contemporary comment criticized the amendments as written as to form, and suggested they did not give adequate consideration to the interests of remaindermen.<sup>13</sup> In the intervening years since 1927, only one decision is reported and the scope of the amendments has not been defined by judicial interpretation.<sup>14</sup>

It is recommended that the provisions of the Partition Act so added in 1927 be replaced by a more comprehensive and fairer treatment of the subject, and one which vests the court with authority to make various dispositions of the partition action according to the circumstances and equities of the particular case. Thus, the present remedy of compulsory sale of the property, upon the suit of the life tenant, and the creation of a "substitutional" trust of the sales' proceeds, is an unduly restrictive one.

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11. A later amendment of Section 763 made inapplicable the provisions for sale, so far as they are mandatory, in the case of property subject to an express trust; see Cal. Stats. 1955, Ch. 1501.
  12. Partition cannot ordinarily be had where there is no concurrent undivided estate. It has been said that only one American jurisdiction (presumably California) permits it; see *Dixon v. Dixon*, 189 Neb. 212, 202 N.W.2d 180 (1972).
  13. Estates: Partition: Sale of Remainder by the Life Tenant, 16 Cal. L. Rev. 63 (1928).
  14. *Estate of Giacomelos*, 192 Cal. App.2d 244, 13 Cal. Rptr. 245 (1961).

The New York statutory treatment of the disposition of real property held in undivided estates and of the proceeds of sale sets out detailed criteria to aid the court in its decisions and vests broad discretion in the court.<sup>15</sup>

The following changes are recommended in California law where only successive estates are present: (1) The criteria for granting partition in this situation should be made explicit in the statute, one requirement being that changed circumstances must be proved; (2) the granting of relief should be discretionary, according to the showings made, and should not be a matter of right of the life tenant or of any person, or representative of a class of persons, having a remainder interest; (3) the statute should be specific as to the authority of the court to order a sale of only part of the property, and should be flexible as to relief and the order of sale; and (4) creation of a "substitutional" trust of the proceeds should not be mandatory but rather the court should also have discretion to order determination of proportional values of the respective estates, and payment over or other disposition of the shares so determined.

In connection with the last proposal, it should be noted that some cases have held such a severance, in lieu of a substitutional trust, to be unconstitutional when applied to preexisting estates. These same decisions have upheld trust provisions for preexisting estates.<sup>16</sup> Although the constitutional question is to be recognized, a statute permitting the court in the exercise

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15. N.Y. Real Prop. Act & Proc. §§ 967, 968, 1602 et seq. (McKinney 1962).

16. E.g., Wilhite v. Rathburn, 332 Mo. 1208, 61 S.W.2d 708 (1933); see 51 Am. Jur.2d Life Tenants and Remaindermen 334-335 (1970).

of a reasonable discretion to sever successive estates by a proportionate value method should be held constitutional by California courts as disposition by proportionate value has long been a recognized part of the California Partition Act in the case of property in which there are concurrent undivided estates.<sup>17</sup> Nevertheless, in recognition of the legal question, the Draft Text (Appendix) includes in Section 3 a provision for the reestablishment of present law if the new method is held invalid as to preexisting estates.

A rather close question of policy is presented in defining the relief which may be granted, and the terms of the trust, if one is ordered established. In the successive estates situation, where typically the creator of the life estate intends to provide for his spouse or other close relative, should (1) the court be authorized to approve an exchange of real property in lieu of ordering its sale; and (2) the trustee be authorized to purchase real property for the use of the life tenant? Though each question can be supported with affirmative arguments, on balance, this author recommends against such expansion; however, it is to be recognized that the first proposition can be more strongly supported than the second.

(C). The Partition Act should contain detailed provisions as to sales procedures, and the trial court should have broad power to prescribe the procedures applicable to particular partition sales. (For Draft Text and Comments, see Article 4, Sections 764.10-768.50--Appendix.) Rather than a fixed, "mechanical" statutory treatment applicable to all partition sales regardless of circumstances, a more satisfactory and realistic approach is to empower the court to deal individually with each partition sale. Such sales are not

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17. Cal. Code Civ. Proc. §§ 778, 779 (West 1955).

easily typed and involve a wide spectrum of properties and situations. The routine sale of residence property after a dissolution of marriage is a far different situation from the sale of a manufacturing plant or of a large agricultural holding.

The goal of a partition sale should be to obtain the maximum price for the property. To this end, all tools should be available to the court to apply at its discretion. In some cases, the aid of brokers may be indicated and, therefore, conditions to encourage their aid will be appropriate. The Draft Text provides for a modified form of "gross overbidding" at court confirmation, to be applied at the court's discretion, with the court also empowered to fix, divide, and limit agents' commissions.<sup>18</sup>

Likewise, other tools--such as the power to require a minimum bid or to reject all bids and the power to require additional notice of sale (which may include advertising in regional or national publications)--should be available to the court. These devices are common in non-court sales by public officers and entities, and they have proven useful. Care must be taken not to delay unduly the partition sale since such a sale is usually a matter of "right." The Draft Text imposes limits on the use of the minimum bid and the power to reject bids.<sup>19</sup>

There is also need for the partition statute to set out procedural detail concerning other aspects of the sale. Some of this can be accomplished by incorporation of similar statutory procedures, but care must be taken to avoid ambiguous statutory references. In the opinion of this author, Probate

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18. Draft Text, § 768.20.

19. Draft Text, § 780.10(f).

Code provisions on sales of real and personal property are not suited for incorporation by reference in the Partition Act; accordingly, certain procedural provisions therein have been adapted, and appear independently in the Draft Text. On the other hand, with slight modification, procedural provisions governing execution sales may properly be incorporated by reference. For recommended adoption of the Probate Code percentage requirements for an initial in-court "overbid," see Part II.

The present Partition Act does not prescribe procedure for sales of personal property with any particularity.<sup>20</sup> The Draft Text makes reference to personal property where appropriate and deletes reference to real property where that is appropriate. Since the sale of personal property is not generally a large factor in partition actions, no attempt has been made to preserve a distinction made in the Probate Code between these two classes of property in the area of in-court "overbidding."<sup>21</sup>

D. The Partition Act should state the powers and indicate the duties of the trial court in more detail. (For Draft Text and Comments, see Article 9, Sections 780.10-780.50--Appendix.) The present act is often criticized for not expressly referring to many of the everyday procedures which occur in the course of the action. For example, there is no provision requiring a closing report and a settlement of accounts by a sale referee. An additional criticism is that the act is fragmentary. Thus, there are several references in general terms to employment of a surveyor or of a surveyor and his assistants.<sup>22</sup> The proposed statute cures these defects.

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20. Cal. Code Civ. Proc. § 752a (West 1955).

21. See Cal. Prob. Code §§ 756.5 (West 1955) (personal property), 785 (West 1955) (real property).

22. Cal. Code Civ. Proc. §§ 763, 764, 768 (West 1955).

Besides making more complete reference to "third-person" services, the Draft Text makes it the duty of the trial court to authorize or approve contracts for such services. For example, present-day employment of a surveyor can involve substantial amounts and also the question of how and when he is to be paid. The decision should not be left to the referee alone.

The present statute does not expressly provide for a procedure under which the court may instruct the referee in the performance of his duties. Yet the procedure is in common use and is a valuable tool.

In general, if the provisions herein recommended are adopted, trial courts will assume a more active role in all facets of a non-routine partition case. The proposal makes possible more court supervision of the referee, as is suggested above. Furthermore, if its orders are disobeyed, the court is given new authority to issue restraining orders or injunctions without reliance upon ordinary injunction procedure.

It should be noted, however, that, although the Draft Text states more expressly the powers of the court for clarity and to eliminate possible uncertainty, it is not intended to be an all-inclusive statement of the trial court's powers and duties. The court retains all of its inherent powers in the action, which is equitable in nature.<sup>23</sup>

E. Provisions for liens upon undivided shares for costs of partition should be made clearer and more effective. (For Draft Text and Comments, see Article 12, Sections 785.10-785.40--Appendix.) Generally, the costs of partition include fees and expenses of referees, counsel fees expended by the plaintiff or a defendant for the common benefit and "other disbursements."<sup>24</sup>

23. See note 5, supra.

24. Cal. Code Civ. Proc. § 796 (West 1955).

Included in the latter may be survey expenses, legal notice expenses, title report expenses, and a variety of items, including the expense (but not counsel fees) of settling title or determining boundaries of the property.<sup>25</sup>

The present provisions are believed unsatisfactory. They deal mainly with the court's determination of such costs, their allocation by the court, usually in proportion to the interests of the parties in the property, and their entry in the "final judgment."<sup>26</sup> Upon the latter event, they are a lien on the several shares and the judgment may be enforced by execution against such shares and against other property of the party.<sup>27</sup>

Difficulties which arise from present wording, in large part, center on the reference to entry in the final judgment and enforcement by execution.<sup>28</sup>

As has been earlier indicated, the value of surveyors' services and those of other "third persons" is often substantial. Yet the present statute gives no assurance of reasonably prompt payment or adequate security. It is not worded so clearly as to insure against a settlement of the action by the parties, after services have been rendered by "third persons." The remedy of enforcement by execution upon the shares of co-owners is not an appealing one to referees and persons providing "third-person" services. The shares may be subject to levies or liens not connected with the action. Whether the

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25. Cal. Code Civ. Proc. §§ 796, 798, 799 (West 1955).

26. Ibid.

27. Ibid.

28. E.g., Southern Cal. Title Clearing Co. v. Laws, 2 Cal. App.3d 586, 83 Cal. Rptr. 8 (1969) (Cal. Code Civ. Proc. § 796 requires ascertainment and entry in final judgment); cf. Sousa v. Sinsheimer, 62 Cal. App.2d 107, 144 P.2d 82 (1943) (in interlocutory decree for sale, costs made a lien on sales proceeds with proof to be later made).

lien is superior to such other claims is not clear. Likewise, if a dispute exists between other persons claiming costs of partition and the party charged, and an appeal is taken from that part of the final judgment, it is uncertain whether those lienholders whose claims are not in dispute can enforce the judgment pending appeal or, if a stay bond is given as part of the appeal, whether it applies to them.

More effective provisions would recognize the lien as an inchoate lien and vest the court with authority and discretion to enforce the lien, before or after final judgment, leaving the remedy of execution as an alternative.

It may be objected that such provision for an inchoate lien will affect marketable title or title insurance. If such is the case, provisions can be added protecting bona fide purchasers and encumbrancers or requiring the recording of a notice of lien for the lien to be effective against persons not parties to the action and not claimants under such lien.

The present act should be clarified also to permit the court, in proper circumstances, to declare sales' proceeds subject to the lien in question.<sup>29</sup>

F. Minor clarifications. Many clarifications and changes in wording appear in the Draft Text and Comments (Appendix).

Part II. Uniformity in Confirmation Procedures Under the General Partition Law of the Code of Civil Procedure and Under Provisions of the Probate Code--Amendment of Section 775 of the Code of Civil Procedure

Intrinsic differences exist between sales of real property in a partition action and sales of real property in a decedent's estate, so that, in the

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29. See *Southern Cal. Title Clearing Co. v. Laws*, 2 Cal. App.3d 586, 83 Cal. Rptr 8 (1969) (wording of act as to disposition of sales proceeds did not create an exception to Cal. Code Civ. Proc. § 796).

opinion of this author, adoption of the Probate Code provisions for confirmation of such sales in partition actions is neither required nor desirable. Furthermore, although Section 775 of the Code of Civil Procedure, taken by itself, contains wording which may give some support to the argument that the probate confirmation procedure is to apply in private partition sales,<sup>30</sup> the partition act, read as a whole, the legislative history of Section 784 of the Code of Civil Procedure--providing a partition confirmation procedure--and of other code sections, and established rules of statutory construction lead to the conclusion that confirmation of partition sales is governed by Section 784. However, to eliminate any ambiguity, a simple amendment is proposed to Section 775.

Discussion of the uniformity issue. The Probate Code contains somewhat extensive provisions for the procedure upon court confirmation of a real property sale, for the employment and payment of agents, and for fixing, dividing and, in some cases, limiting commissions by the court. In probate sales: (1) No private sale of real property may be confirmed for less than 90% of the appraised value;<sup>31</sup> (2) the minimum amount of the first "increased offer" in court is 10% of the first \$10,000 and 5% of amounts in excess of \$10,000, computed on the original bid returned to the court;<sup>32</sup> (3) the first "increased offer" in court and subsequent "increased offers" in court are to be considered on a "gross basis" (i.e., without regard to any commission payable to an agent under a contract with the personal representative or as a

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30. The ambiguity is in the definition of "sale" in Code of Civil Procedure Section 775 (West 1955).

31. Cal. Prob. Code § 784 (West 1955).

32. Cal. Prob. Code § 785 (West 1955).

condition of the bid);<sup>33</sup> if the sale is confirmed to an overbidder, the court is to fix the compensation of the agent producing the overbidder at an amount not to 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 limit does not apply to compensation of an agent "holding the contract" with the personal representative;<sup>34</sup> further, if the sale is confirmed on an overbid and agents have produced both the original offer and the successful overbid, the court is to allow a commission on the full amount, to be divided as follows: one-half of the commission on the original bid to the agent whose bid was returned to the court for confirmation and the balance to the agent who procured the successful overbidder;<sup>35</sup> if the successful overbidder was not procured by an agent, then the agent whose bid was originally returned to the court is to be allowed a full commission on the amount of the original bid.<sup>36</sup> Other provisions authorize a personal representative to contract with an agent or broker or a multiple group of agents or brokers to procure a purchaser, with the commission payable out of the proceeds of sale in an amount to be allowed by the court.<sup>37</sup>

In a sale of real property in a partition action the following rules govern: (1) There is generally no requirement for appraisal of the property,<sup>38</sup>

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33. Ibid.

34. Ibid.; compare with Cal. Prob. Code § 761.5 (if the original bid is "direct" but the successful overbid is by an agent, the court shall allow a commission to the agent in an amount which is reasonable compensation for services of the agent to the estate).

35. Cal. Prob. Code § 761 (West 1955).

36. Ibid.

37. Cal. Prob. Code § 760 (West 1955).

38. For a limited exception, see Cal. Prob. Code § 763 (West 1955) (site of an incorporated city or town included within the property).

and the 90% requirement of the probate confirmation procedure does not exist; (2) the minimum amount of the first "increased offer" to the court is 10% of the amount named in the return<sup>39</sup> and, although the partition act refers only to the first "increased offer," identical provisions have been construed to permit successive "increased offers" until the highest overbid is reached;<sup>40</sup> (3) there is no language relating to so-called "gross overbids" and no framework of statutory rules as to allowing, fixing, dividing and limiting agents' commissions or authorizing the employment of an agent, broker, or group of agents of brokers; however, it should be noted that, although the partition statute does not expressly provide for agents' commissions, it likewise does not forbid their payment, and it is a common practice under the present act to receive bids conditioned upon payment of the agents' commission, with judicial regulation of the amount of the commission.

Although the varying provisions concerning notice of the confirmation proceeding are of minor significance for present purposes, they are worth noting. In the probate sale, notice of a hearing must be posted at the courthouse and a copy must be served upon, or mailed to, any non-petitioning personal representative and to persons who have requested special notice, or made a formal appearance, in the probate proceeding, at least 10 days in advance of the hearing date.<sup>41</sup> In a partition action, the referee makes a written report of sale or sales to the court. Thereafter, any purchaser, the

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39. Cal. Code Civ. Proc. § 784 (West 1955).

40. Estate of Griffin, 127 Cal. 543, 544-545, 59 P. 988 (1900) (construing former Cal. Code Civ. Proc. § 1552, governing probate sales); see Sting v. Beckman, 105 Cal. App.2d 503, 233 P.2d 591 (1951) (partition sales involving successive overbids, a point not discussed); Parker v. Owen, 96 Cal. App.2d 78, 214 P.2d 417 (1950) (only 10% initial overbids in partition sales involved).

41. Cal. Prob. Code §§ 1200, 1202 (West 1955).

referee, or any party to the action, upon 10 days' notice to the other parties who have appeared, may move to confirm or set aside the reported sale or sales.<sup>42</sup>

Before discussion of the three major varying aspects of probate procedure, two general observations may be made. First, a partition proceeding is usually a contested civil action, in which the principal parties appear and are represented by counsel. Though these facts do not assure adequacy of sales' price and proper terms in every case, they are an aid to the sale referee and the court. Second, the Draft Text (Appendix) adopts the view that the trial court should have authority, in particular sales, by order in advance of sale, to make applicable a modified form of "gross overbidding" with companion provisions as to agents' commissions. Thus, the court is authorized to adopt a procedure which, in the circumstances, seems suited to providing the highest return.

The 90% of appraised value rule. In probate, this is an inflexible requirement. However, it is to be noted that appraisal of the property of a decedent's estate is required for purposes other than sale of real property.<sup>43</sup> In a partition action in California, an appraisal is required only in rare instances. In the opinion of this author, adoption of the probate rule as a fixed requirement would tend to increase expense and delay the proceeding, without real advantage. Thus, it frequently happens in probate sales that when the property is placed on the market, it will not bring 90% of appraised value,

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42. Cal. Code Civ. Proc. § 784 (West 1955).

43. For example, appraisal is needed for state inheritance tax purposes (Cal. Prob. Code § 605) and to fix the statutory commissions of the personal representative and the ordinary fees of his attorney (Cal. Prob. Code §§ 901, 910). It is also relevant for later tax purposes.

and a reappraisal is then made in the light of pending offers, to permit consummation of a pending transaction. A better procedure would permit the court, in its discretion, to prescribe a minimum bid, as proposed in the Draft Text (Appendix).

The "gross overbidding" rule; agents' commissions. The major argument in favor of the probate treatment of agents' commissions, both in the computation of in-court "overbids" and in the various provisions as to allowance of such commissions is that absence of such fixed rules diminishes the incentive of agents to procure original offers and in-court "overbids"; in turn, the amount realized on the sale in partition tends to be reduced, especially if the co-owners do not bid on the property. Furthermore, it is contended that a "net overbidding" system unduly favors investors and speculators who make direct "overbids" at court confirmation.

Whatever may be the merits of the "gross overbidding-commission" system in the repetitive and comparatively settled field of private sales of real property in probate, the normal partition sale is so different from a probate sale that to adopt the probate system as a fixed requirement for all partition sales would be unwise and often very unfair. The actual or potential interest of co-owners and others such as encumbrancers makes it difficult to analogize probate and partition sales. Not only are such persons bidders in many partition sales, but they also serve to "make the market" or as a check on price where there are third-party offers whereas heirs seldom bid in probate sales. Moreover, fairness would seem to require that the probate method of comparing in-court "overbids" should never prevail against bidding co-owners or others having a preexisting interest in the property, when they make a "direct" bid. The following example illustrates the potential danger and unfairness of applying the probate "gross overbid" formula to a partition sale.

A and B each own an undivided one-half interest in Blackacre. In a partition proceeding for Blackacre, A makes a direct offer of \$40,000 which is accepted by the referee and returned for confirmation. At the confirmation hearing, B makes a direct overbid of \$44,000, the required 10%. T, an outsider represented by an agent, then makes an overbid of \$44,150. B overbids to \$44,500. T then makes a successful overbid of \$45,000. Under the probate system, the court must allow a commission to T's agent which under these facts may not exceed one-half of the difference between the offer returned to the court and the final bid. The court allows T's agent a \$2,500 commission. In final result, A and B, the co-owners, will have "lost" their property and, since the \$2,500 is an expense of sale, they will, between them, receive \$2,000 less than one of them (B) was willing to pay.

The minimum "increased offer" rule. One aspect of the probate system should be incorporated into the partition law. A lower amount is required to make the initial in-court "overbid," i.e., 10% of the first \$10,000 and 5% of amounts in excess of \$10,000, such percentages to be applied to the amount of the offer returned to the court for confirmation. Presently, the partition statute fixes the minimum amount at a straight 10%, computed in the same manner. The lower formula of the probate system is desirable because it facilitates the making of the initial overbid when the amount in the offer returned to the court is comparatively large. The lower requirement also aids co-owners who have difficulty in raising funds. Opposed to these considerations is the fact an outsider may more easily bid against a co-owner. Nevertheless, on balance, the probate treatment is better.

In summary, except perhaps for the lower initial "increased offer" formula of the probate procedure, the confirmation procedures of the Partition Act should not be revised to adopt the more detailed provisions of the Probate Code. There are too many fundamental differences between the two

types of sales to warrant uniformity of treatment, and uniformity for its own sake is not sound policy. Moreover, the procedures of the Probate Code are now under study. Serious efforts are being made in the Legislature to reduce the degree of court supervision or participation in probate administration.<sup>44</sup> The extent of revision and whether sales' confirmation hearings will become optional or be minimized in actual use are not known at this time.

(See Draft Text and Comments (Appendix) for a more complete statement of suggested statutory provisions concerning private sales of real property and other sales.)

Discussion of the ambiguity in Section 775 of the Code of Civil Procedure.

The relevant language of Section 775 reads:<sup>45</sup>

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.

It is possible that this wording, considered alone, might be interpreted by a court to incorporate the probate confirmation procedure as it presently exists, under the rule of statutory construction that a "general reference" to a body of law in an adopting statute carries with it the adopted law as it may be changed later.<sup>46</sup>

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44. See, e.g., Cal. Senate Bill No. 1 (1973-74) (Uniform Probate Code), Assembly Bill No. 517 (1973-74) (State Bar bill for less court supervision), Assembly Bill No. 2001 (1973-74) (procedure for independent administration in smaller estates).

45. Cal. Stats. 1909, Ch. 666, § 1, now Cal. Code Civ. Proc. § 775 (West 1955).

46. E.g., Palermo v. Stockton Theatres, Inc., 32 Cal.2d 53, 59, 195 P.2d 1, 5 (1948).

The questioned wording, however, is not sufficiently clear of itself to require the result above outlined. The weakness of such an interpretation is that it ignores the Partition Act as a whole, and particularly Section 784, the legislative history of the two relevant sections of the Partition Act, and other important rules of statutory construction. Section 784 provides the procedure for confirmation of a partition sale, and the language there is without any distinction as to the type of sale.

In light of Section 784, "sale" in Section 775 should be interpreted to mean the agreement to sell returned to the court and not the court confirmation of such "sale" or a sale to a higher bidder under Section 784. The Partition Act itself gives evidence of such a meaning of "sale"; it refers to "all sales of real property made by the referees" and to an order that the property "be sold" either at public auction or private sale.<sup>47</sup> Moreover, the courts recognize that "sale" does not necessarily mean a sale completed by passage of title. In Consolidated Copperstate Lines v. Frasher, the court of appeal stated, in interpreting Section 773 of the Probate Code:<sup>48</sup>

There are many meanings of the word "sale" in common use and in accordance with the context the word may refer to the completed sale or an agreement of sale.

It is to be noted that Section 775, in subject matter, does not relate to court confirmation nor is the word "confirm" used in Section 775. To interpret "sale" broadly in this section would be to ignore the intent of the Legislature and create the manifestly absurd result of placing private partition sales under one confirmation procedure and public auction partition sales

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47. Cal. Code Civ. Proc. § 775 (West 1955).

48. Consol. Copperstate Lines v. Frasher, 141 Cal. App.2d 916, 925, 297 P.2d 692, 698 (1956).

under another, without any indication by the Legislature that it intended such a distinction.

The conclusion that the Legislature did not intend an incorporation of probate procedure by reference is strengthened by the fact that the ambiguous wording in Section 775 was added at the same time a companion measure amended the confirmation procedure in Section 784.<sup>49</sup> The failure of the Legislature at that time to refer in Section 784 to the probate confirmation procedure in case of private sales seems by itself sufficient to negate the "incorporation" argument. Moreover, subsequently, Section 784 has been amended several times without any reference to the probate procedure and without conforming it to the changes that have been made in the probate confirmation procedure.<sup>50</sup> In summary, neither in the wording of Section 784 nor in its subsequent consideration of the section has the Legislature given recognition to the fact that private partition sales are not to be governed by Section 784 but rather by the probate provisions on confirmation of private sales.

Finally, an even more difficult "incorporation by reference" problem is posed in the case of partition sales of personal property. Section 752a of the Code of Civil Procedure provides that in partition actions involving personal property "the provisions of this chapter (Partition Act) shall govern wherever applicable." The question suggested is whether the confirmation provisions of Section 784 govern, or whether recourse must be had to various sections of the Probate Code governing the confirmation, or providing for lack of need for confirmation, of sales of personal property.

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49. Cal. Stats. 1909, Ch. 666, now Cal. Code Civ. Proc. § 775; Cal. Stats. 1909, Ch. 667, now Cal. Code Civ. Proc. § 784.

50. Cal. Code Civ. Proc. § 784, amended by Cal. Stats. 1955, Ch. 1501, and Cal. Stats. 1959, Ch. 1320.

Existing case law does not discuss the problems of interpretation discussed under this heading. However, the courts have applied Section 784 without mentioning any distinction in the confirmation proceeding between private and public auction partition sales.<sup>51</sup>

The following amendment to Section 775 will remove the uncertainty:<sup>52</sup>

775. 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 made upon the notice and in the manner required in private sales of real property of estates of deceased persons. A sale at public auction or private sale shall be reported to the court pursuant to Section 784 of this code and is subject to the confirmation and other provisions of such section.

August 27, 1973

Garrett H. Elmore

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51. Parker v. Owen, 96 Cal. App.2d 78, 214 P.2d 417 (1950); Sting v. Beckman, 105 Cal. App.2d 503, 233 P.2d 591 (1951).

52. This form of amendment does not reach the problem of notice of sale and confirmation proceedings when a sale of personal property is ordered.

APPENDIX

DRAFT ACT FOR REVISION OF CHAPTER 4, TITLE 10

PART 2, CODE OF CIVIL PROCEDURE

Sec. 1. Chapter 4 (commencing with Section 752) of Title 10 of Part 2 of the Code of Civil Procedure is repealed.

Sec. 2. Chapter 4 (commencing with Section 752.10) is added to Title 10 of Part 2 of the Code of Civil Procedure, to read:

Article 1. Definitions

752.10. Unless the context otherwise requires

- (a) "Action" means the proceeding provided for by this chapter;
- (b) "Co-owner" means a person having an ownership estate in the property, real or personal, sought to be partitioned;
- (c) "Encumbrance" includes, in the case of real property, a deed of trust, mortgage and reserved title under a contract of purchase and sale, and, in the case of personal property, a security interest, as defined in the Commercial Code;
- (d) "Guardian" includes conservator and similar fiduciary;
- (e) "Ownership estate" means an estate of inheritance, for life or for years;
- (f) "Remainder" includes reversion;
- (g) "Title report" includes a preliminary title report, a policy of title insurance, a litigation report, a written guarantee as to necessary parties, an abstract of title, and a chattel lien report.

Comment. The definitions in Section 752.10 are not intended to make substantive changes. They include references to personal property. See present Section 752a, added in 1919, and referring to the general applicability of the chapter to personal property owned by several persons as co-owners.

752.20. In cases not specifically provided for, the general provisions of this chapter govern actions for the partition of personal property, as nearly as they apply.

Comment. Based on second sentence of present Section 752a.

#### Article 2. Action For Partition-General

753.10. An action for the partition of property may be maintained

(a) By one or more co-owners when the property or ownership estates therein are owned by several persons as joint tenants or tenants in common; or

(b) As provided in Article 5 (commencing with Section 770.10) when the ownership estates consist solely of successive estates; or

(c) By the owner or holder of a lien on real property when the real property is subject to a lien which is on a parity with that on which the owner's title is based.

Comment. Subdivisions (a) and (c) continue without substantive change corresponding provisions of present Section 752. In subdivision (a), "co-owners" and "ownership estates" are to be read with subdivisions (b) and (e) of new Section 752.10 (definitions). In subdivision (a) "property" is used in contrast to "ownership estates" to denote property which is the subject to absolute ownership.

Subdivision (b) makes a substantive change in present Section 752 by removing from general partition provisions cases in which there is no concurrent undivided ownership interest in the property, but only successive estates. These cases are subject to a different procedure, as set forth in new Article 5, infra. Example: A parcel of real property is transferred to A for life, remainder to B or if he predecease A, to his issue per stirpes.

753.20. (a) If several persons own condominiums in a condominium project, as such terms are defined in Sections 783 and 1350 of the Civil Code, one or more may maintain an action for partition by sale of the entire project, as if the owners of all condominiums in the project were tenants in common in the entire project in the same proportions as their interests in common areas.

(b) Such partition shall be made only upon the showing (i) within three years after damage to or destruction of the project which renders a material part thereof unfit for its use prior thereto, the project has not been rebuilt or repaired substantially to its state prior to its damage or destruction, or, (ii) three-fourths or more of the project has been destroyed or substantially damaged, and condominium owners holding a 50 percent interest, or more, in the common areas are opposed to repair or restoration of the project, or, (iii) the project has been in existence in excess of 50 years, is obsolete and uneconomic, and condominium owners holding a 50 percent interest, or more, in the common areas are opposed to repair or restoration of the project, or (iv) conditions for such a partition by sale set forth in restrictions entered into with respect to such project pursuant to the provisions of Chapter 1 (commencing with Section 1350), Title 6, Part 4, Division 2 of the Civil Code have been met.

Comment. Section 753.20 continues present Section 752b without substantive change.

753.30. It is not necessary to join as defendants or set forth the interests of

(a) Persons whose only interest is that of a lessee, royalty-owner, lessor-owner of other real property in the community, unit or pooled area, or working interest owner, or persons claiming under them, when the property is subject to a lease, community lease, unit agreement or other pooling arrangement with respect to oil or gas or both, but no sale or judgment shall affect the interests of such persons not made defendants;

(b) Persons having a conveyance of, or claiming an encumbrance or lien on the property, or some part of it, unless such conveyance, encumbrance or lien appears of record or is known to the plaintiff.

Comment. Section 753.30 continues present Section 753.1 without substantive change, in subdivision (a). Section 753.30 continues present Section 754, without substantive change, in subdivision (b). "Encumbrance" has been added for technical clarity. "(O)r is known to the plaintiff" is added, to reflect interpretation of the present Act that a plaintiff having knowledge of a defendant's lien is required to set it forth. See Stewart v. Abernathy, 62 Cal. App.2d 429, 432, 144 P.2d 844, (1944).

754.10. Subject to Section 753.30 and except as otherwise required for a particular action, the complaint shall state:

(a) The real property involved, by particular description and by street address or common designation, the personal property involved, and the usual location of tangible property;

(b) Plaintiff's undivided ownership estate or estates, and any other right, title or interest in, or encumbrance or lien on, the property, owned, held or claimed by him;

(c) So far as known to the plaintiff, the other undivided ownership estates in, and every other right, title or interest in or on the property, including liens and encumbrances, owned, held or claimed by persons other than the plaintiff.

Comment. Section 754.10 continues, but in more detail, the provisions of the first part of present Section 753.

754.20. When an ownership is uncertain by reason of a limitation such as a transfer to a member or members of a designated class who are not ascertained or who are unborn, a transfer by way of contingent remainder, or vested remainder subject to defeasance, or executory devise, or similar disposition, or if the identity of the owner or extent of his share or interest is unknown, the complaint shall state, so far as known to the plaintiff (i) the relevant facts, in brief, (ii) the names and ages, and the legal disability, if any, of the persons in being who would be entitled to ownership of the

estate or other interest, if the event or contingency upon which their estate or right depends had occurred immediately prior to the commencement of the action.

Comment. Section 754.20 is based in part upon principles stated in present Section 753. However, Section 754.20 is substantially different. It requires more explicit pleading to aid the court and parties in determining (i) issues as to indispensable parties; (ii) the need for or propriety of appointing one or more guardians ad litem for "unknown," "unborn," or "unascertained" persons pursuant to Section 373.5 of the Code of Civil Procedure, or appointing a guardian ad litem for a minor or incompetent person or persons who are individual defendants, pursuant to Sections 372 and 373 of the Code of Civil Procedure.

If the plaintiff alleges that he has no information as to the owners or presumptive owners, or of the extent of their shares or interests, the basis for such lack of information should be stated, so the court may determine whether further steps should be taken to assure the presence or representation of all indispensable parties. Wording in present Section 753 referring to the nonjoinder of "parties" unknown or whose share or interest is uncertain or contingent, or dependent upon executory devise, or by way of contingent remainder ("so that such parties cannot be named") is omitted. That wording can be taken to imply that the presence of persons in being having such interests is not required because, first, such persons are brought into the action by summons directed to "unknown owners," and, second, the court itself is required to make provisions for the protection of such interests and their owners. In practice, the quoted words are not taken at such literal meaning.

754.30. In cases specified in Section 754.20 the court shall make such order or orders for joinder of parties defendant, for appointment of a guardian or guardians ad litem pursuant to Section 373.5 and for appointment of a guardian ad litem or guardians ad litem pursuant to Sections 372 and 373 as are necessary or proper.

Comment. Section 754.30 is new. Though the subject is covered by the general requirements of Section 389 of the Code of Civil Procedure, a specific statement for partition actions seems desirable.

Section 754.30 gives the court flexibility in determining what steps will satisfy the requirement for joinder of parties and representation of their interests according to the circumstances of the case.

For example, it seems proper for the court to apply principles of virtual representation or to appoint guardians ad litem for a class of persons, as provided in Section 373.5 of the Code of Civil Procedure, or both. Additionally, the Act elsewhere contains provisions for the protection of the interests of so-called "unknown owners" (persons not in being or who are unascertained or unknown) by decree or order. See generally Mabry v. Scott, 51 Cal. App.2d 245, 124 P.2d 659 (1942), cert. denied, 317 U.S. 670, 87 L. ed 538, 63 S. Ct. 75 (1942); Los Angeles County v. Winans, 13 Cal. App. 234, 109 P. 640 (1910); Garside v. Garside, 80 Cal. App.2d 318, 181 P.2d 665 (1947).

754.40. The plaintiff may name as defendants, in addition to persons who appear of record or are known to plaintiff to have or claim an interest in the property, "All Persons Unknown" claiming any title or interest in the property," and "The heirs and devisees of \_\_\_\_\_ (name of deceased claimant), deceased, and all persons claiming by, through, or under said decedent," and a decedent, as provided in Section 1245.3 of this code. The provisions of Section 1245.3, insofar as they relate to jurisdiction, process and effect of the judgment, shall apply, as nearly as may be. If the action involves personal property, reference shall be made to legatees of the decedent.

Comment. Section 754.40 is new. Section 1245.3 of the Code of Civil Procedure contains procedures for naming and serving unknown defendants in an eminent domain action. The second sentence of Section 754.40 is intended to exclude the second paragraph of Section 1245.3 which relates to determining the value of the interest or damages of unknown defendants and payment of proceeds to the clerk. This phase is separately provided for herein. Since the partition action may involve personal property, in whole or in part, the last sentence of Section 754.40 is added.

755.10. Immediately after filing the complaint in the superior court, the plaintiff must record in the office of every county in which any real property is situated a notice of the pendency of the action, containing the names of the parties, so far as known, and a statement of any defendants sued by general designation pursuant to Section 754.40, the object of the action, and a description of the property to be affected thereby. If other real property is thereafter included in the action, the plaintiff must promptly record a supplemental notice

in like form. From the time of filing any such notice for record all persons shall be deemed to have notice of the pendency of the action.

Comment. Section 755.10 is based on present Section 755. However, the second sentence, relating to real property which thereafter may be included is new. Also, the notice will be required to refer to defendants sued by general designation pursuant to Section 754.40. Since the partition action is quasi in rem, it does not seem appropriate to include qualifying wording now found in the general lis pendens section (CCP 409) that a purchaser or encumbrancer is placed upon notice only of the pendency of the action against "parties designated by their true names."

755.20. If the notice required by Section 755.10 is not filed for record, the court, upon motion of a party, or upon its own motion, may stay the action until the notice is so filed, and may order the plaintiff, or another party on behalf of plaintiff, to file the notice at plaintiff's expense.

Comment. Section 755.20 is new. The recording of the lis pendens is an essential step in the partition action. Prompt filing of the notice for record enables the court to deal with the title with certainty. The court should be authorized to take steps to insure that the notice is filed.

756.10. The summons shall contain the names of the parties, including parties sued by general designation pursuant to Section 754.40, and a description of the property sought to be partitioned. Otherwise, it shall be in the form of a summons in civil actions.

Comment. Section 756.10 is changed in wording from present Section 756. The reference to "parties sued by general designation pursuant to Section 754.40" is intended to supplant wording in Section 756 that when the complaint shows that a person has or claims an interest in or lien upon the property whose name is unknown to the plaintiff, the summons must also be directed to all persons unknown who have or claim any interest in or lien upon the property. Wording in Section 756 that the summons must be directed to all of the persons named as defendants is omitted, in view of Section 756.20, infra. See also Comment under Section 758.10, infra.

756.20. A summons may be issued which contains only the names of the defendants to be served therewith and a description of only the property

sought to be partitioned against such defendants. Judgment based on failure to appear and answer after service of such summons shall be conclusive against such defendants in respect only to the property described in such summons.

Comment. Section 756.20 is new. It is based on present Section 1245.2 of the Code of Civil Procedure (eminent domain). If there are unknown parties and several parcels of real property, it should not be required that the published summons include a description of all parcels.

757.10. The summons shall be served upon known defendants in the manner provided by Article 3 (commencing with Section 415.10) of Chapter 4 of Title 10 of this code. Defendants sued by general designation pursuant to Section 754.40 shall be served by posting and publication, upon the showing and order of court, and in the manner provided in Section 1245.3 of this code, except that publication shall be made pursuant to Section 6064 of the Government Code in a newspaper of general circulation in the county in which is located the property, or part thereof, in which the defendant to be served has or may have an interest or claim, or, if none, in a newspaper of general circulation in an adjoining county, to be designated in the order. When publication of summons is ordered as to a known party, pursuant to Section 415.50 of this code, the published summons shall include the description of the property set forth in the summons.

Comment. Section 757.10 replaces present Section 757. The new section provides more detail than Section 757. By incorporating Section 1245.3 (eminent domain), Section 757.10 in effect adds the requirement of posting to publication. The wording beginning "except that" is believed desirable to avoid uncertainty both as to the county of publication and as to when service of summons by publication is complete. The last sentence is a modification of the last sentence of present Section 757, to reflect that under new Section 756.20 the summons may be directed to only some of the defendants.

758.10. If the defendant fails to answer within the time allowed by law, he is deemed to admit and adopt the allegations of the complaint. Otherwise,

he shall controvert such of the allegations of the complaint as he does not wish to be taken as admitted, and shall set forth his estate or interest in the property, and if he claims an encumbrance or lien thereon, he shall state the date and character of the encumbrance or lien and the amount remaining due, and whether he has any additional security therefor, and if so, its nature and extent. If he fails to disclose such additional security, he must be deemed to have waived his encumbrance or lien on the property to be partitioned.

Comment. Section 758.10 is substantially the same as present Section 758. The wording thus carried forward is believed to have significance when a party fails to answer, or fails to set forth his estate or interest or his lien and data relating thereto. See Stewart v. Abernathy, 62 Cal. App.2d 429, 144 P.2d 844 (1944). Compare Section 751 of the Code of Civil Procedure, requiring the court, in a quiet title action based on adverse possession, to take evidence of plaintiff's title, and prohibiting judgment by default. See also Section 751.1 of the Code of Civil Procedure.

If this section is to be retained in present form, it is suggested consideration be given to amplifying the information contained in the summons (Section 756.10, supra.) by requiring the partition summons to contain a notation, substantially as follows:

This action is one for the partition of property. If you have or claim an interest in, or any lien or encumbrance on, the property, or any part, upon proper service of this summons upon you, you must appear and make a legal response to the complaint, to avoid prejudice to, or loss of rights.

759.10. Except as otherwise provided in, or inconsistent with the purposes of, this chapter, the statutes and the rules of the Judicial Council governing practice and procedure in civil actions generally shall apply.

Comment. Section 759.10 is new. For similar expressions, see, e.g., Sections 1256, 1256.1 and 1257 of the Code of Civil Procedure (eminent domain), and Section 1233 of the Probate Code.

759.20. An action for partition is equitable in nature. The provisions of this chapter shall be liberally construed in aid of the court's jurisdiction.

Comment. Section 759.20 is new. Though California cases have repeatedly emphasized the equitable nature of the statutory proceeding, a legislative declaration, as above, will tend to avoid or minimize technical attacks upon orders or judgments, on the ground that the Act itself is the precise measure of the court's power, i.e., that the court has jurisdiction only within the framework of the specific statutory provisions.

### Article 3

#### Mode of Partition-Partition By Division

760.10. Except as otherwise provided by statute, the property shall be partitioned by division pursuant to this article, unless it appears by the evidence or a referee's report that a partition by division cannot be had without great prejudice to the co-owners.

Comment. Section 760.10 is new in wording. It continues the general principle stated in present Section 763, first sentence (real property) and present Section 752a (personal property) that partition in kind is required, unless such partition cannot be made without great prejudice to the co-owners. However, wording added to Section 763 in 1927 that partition by sale may be required by a life tenant when the property is subject to a contingent remainder is omitted, since the subject of successive estates is separately covered. See under Article 5, infra.

Section 760.10 derives certain wording ("a partition cannot be had . . .") from present Section 752a, rather than following wording in present Section 763 ("the property . . . is so situated that partition cannot be made . . .") on the ground the former is a more precise statement.

Section 760.10 omits certain wording found in Section 763 ("the property or any part of it is so situated . . ."), on the ground that reference to "part" of the property is ambiguous and the subject should be more specifically treated. See Sections 761.50 and 764.30, infra.

Section 760.10 adds wording making clear that an order for sale, rather than partition in kind, may be based upon a referee's report. Present Section 763, first sentence, refers to "evidence." It does not seem to be advisable to add a reference to judicial notice. Such a reference could be misleading. If, for example, a city lot is almost wholly occupied by a dwelling or apartment house, so that partition in kind is impracticable, that fact can be easily established by brief evidence, admissions in pleadings or a stipulation of fact.

760.20. The power of the court to order partition by division or by sale is not limited by allegations or admissions in the pleadings.

Comment. Section 760.20 is a more complete statement of provisions found in present Section 763, first sentence ("whether alleged in the complaint or not").

760.30. Unless another mode of partition is required or permitted by statute, upon the requisite proofs being made, the court shall order partition by division according to the respective rights of the co-owners as ascertained by the court, and designate the portion to remain undivided for co-owners whose interests remain unknown, or are not ascertained.

Comment. Section 760.30 continues without substantive change comparable provisions in present Section 763, first paragraph. The words "upon requisite proofs being made" are retained.

764.40. The court shall appoint three referees or, with the consent of the parties, one referee who shall have all the powers and perform the duties of three referees to make the division.

Comment. Section 760.30 continues without substantive change comparable provisions of present Section 763, first sentence. Other provisions as to the appointment of referees for division or sale are set forth in Sections 764.10 and 764.20, infra.

761.10. In partition by division, the referees shall divide the property, and allot the several portions thereof to the respective co-owners, quantity and quality relatively considered, according to the respective rights of the parties as determined by the court pursuant to this chapter, designating the several portions by proper landmarks, and, with the approval of the court, may engage the services of a surveyor with the necessary assistants to aid them.

Comment. Section 761.10 continues, without substantive change comparable provisions in present Section 764, first sentence, except that a requirement ~~for approval~~ by the court, before a surveyor is engaged by the referees is added. Amounts involved in such services may be substantial, and means of payment may present a problem. Hence, the new requirement is added for court approval.

761.20. In partition by division, whenever the same can be done without material injury to the rights and interests of other co-owners, the referees shall

(a) Allot to a purchaser, his heirs or assigns, the land described as a specific tract by metes and bounds in a deed of conveyance executed by one or more of the co-owners, purporting to convey the whole title to the specific tract to the purchaser in fee and in severalty, or take such other action as will make such deed effective as a conveyance of the whole title to the specific tract;

(b) Allot to each co-owner lands which embrace, so far as practicable, improvements which he has made for himself, the value of such improvements to be disregarded in making the allotment.

Comment. Section 761.20, sub-paragraphs (a) and (b), continue without substantive change comparable provisions in the fourth and fifth sentences, respectively, of present Section 764. In sub-paragraph (b) of Section 761.20, the provisions in the fifth sentence of Section 764 are re-worded to express the intent more clearly, i.e., the improvements referred to are those made by a co-owner for his benefit, and not for the common benefit, and the word "valuation" has been omitted, since, generally, there is no requirement for a valuation of parcels or sub-parcels in a partition by division.

761.30. In partition by division, the referees shall make determinations and recommendations as to ways, roads, streets and easements required by Section 782.30.

Comment. Section 761.30 is a reference section only.

761.40. In partition by division, the referees may recommend, and the court may adjudge, compensation to be made by one co-owner to another, but such compensation shall not be required to be made by unknown co-owners, nor by a minor unless it appears that the minor has sufficient personal property for that purpose and that his interest will be promoted thereby.

Comment. Section 761.40 continues without substantive change present Section 792, first sentence. The second sentence of Section 792 ("(I)n all cases the court has power to make compensatory adjustment . . . according to the ordinary principles of equity") is placed in Section 780.50, infra.

761.50. When part of a parcel of real property is ordered partitioned by sale, as provided in Section 764.30, the remainder shall be partitioned by division, as provided in this article.

Comment. Section 761.50 is new. It is a conforming section to new Section 764.30, infra.

762.10. Upon division of the property, the referees shall make a report of their proceedings, specifying the manner in which they have executed their trust, and describing the property divided, the shares allotted to each party, with a particular description of each share, any compensatory adjustment recommended, and any determination and recommendations as to ways, roads, streets and easements pursuant to Section 782.30. Any party, upon 10 days' notice to the other parties who have appeared, may move the court to confirm, change, modify or set aside such report. The referees, upon 10 days' notice to the parties who have appeared, may move the court to confirm the report.

Comment. Section 762.10 continues comparable provisions in present Section 765 with the following changes: (1) specific reference is made to any recommendations of the referees as to compensatory adjustments or as to ways, roads, streets and easements; (2) the referees themselves may move to confirm the report. See present Section 784 (sale).

762.20. The court may confirm, change, modify or set aside the report, and, if necessary, appoint new referees. Upon the report being confirmed, judgment shall be entered that such partition be effectual forever. The judgment is binding and conclusive as provided in Article 11 (commencing with Section 783.10).

Comment. Section 762.20 continues without substantive change comparable provisions in present Section 766. Provisions in Section 766 which specify in detail the manner in which the judgment is binding are replaced by similar provisions in new Section 783.20.

#### Article 4

#### Partition By Sale

764.10. When partition by sale is or may be required, the court shall appoint one referee, or with the consent of the co-owners, three referees for that purpose.

Comment. Section 764.10 is new. It establishes one sale referee as the norm. A sale conducted by three referees is cumbersome, though it may be desirable in unusual cases when the co-owners agree. On interpretation of present statutory provisions, see Hughes v. Devlin, 23 Cal. 501 (1863)(upholding power of court to appoint one referee); Ahr v. Ahr, 153 Cal. App.2d 1, 314 P. 95 (1957)(refusing on appeal to consider question because no objection to one referee was made at the trial); compare Parmelee v. Brainard, 62 Cal. App.2d 182, 144 P.2d 381 (1944)(alternative ground of reversal, on appeal, that one referee was appointed for sale, without citation of Hughes decision).

764.20. The same person or persons may be appointed as referee or referees for division and sale or a different person or persons may be appointed for the respective functions or one of three referees may be appointed to act in both capacities.

Comment. Section 764.20 is new. Its purpose is to give the court flexibility in appointing referees for division or for sale or both.

764.30. When a tract of land includes land which is of a special nature because of location, use classification, improvements or other reason and which cannot be partitioned by division without great prejudice to the co-owners, and the remainder may be partitioned without such prejudice, the land which is of a special nature may be ordered severed and sold.

Comment. Section 764.30 is new. It replaces general wording in present Section 763 that if it appears "any part" of the property is so situated that it cannot be partitioned without great prejudice to the owners, the court may order a sale of "the property." Section 764.30 may be at least partially at variance with expressions in East Shore Co. v. Richmond Belt Ry., 172 Cal. 174, 155 P. 999 (1916), to the effect that if some part of the common lands is of far more value than other parts, the referees can take these matters into account in making the partition. The rule stated in Section 764.30 is believed more consistent with the basic principle of partition in kind. It avoids the unfairness of awarding readily vendible property of small area to Co-owner A and awarding a large area of unimproved property which is not readily vendible to Co-owner B. However, there may be cases where the tract consists of "unit" property and the proposed rule would not apply.

765.10. Except as otherwise provided by statute, a sale of property, real or personal, shall be at public auction or by private sale, as may be designated by the court, or, if the court does not designate, as the referee in his discretion may determine.

Comment. Section 765.10 is new. It permits the court to designate the type of sale; otherwise the matter is one for the discretion of the referee. Present Section 775 refers to a sale at public auction or at private sale, as the referee shall judge to be most beneficial to all parties interested.

765.20. Items of personal property not part of a unit sale may be sold separately or as a lot or lots, as the court may direct or, if the court does not direct, as the referee in his discretion may determine.

Comment. Section 765.20 is new. The present Act has no provisions on this subject.

765.30. Unless they are ordered sold as a unit, several known lots or parcels of real property shall be sold separately.

Comment. Section 765.30 is new, but states the principle of present Section 782 that "(I)f the premises consist of distinct farms or lots, they must be sold separately." The words "several known lots or parcels" are derived from the execution statutes. See Section 692 of the Code of Civil Procedure. The words do not necessarily refer to legal descriptions of tracts or lots. If the referee is in doubt as to how to proceed under this section or the two preceding sections, he may petition the court for instructions.

765.40. When real and personal property is ordered sold as a unit, it shall be sold under one bid.

Comment. Section 765.40 is new. See generally Section 745.5 of the Probate Code, referring to sale under "one bid."

766.10. Except as otherwise provided by statute, the sale shall be upon the following notice:

(a) In the case of real property or a leasehold estate therein, or a sale of unit property in which is included real property or such a leasehold estate, by publication and posting of notice of sale in the manner required for the sale of real property upon execution;

(b) In case of personal property not included in unit property, by posting of notice of sale in the manner required for sale of like property upon execution;

(c) In either case, upon such additional notice as the court may order.

Comment. Section 766.10 is new. With succeeding sections, it replaces present Section 775, which contains an unsatisfactory reference to procedure in decedents' estates for a private sale of real property. The provisions as to notice of sale upon execution are definite, both for real and personal property. Section 766.10 incorporates only the publication and posting provisions of the execution statutes. See Section 692 of the Code of Civil Procedure. It does not appear necessary or desirable to add provisions for delivering or mailing notice of sale to the co-owners. Such persons have means of keeping informed. Upon a balancing of interests, even a "courtesy" notice provision appears inadvisable, in view of the quasi in rem nature of the judgment. In some types of sales, the court may deem it desirable to order other types of notice, such as display or classified advertisements.

Section 766.10 does not include provisions governing sales in decedents' estates which permit the court to shorten publication time in case of a private sale of real property, to shorten time for notice of sale of personal property, or to dispense with published notice of sale if the real property is valued at \$1,000, or less. See Probate Code Sections 772, 780, 782. Such provisions are not deemed sufficiently important in partition sales.

766.20. In case of private sale, the notice shall state the date on or after which the sale will be made and a place of business of the referee or his attorney at which written offers may be left. In case of sale at public auction or private sale, the notice shall contain a brief reference to the principal terms of sale; as applicable, including but not limited to, the following: minimum bid, right to reject all bids, terms of a credit, any prior estate, right, claim, encumbrance or lien subject to which title will be transferred, escrow and title insurance expenses, and procedure as to increased offers at court confirmation and agents' commissions, as provided in Section 768.20.

In lieu thereof, the notice may refer to an order of court or to a written statement setting forth such matters which may be inspected at a place of business above mentioned.

Comment. Section 766.20 is new. It is intended to provide a meaningful notice of sale, in a practical manner. In real property sales in decedents' estates, the published notice includes some of the matters listed, upon occasion, as a voluntary practice by fiduciaries. For legal requirements in such sales, see Sections 772, 780, 782 of the Probate Code. However, the partition sale procedure differs from probate sale procedure. More detailed information is desirable. The present Act is more general, i.e., "In all . . . sales . . . the terms must be made known at the time" (Section 782); in a sale at public auction, the notice "must state the terms of sale," and, if the property "is to be sold subject to a prior estate, charge or lien, that must be stated in the notice." (Present Section 775.)

766.30. If the property to be sold is

- (a) Perishable property or personal property which will depreciate in value if not disposed of promptly or which will incur loss by being kept; or
- (b) A stock, bond, voting trust certificate, stock warrant or subscription right, or a land trust certificate, certificate of beneficial interest in trust, investment trust certificate, mortgage participation certificate, or any other security, or a certificate of deposit for any thereof.

it may be ordered sold upon such notice and conditions, if any, as the court may prescribe. Title shall pass without court confirmation, unless the court shall otherwise order. If the property is sold without the need for court confirmation, the referee shall be responsible for the actual value until, after return and proper showing, the court shall approve the sale.

Comment. Section 766.30 is new. It follows, in part, Sections 770 and 771 of the Probate Code. However, the court is authorized to require court confirmation. When time permits, court confirmation will eliminate the potential liability of the referee stated in the last sentence. The sale of a security will not be usual in a partition action. The provisions of paragraph (b), above, are more general than corresponding provisions of Section 771 of the Probate Code.

766.40. A sale at public auction shall be conducted at the place specified by court order, or, if none, in a county in which the real property, or part thereof, is situated, or, if the sale does not involve real property, in a county in which the personal property, or part thereof, is situated. The sale may be postponed by the referee by public declaration, as provided for sales upon execution. Unless required by court order, personal property need not be present at the sale.

Comment. Section 766.40 is new. It provides procedural detail for sales at public auction. Generally, it follows execution procedure, except for the last sentence.

766.50. If a co-owner or a person entitled to have his encumbrance or lien paid out of the proceeds of sale becomes a purchaser, the referee may take his receipt for such of the proceeds as belong to him upon his giving security, or making arrangements satisfactory to the referee, for payment of amounts which are or may become due from him on account of expenses of sale, general costs of the action and costs of the reference.

Comment. Section 766.20 is new in wording, and provides expressly for assurances as to payment of the bidder's share of expenses and costs, some of which will not have been determined at the time of sale in many instances. Present Section 786 is generally to the same effect, but does not include wording as to security for expenses and costs.

766.60. Except as provided in Section 766.30, title to the property sold shall not pass until confirmation by the court.

comment. Section 766.60 is new but non-substantive.

767.10. After making a sale or sales, the referee shall report the same in writing to the court. For each sale, the report shall include (i) a description of the property sold, (ii) the purchaser's name, (iii) the purchase price and manner of payment, (iv) other terms and conditions of the sale, including, if any, the security taken for the purchase price, (v) any amounts payable to encumbrancers and lienors, (vi) a statement as to contractual or other arrangements or conditions as to agents' commissions, (vii) recommendations as to ways, roads, streets and easements pursuant to Section 782.30, and (viii) other material facts relevant to the sale and the confirmation proceeding.

Comment. Section 767.10 is based, in part, upon present Section 784, first and second sentences. However, more detail is specified, i.e., items (v) through (viii), inclusive.

767.20. A purchaser, the referee, or any party who has appeared upon 10 days' notice to the other parties who have appeared, and also to the purchaser and referee, if such person is not the moving party, may move the court to confirm or set aside the sale or sales.

Comment. Section 767.20 continues without substantive change present Section 784, third sentence.

768.10. Upon the hearing, the court shall examine the report and witnesses in relation to the same. If it appears the proceedings were unfair or the sum bid is disproportionate to the value, or if it appears that a sum exceeding such bid by at least 10 percent on the first \$10,000, and 5 percent of the amount in excess of \$10,000, determined after a reasonable allowance for expenses of a new sale, may be obtained upon a new sale, the court may vacate the sale and order another to be had, of which notice shall be given, and the sale conducted as if no previous sale had taken place.

If, upon the hearing, an offer exceeding the amount named in the report by at least 10 percent on the first \$10,000, and 5 percent of the amount in excess of \$10,000 is made to the court, in writing, by a responsible bidder, it is in the discretion of the court to accept such offer and confirm the bid to such person, or to order a new sale. If more than one such offer is made to the court, in writing, by a responsible person, it is in the discretion of the court to accept the highest increased offer and to confirm the bid to such person, or to order a new sale.

Comment. Section 768.10 is based upon present Section 784, fourth and fifth sentences, with the following changes: (1) In both paragraphs, the 10%-5% formula is used, in place of the present 10% formula. No distinction is made in this respect between sales of real and personal property. Compare Sections 756.5 and 785 of the Probate Code. (2) In the first paragraph, second sentence, following the words "disproportionate to the value," the word "and" is changed to "or"; the words "determined after a reasonable allowance for expenses of a new sale" are substituted for "exclusive of the expenses of a new sale." The latter words have been declared to lack certainty in this context. See Estate of Naftzer, 24 Cal.2d 595, 150 P.2d 873 (1949).

The new wording is intended to enlarge the discretion of the court to order a new sale, by permitting such order where it appears probable that a new sale, after a reasonable allowance for expenses of a new sale, would bring more than the stated percentage increase, though no firm offer be in hand. To an extent this ground overlaps another ground ("the sum is disproportionate to the value"). This latter ground can be given effect when there is a showing of gross disparity.

The last sentence of the second paragraph is added for completeness. It is believed to state present law. See Estate of Griffin, 127 Cal. 543, 544-545 (1900)(construing former Section 1552 of the Code of Civil Procedure, governing probate sales); Sting v. Beckman, 105 Cal. App.2d 503, 233 P.2d 591 (1951) (partition sales involving successive overbids, a point not discussed).

768.20. (a) This section applies when, in advance of sale, the court shall have so ordered, or the parties shall have so agreed.

(b) In a sale governed by this section, the amount of an increased offer in court shall be determined without regard to agents' commissions, if any, and the commissions payable on account of the sale shall be fixed by the court, and shall be divided or limited, as provided in any such instance, for private sales of real property in decedents' estates, except that if an original offer or an increased offer is made to the court by a co-owner, encumbrancer or lienor not represented by an agent, the amount of an increased offer in court made by one who is not such co-owner, encumbrancer or lienor shall be determined with regard to agents' commissions, if any, payable on account of the sale.

Comment. Section 368.20 is new. It provides a flexible procedure whereby the court may order, or the parties in advance of the sale may agree, that the procedure in private sales of real property in decedents' estates shall apply to the sale, with one modification. That modification, stated in the last clause of subdivision (b), makes inapplicable the "gross overbidding" rule when the original or an increased offer to the court is a "direct" offer of a co-owner, encumbrancer or lienor.

The rule takes cognizance of two important factors, first, the legitimate interests of co-owners, encumbrancers and lienors in preserving their property or contract rights by bidding in the property at what essentially is a forced sale, and in not being forced to take proceeds or a share of proceeds lesser in amount than they are willing to pay; second, certain types of property to be sold at partition sale, and certain indicated situations, lend themselves to adoption of the probate sale method, modified as above.

This approach better serves the ends of justice than a fixed adoption of the probate sale procedure. The latter, even with limitations on commissions, can result in less "net" than a direct offer or increased offer.

Though there is no reported California case, it is believed that presently the court, sitting as a court of equity, has authority to accept increased offers on a "net overbid" basis (see, generally, Estate of Cole, 124 Cal. App.2d 615, 269 P.2d 739 (1954)) and to fix and, where necessary, limit and divide agents' commissions.

Statutory provisions, however, are desirable, so that when the procedure is availed of under subdivision (a), there will be established rules as to agents' commissions ordered in advance of sale. For various statutory provisions as to agents' commissions in private sales of real property in probate, see Sections 760, 761, 761.5 and 785 of the Probate Code.

768.30. Upon confirmation of a sale, the court shall order the referee to execute a conveyance or other instrument of transfer, as may be required, and to take securities pursuant to the sale. The order may direct the referee respecting the disposition of the proceeds of sale. A conveyance of real property shall be recorded in each county in which the property or part is situated. The conveyance or transfer pursuant to the order is a bar to all persons interested in the property, as provided in Article 11 (commencing with Section 783.10).

Comment. Section 768.30 continues without substantive change present Section 785 (first and second sentences) and part of present Section 787. The remaining part of Section 787 is covered, without detail, in a general section (Section 783.10, infra).

768.40. If the purchaser, after confirmation of the sale, refuses to pay the amount of his bid, the referee may again sell the property at any time to the highest bidder. If any loss is occasioned thereby, the referee may recover the amount of such loss and costs and expenses incurred, including a reasonable attorney's fee, from the bidder so refusing, or the referee, without making a re-sale, may maintain an action against the purchaser and, if he recovers judgment, shall be awarded a reasonable attorney's fee.

Comment. Section 768.40 continues present Section 785, third sentence, with addition of express provisions for recovery of a reasonable attorney's fee in either of the events stated. In permitting recovery of a loss by the referee, present Section 785 refers to "costs incurred." This expression is ambiguous. The attorney's fee provisions are reasonable in the circumstances stated in this section.

768.50. A referee or guardian shall not, nor shall any person for the benefit of either, be interested in the purchase of any property which is the subject of the action, except that a guardian may be interested in the purchase of property for the benefit of his ward and a referee or guardian ad litem in whose favor a lien has been imposed pursuant to this chapter may purchase the property or the interest of a party in a sale which is made to enforce the lien. Sales contrary to the provisions of this section are void.

Comment. Section 768.50 continues present Section 783 without substantive change, except (1) the provisions are applicable to any guardian, rather than to the guardian of an "infant," and (2) a new provision is added where a referee or guardian ad litem bids in at a sale held to enforce a lien in his favor imposed under the chapter.

## Article 5

### Successive Estates

770.10. When the ownership estates in the property are solely successive estates, a partition of the property, or part thereof, shall be ordered only pursuant to this article.

Comment. Section 770.10 and succeeding sections in this article are new. They are intended to provide different standards when the ownership estates are solely successive estates, thereby replacing certain 1927 amendments to present Sections 752, 763 and 781.

770.20. The partition of such property, or part thereof, shall be ordered if the court determines that a partition is in the best interests of all the co-owners, including known co-owners and unascertained, unborn and unknown co-owners. In determining such issue, the court shall consider whether the estate in possession has become unduly burdensome by reason of taxes or other annual charges, existing or proposed public improvement assessments, expense of ordinary or of any needed extraordinary repairs, any substantial change in the character of

the property or of surrounding property since the creation of the ownership estates, the provisions of the decree or other writing defining the terms and conditions of the ownership estates, the circumstances under which the ownership estates were created, and all other factors which would be considered by a court of equity in the case of trust property.

Comment. Section 770.20 is new. It vests the court with jurisdiction to order a partition and specifies generally the guidelines for severing the co-ownerships as to the entire property or a part of the property.

770.30. When all the ownership estates are held in absolute ownership by persons in being, the court, in its discretion, may order a partition of all or part of the property by division, sale or appraisal, pursuant to other provisions of this chapter, as it deems appropriate to the circumstances.

Comment. Section 770.30 is new. Unlike cases of concurrent ownership, where partition by division is the general rule, the court is vested with discretion to determine the particular mode of partition. Part of the property may be sold off and another part divided, or the court may order only part sold off, leaving the successive estates in the balance. For partition by appraisal, the consent of the parties is required. See Article 8, infra.

770.40. When all the ownership estates are not held as provided in Section 770.30, the property ordered partitioned shall be partitioned by sale.

Comment. Section 770.40 is new. It is believed that the existence of future estates or rights which are contingent or subject to defeasance makes difficult, if not impractical, a partition by division, as to any property not sold.

It can be argued the court should have discretion to authorize an exchange, or the creation of a trust to administer the property itself, in lieu of the ordering partition by sale as provided in this article. However, this draft does not take such advanced steps if the creator of such successive estates has not made provision therefor. Under Section 770.20, a part only of the property may be ordered partitioned. It would seem that many problems can be resolved by a sale of part only of the property.

770.50. In, or prior to making, the order for sale, the court shall determine whether the sales' proceeds are to be placed in trust for the benefit of all owners, as provided in Article 6 (commencing with Section 772.10) and, if not, the value of the proportional interest of the tenant for life or years entitled to possession of the property sold.

Comment. Section 770.50 is new, in procedural detail. It is a companion section to Section 772.20, *infra*. If the court determines not to order the entire proceeds placed in trust (see present Section 781 as amended in 1927), such determination should be made in advance of the sale.

## Article 6

### Protection Of Estates And Future Interests

772.10. Except as provided in Section 772.20, in all cases of sales, when it appears that any person has a vested or contingent future estate or right in any of the property sold, the court shall ascertain and settle the proportional value of such estate or right, and shall direct such proportion of the proceeds of sale to be invested, secured, or paid over, in such manner as will protect the interests of all such persons.

Comment. Section 772.10 continues, without substantive change, the provisions of present Section 781, except for provisions added in 1927 as to property subject to a life estate with remainder over. As to the latter, see Section 772.20, *infra*.

772.20. Upon a sale pursuant to Section 770.40, the court shall direct the entire proceeds of the sale of the ownership interests to be paid to a trustee to be appointed by the court, upon security satisfactory to the court, to be invested and re-invested, the income to be paid to the tenant for life or for years, and the corpus of the trust estate, upon termination of such prior estate, to be delivered or paid to the remaindermen as in the decree determined; and the court shall retain jurisdiction for the settlement of the

accounts of such trustee and in all matters necessary for the proper administration of the trust; provided, the court, upon a showing that the establishment of such a trust is not economically feasible or would not serve the best interests of the co-owners, known or unknown, may order the proceeds divided according to proportional values, and shall order the shares of the proceeds to be invested, secured or paid over, in such manner as will protect the interests of the parties or persons in interest.

Comment. Section 772.20, to the proviso, continues present Section 781 in its provisions for property subject to a life estate with remainder over, except that the estate in possession may be a term for years, as well as a life estate. A substantive change is made by the proviso, i.e., the court need not universally require the proceeds to be placed in trust. A court of appeal decision has held that the trust disposition is required under the present Act because of the later enactment of amendments to present Section 781, after adoption of present Sections 778 and 779. See Estate of Giacomelos, 192 Cal. App.2d 244, 13 Cal. Rptr. 245 (1961). Certain out of state cases hold that a statute permitting the court to make a proportional valuation and order direct payment to the life tenant of the proportional value of his estate cannot constitutionally be applied to property held only in successive estates acquired before the effective date of the statute. See, e.g., Wilhite v. Rathburn, 332 Mo. 1208, 61 S.W.2d 708 (1933).

However, in California since 1872 the Partition Act has permitted this type of decree in general under Sections 778 and 779. Wording added in 1927 to Section 781 for creation of a trust is permissive ("may"). The California case cited above does not discuss the question of retroactive application.

772.30. Whenever a minor or other person under a disability has no guardian, money or property due him may be ordered paid or delivered in a manner authorized by Section 1510 of the Probate Code and subject to the limitations of that section.

Comment. Section 772.30 is new. It is designed to dispense with the appointment of a guardian in certain cases, by adopting the procedure of Probate Code Section 1510.

772.40. An estate for life or years in an undivided share of the whole property which is entitled to possession may be set off in any part of the property not ordered sold, either by way of complete or partial satisfaction.

Comment. Section 772.40 is intended to state, though in different wording, the substance of present Section 770, with the addition of (1) "which is entitled to possession" and (2) "either by way of complete or partial satisfaction" for clarity.

## Article 7

### Encumbrances-Adverse Estates Or Interests

774.10. As used in this article

"Encumbrance" includes encumbrances and liens of every kind except liens for property taxes, public improvement assessments or bonds.

"Adverse estate or interest" means the estates, interests rights and claims described in paragraph (c) of Section 754.10 owned, held or claimed by persons not named as parties to the action.

Comment. Section 774.10 is new.

774.20. Before making any order or decree for partition by any method, the court, to the extent necessary to grant the relief sought or other appropriate relief, shall ascertain the state of the title as between the parties, except that where there are several unknown persons having an interest in the property, their rights may be considered together, and shall determine (i) the validity and priority of, the sums due or to become due upon, encumbrances of record at the time of the commencement of the action, or known to the plaintiff, and, if the amount remaining due is secured in any manner, the nature and extent of the security; and (ii) the validity, nature and extent of adverse estates or interests which were similarly of record or known to the plaintiff.

Comment. Section 774.20 states, in different wording, and with some enlargement requirements now stated in present Sections 759 and 761. Thus, (1) it is contemplated that before any partition decree or order is made, the matters above specified will have been determined; (2) the need for determining

the title upon any mode of partition is states more explitley; (3) the qualify-  
ing words "to the extent necessary to grant the relief sought or other appropri-  
ate relief" are added, in recognition of the fact not every partition action  
contemplates or requires a complete adjudication of title to the property,  
including such matters as easements, and claims of adverse user; and (4) "known  
to to the plaintiff" is new.

774.30. The court may order an encumbrancer or the owner, holder or  
claimant of an adverse estate or interest not already a party to be joined as  
a party defendant.

Comment. Section 774.30 is new. Whether a person should be required to  
be joined will depend upon circumstances, and the relief contemplated. See  
Section 774.40, infra.

774.40. The court may appoint a referee to require and receive evidence  
or verified proof as to all or any of the matters stated in Section 774.20,  
from a party or non-party. Upon application of the referee, a party or a per-  
son whose encumbrance, estate or interest is being adjudicated, the court shall  
direct the issuance of process to compel attendance of witnesses, the production  
of books, documents or things, and filing of verified claims.

Comment. Section 774.40 is new. Present Section 761 authorizes the  
appointment of a referee to determine whether encumbrances have been paid,  
whether other security is held and priority, in lieu of making an encumbrancer  
a party. Section 774.40 is broader in scope, extending also to estates and  
interests. It is not limited to a non-party. It also provides for different  
process. In some cases, neither joinder as a party nor the appointment of a  
referee will be necessary, e.g., the validity and priority of an encumbrance  
may be undisputed and a written statement of the amount due and security may be  
voluntary supplied by the encumbrancer.

774.50. The referee shall report his findings and conclusions in writing  
to the court, which may conform, modify or set aside the report, or order a  
new reference.

Comment. Section 774.50 is based on present Section 762, last sentence.

775.10. When an encumbrance is on an undivided estate or interest of any party, if partition is ordered, the encumbrance shall thenceforth be a charge only on the share assigned to the party but such share shall first be charged with a just proportion of the costs of the action.

Comment. Section 775.10 continues present Section 769, without substantive change.

775.20. When property is sold free of encumbrances, or some thereof, the proceeds shall be applied under the direction of the court:

1. To pay a just proportion of the general costs of the action;
2. To pay the costs of the reference;
3. To satisfy of record such encumbrances in their order of priority, if entitled to priority over the lien under which the owner's title was obtained;
4. The residue among the co-owners according to their respective shares therein as found by the court, in such manner as the court may direct.

Comment. Section 775.20 continues present Sections 771 and 773, with the following changes: (1) "When property is sold free of encumbrances" is added, in recognition of the fact that in some partition actions, a sale subject to encumbrances may be desirable and may be ordered even without a stipulation of all interested parties (compare Cohen v. Karubian, 276 Cal. App.2d 44, 80 Cal. Rptr. 702 (1969), holding that a stipulation is required; see present Section 775, referring to a sale at public auction "subject to a prior estate, charge or lien"; (2) subdivision (4) wording "in such manner as the court may direct" is substituted for the more detailed provisions of present Section 773.

775.30. If a party holding an encumbrance has other security, the court may, in its discretion, order such security to be exhausted before distribution of the proceeds of sale, or that a just deduction be made from the amount of the encumbrance on account of the other security.

Comment. Section 775.30 continues present Section 772, without substantive change.

## Article 8

### Partition By Appraisal

777.10. When the undivided interests of all co-owners are undisputed or have been adjudicated, and all such interests are owned in absolute ownership, the co-owners may agree upon a partition by appraisal pursuant to this article.

Comment. Section 777.10 and other sections in this article are new. The purpose of this article is to provide an alternative method of partition for co-owners who are willing to agree to the method and whose ownership interests permit them to avail themselves of this method. It is believed that the offering of a statutory procedure based upon appraisal by a referee or referees, with court supervision, will serve the interests of co-owners who find themselves in disagreement, in some situations. An acquisition method does not appear to involve the same tax consequences as a partition sale. See 3 Rabkin & Johnson, Federal Income, Gift and Estate Taxation, Section 43.01.

Though the same result can be accomplished by an agreement to arbitrate, the authority of the court under the article proposed is much broader than in case of arbitration. Moreover, arbitration does not establish or clear title.

777.20. The agreement shall be in writing filed with the clerk and shall include:

- (a) A description of the property;
- (b) The names of the parties who have requested the partition and their respective ownership estates;
- (c) The names of the parties who have not requested the partition but who are willing to acquire the estates described in (b) above; and the undivided ownership estates of the acquiring parties;
- (d) Whether one or three referees shall be appointed, and the name or names of a person or persons to whose appointment the interested parties consent;
- (e) The date or dates as of which the ownership estates to be acquired shall be appraised;

(f) Other terms mutually agreed upon which may include, but not by limitation, provisions as to abandonment of the proceeding if the appraised value of the ownership estate or estates to be acquired exceeds a stated amount or amounts; required deposits on account of purchase price; terms of any credit; title and objections to title, and payment of the expenses of the proceeding authorized by this article and of costs of the action.

Comment. Section 777.20 is new. It establishes the framework for the agreement of the parties without, however, providing a fixed form of agreement.

777.30. If the court determines that the agreement complies with Section 777.20, that the terms and conditions are equitable and that there are no objections to the proposed procedure, it shall approve the agreement and stay any pending partition by division or sale.

Comment. Section 777.30 is new. The court, as a court of equity, may exercise a sound discretion in approving or refusing to approve a particular agreement.

777.40. The court shall appoint one or three referees, as requested (herein referred to as "referee"). The referee shall appraise the property and the ownership estates involved, and report his findings and valuations to the court by report in writing filed with the clerk. Any party to the agreement or the referee, upon 10 days' notice to the other parties to the agreement and to the referee, if he is not the moving party, may move the court to confirm, modify or set aside the report.

Comment. Section 777.30 is new. It follows other partition procedures in respect of the referee's report and the authority of the court to act upon the report.

777.50. The court shall examine the report and witnesses in regard to the same. If the court finds that the proceedings have been regularly

conducted; that transfer of title to the ownership estates of the co-owners requesting partition may regularly be made, and that no facts appear which would make such transfer inequitable, it shall confirm the report and order the ownership estates being acquired transferred to the acquiring co-owners in proportion to their respective ownership estates, or in such other proportion as is set out in the agreement, upon payment of the amounts fixed as the purchase price and any other amounts required by the agreement, the giving of any required security, and payment by the interested parties of the expenses of the proceeding authorized by this article and of the general costs of the action or an appropriate share thereof.

Comment. Section 777.40 is new. It may be argued that the words "that no facts appear which would make such transfer inequitable" vest too great discretion in the court. On balance, it seems preferable to vest the court with equitable powers to refuse to permit consummation of the transaction where it would be inequitable. The parties contract in the light of such power of the court. Presumably, the power would seldom be exercised.

777.60. The agreement shall bind the respective heirs, executors, administrators, successors and assigns of the parties, and, in the event of default, may be specifically enforced by further proceedings in the action, or the aggrieved parties may pursue any other remedy, at law or in equity, which they may have.

Comment. Section 777.60 is new. The agreement, subject to the provisions of the article, is a binding agreement. Even though the subject is personal property, the agreement should be specifically enforceable, if the innocent party chooses this remedy.

777.70. The provisions of this article are cumulative, and if, for default or other cause, ownership interests are not transferred and acquired pursuant to this article, the parties may pursue their other rights of partition, subject to Section 777.60.

Comment. Section 777.70 is new. If the proceeding aborts or is not carried out, the parties should not be prejudiced as to their normal rights of partition, except as an innocent party may elect to proceed under the agreement pursuant to Section 777.60.

## Article 9

### Powers Of Court-General

780.10. In the conduct of the action the court may make decrees and orders (herein "orders") necessary or incidental to carrying out the purposes of this chapter, including

- (a) Temporary restraining orders and injunctions, with or without bond, to prevent waste and to protect the property and title thereto, and restrain unlawful interference with a partition ordered by the court;
- (b) Orders appointing and removing referees, including new referees;
- (c) Orders instructing referees;
- (d) Orders authorizing or approving contracts for the services of surveyors, engineers, appraisers, attorneys, real estate brokers and others, and for their expenses; allowing or rejecting claims thereunder; providing for the date of commencement of any lien provided by law or contract for such claims;
- (e) Orders fixing the reasonable compensation for the services of referees and allowing their reasonable expenses; providing for the date of commencement of the lien of the referees allowed by law;
- (f) Orders, in advance of sale, prescribing any additional terms and conditions of sale which the court deems proper for the particular property or sale, including orders adopting the procedure of Section 768.20; fixing a minimum bid, to be effective for a reasonable time, not exceeding six months from the date of the order; permitting rejection of all bids, upon a first sale; requiring additional notice of sale to be given;

(g) Orders approving or prescribing terms of securities to be taken upon the sale, including the manner in which title thereto is to be taken, whether in a single instrument or in several instruments, according to the interests of the co-owners;

(h) Orders for the distribution, deposit or securing of sales' deposits and sales' proceeds;

(i) Orders relating to the closing of a sale after confirmation, including escrow and closing provisions and adjustments based on objections to title or after discovered defects; and

(j) Orders requiring the filing of interim or final accounts of referees; settling the accounts of referees and discharging referees.

Comment. Section 780.10 is new. Generally, its purpose is to give statutory authorization to powers which the court probably now has, since the proceeding is equitable in nature. In addition, certain provisions replace existing provisions of the partition act. Other provisions implement the concept expressed elsewhere that the court should have authority to shape the terms and conditions of a particular sale, to suit the indicated circumstances.

Subd. (a). The court should have authority to take the protective steps described, without having to rely either upon its contempt powers or the general provisions as to temporary restraining orders and injunction.

Subd. (b). The subdivision is intended to state the substance of present Section 766 (partition by division) but to broaden it to apply to all referees.

Subd. (c). Express recognition is given the instructions procedure. It is a valuable tool for resolving ambiguities and matters not otherwise covered, and, properly used, serves to expedite the proceeding.

Subd. (d). The subdivision recognizes that the court is, or should be, the supervising entity in carrying out the partition. It contemplates that the court will authorize or approve contracts of the referees for "third party" services and expenses thereunder; allow or reject claims under the contracts, and in proper cases specify the priority of any lien therefor. Present Sections 766 and 768 provide generally for employment by the referees of surveyors and necessary assistants, and allowance of their fees and expenses. Otherwise the present act is silent as to "third party" aid.

The subdivision is intended to vest the court with broad discretion and with corresponding duties. Surveying services may involve substantial sums. Ability to obtain such services may depend upon assurance of, or security for payment, despite any later settlement by the parties and dismissal of the action.

So, also, in a particular case, employment of a real estate broker by the referees may be deemed desirable. Under the subdivision, such employment may be authorized or approved, and the terms of the contract prescribed or approved, by the court.

The subdivision removes from the referees, acting alone, authority to engage the services of "third parties" for their assistance.

Subd. (e). The subdivision states the substance of present Section 769, in providing for allowance of fees and expenses of referees by the court, but adds the court may fix the date of commencement of lien, to avoid the possibility of later settlement and dismissal of the action.

Subd. (f). The subdivision implements Section 768.20, *supra*, which permits the court to make applicable to the sale the so-called "gross overbidding" procedure (as modified), and to fix, divide and limit agents' commissions in the sale. Thus, in advance of sale, and as part of its terms and conditions, the court may adopt Section 768.20 and state the manner of handling agents' commissions. Also, in advance of sale, the court may prescribe such terms as minimum bid, right of the referee to reject all bids, and additional notice of sale. For example, if the property is a manufacturing plant which has been shut down and there are few potential buyers, it may be desirable to impose one or more of the conditions authorized by the subdivision. Minimum bids, right to reject all bids, display or national advertising are tools that are often used in non-court sales. The use of conditions such as minimum bids in partition sales does not appear to have been decided by appellate courts of California. Divided views have been expressed in other jurisdictions. See Kemp v. Waters, 165 Md. 521, 170 A. 178 (1934); Schmitt v. Weber, 60 Misc. 361, 113 N.Y.S. 449 (1908); compare Ch. 106, Ill. Stats., Section 60 (Smith-Hurd 1952) which requires a sale at two-thirds of the valuation of the property, with provision for a new valuation if the property cannot be sold at the original "upset" figure.

To meet the objection that a minimum bid requirement may deprive a co-owner of his right to have the property partitioned, a six months' limit is stated in the use of this condition. Likewise, the right to reject all bids, if that condition is used, is available on only the first "sale," for similar reason.

Subd. (g). The subdivision states the court's authority over purchase-money securities in general terms. The subject is covered in present Section 773 and 776. These sections appear to divide the authority between the court and the referee.

Subd. (h). The subdivision states the court's authority over monies involved in a sale transaction in broader terms than the present Act. Present Section 773 refers only to "proceeds of sale." These are to be distributed to the person entitled "when the court directs" or are to be paid into court

or deposited therein "or as the court directs." However, substantial sums may be held by referees or others pending a sale. These funds, as well as technical "proceeds of sale," should be subject to the court's order.

Subd. (i). The subdivision recognizes that modern-day transactions often involve, at closing, minor deviations or adjustments. The court should be expressly authorized to pass upon them.

Subd. (j). The subdivision recognizes the need for and practice of receiving and passing upon accounts and final reports of referees, particularly in, but not limited to, sales transactions, and of discharging referees when they have made a final report and accounting.

780.20. If, in the opinion of the court, it is impracticable or highly inconvenient to make a complete partition in the first instance among all the parties in interest, the court may first determine the shares or interests respectively held by the original co-owners, and adjudge and cause partition to be made on that basis, and thereafter may adjudge and partition separately each share or portion so ascertained or allotted, among those claiming under the original co-owner, or may allow such persons to remain tenants in common, as they may desire.

Comment. Section 780.20 continues present Section 760 without substantive change.

780.30. When the proceeds of the sale of any share or belonging to persons who are parties to the action, whether known or unknown, are paid into court or otherwise deposited, invested or secured subject to the jurisdiction of the court, the action may be continued as between such parties, for the determination of their respective claims thereto, which must be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee, in the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy by pleadings, as in an original action.

Comment. Section 780.30 continues present Section 774 without change, except the words "paid into court" are amplified by "or otherwise deposited, invested or secured subject to the jurisdiction of the court."

780.40. When the site of an incorporated city or town is included within the exterior boundary of the property to be partitioned, and the court is of the opinion that other provisions of this chapter do not adequately provide for or protect the interests of co-owners in actual possession of lots or subdivisions within the city or town, it may order partition to be made and proceedings had as provided for such cases by Section 763 of this code, as it was in effect immediately prior to enactment of this chapter.

Comment. The third, fourth and fifth paragraphs of present Section 763 provide a special procedure when the property included within it an incorporated city or town, with co-owners in actual possession of lots or subdivisions of the city or town, and in some instances having made improvements. Section 780.40 is intended to provide a means of dealing with the rare situation, if one occurs. Present Section 763 calls for the referees to survey and appraise the property according to actual lots and subdivisions in the actual possession of the several co-owners, and grants a prior right to a co-owner to purchase a city or town lot or subdivision upon which he has made improvements.

780.50. In all cases, the court may make compensatory adjustments between the parties, according to ordinary principles of equity.

Comment. Section 780.50 continues present Section 792, last sentence. It is not intended to refer to adjustments by way of owelty, but to other matters, such as accountings and other incidental relief.

## Article 10

### Referees

782.10. A referee is entitled to reasonable compensation for his services and to reasonable expenses, as ascertained and allowed by the court.

Comment. Section 782.10 continues, in part, present Section 768.

782.20. A referee shall not be personally liable on contracts made or for expenses incurred by him except as he shall expressly assume such liability in writing.

Comment. Section 782.20 is new. The contract itself may provide a mode of payment, e.g., the commission of a real estate broker to be payable out of proceeds of sale. In other cases, the third person will usually have lien rights.

782.30. Before making a partition by division or sale, the referee, when it will be for the advantage of those interested, may set apart a portion of the property as a public way, road or street, or as a private way, road or street, for the use of the parties interested, or some of them, or others, as the referee shall designate. In his report, the referee shall make recommendations as to the acceptance by public authorities of any new public ways, roads or streets and as to the closure or abandonment of some or all other ways, roads and streets. Upon confirmation of the court, or upon the taking of such other action as may be prescribed by the court, the designated existing roads, ways or streets to be closed or abandoned shall cease to be public or private ways, roads or streets, as the case may be.

Comment. Section 782.30 is new. It is based on present Section 764, but is in different terms. Where the public rights are involved, unless all public entities having jurisdiction are parties, the judgment could not be self-executing.

782.40. Subject to orders of the court, a sale referee shall have authority to determine whether a sale shall be at public auction or a private sale, the property to be sold as a lot or unit and, in the closing of a sale transaction to agree to minor adjustments in the purchase price or the terms of a security for reasonable cause, and to grant reasonable extensions of time; provided, such matters may be submitted to the court for instructions.

Comment. Section 782.40 is new. It makes explicit a referee's powers in matters of detail.

782.50. No person shall be appointed as referee who is a clerk or deputy clerk of the court, a partner or employee of the judge, or a person related to the judge or his spouse within the third degree, or who owns an interest or estate in the property.

Comment. Section 782.50 continues provisions in present Section 763.

782.60. A guardian or guardian ad litem may consent to the appointment of persons as referees, and request or consent to a particular number of referees.

Comment. Section 782.60 continues, in different wording, provisions in present Section 763.

## Article 11

### Judgment-Effect

783.10. As used in this article, "judgment" means a decree or order confirming a referee's report upon partition by division, confirming a referee's sale of property or accepting and confirming a sale of property upon increased offer in court or confirming a referee's report upon partition by valuation.

Comment. Section 783.10 is new. It reflects partition by appraiser, a new method. Also, conclusive effect is stated in terms of the court's decree or order in each instance. Compare present Section 787 (conclusive effect of conveyance, rather than decree or order).

783.20. The judgment shall be binding and conclusive on

(a) All persons named as parties, and their legal representatives, who have at the time any interest in the property, or any part thereof, as owners in fee or as tenants for life or for years, or as entitled to the reversion, remainder or the inheritance of such property, or any part thereof, after the

determination of a particular estate, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life;

(b) On all persons not in being at the time the judgment is entered, who have any interest in the property, or any part thereof, as entitled to the reversion, remainder or the inheritance of such property, or any part thereof, after the determination of a particular estate, and who by any contingency may be entitled to a beneficial interest in the property; provided, if sale has been made, the judgment shall provide for keeping intact, investing or securing the share of the proceeds of said sale to which said party or parties not in being at the time are or may be entitled until such time as such party or parties may take possession thereof;

(c) The heirs and devisees of, and all persons claiming by, through, or under a decedent, who are named as defendants, and persons unknown, who are named as defendants, pursuant to Section 754.40;

(d) All persons not parties and whose interests are unknown to the plaintiff, having unrecorded interests in the property at the time of the commencement of the action; and

(e) All other persons claiming from such parties or persons, or any of them.

Comment. Section 783.20 continues present Section 766 with, however, (1) different wording as to so-called "unknown defendants"; (2) in the "proviso," in subd. (b), addition of "investing or securing" after "keeping intact"; (3) new subd. (d) as to persons having unrecorded interests (compare present Section 787).

783.30. No judgment is invalidated because of the death or incompetency of a party before final judgment. In either case, the court shall authorize

the attorney who has appeared for such party to continue to represent such interest, or shall appoint a guardian ad litem to represent such interest, until such time as the personal representative, guardian, or heirs or successors in interest shall have appeared. The attorney or guardian ad litem so appointed shall be allowed reasonable compensation and reasonable expenses which shall be taxed as costs against the share or interest so represented and may be adjudged a lien thereon, in the discretion of the court.

Comment. Section 783.30 is intended to continue present Section 763, in substance. See also present Section 766, last paragraph.

783.40. If, during the pendency of the action and before final judgment, a co-owner has conveyed or transferred to another his interest, or part of his interest, in the property, such conveyance or transfer, whatever its form, shall be deemed to have transferred to the grantee or transferee any property which, after its execution, is set aside upon partition by division to the grantor or transferor, in severalty, or such proportionate interest as the interest conveyed or transferred bears to his whole interest.

Comment. Section 783.40 continues, in substance, provisions in present Section 785, last paragraph.

## Article 12

### Costs Of Partition-Appportionment And Payment

785.10. As used in this article, "costs of partition" means expenses incurred and disbursements made for the common benefit, as determined by the court pursuant to this chapter, and include:

(a) Costs, including reasonable attorney's fees, paid or incurred by the plaintiff or any of the parties in the action for the common benefit;

- (b) The fees of referees and their expenses;
- (c) Compensation for services of surveyors and other third persons described in subdivision (d) of Section 780.10, and their expenses;
- (d) The reasonable cost of a title report procured by the plaintiff, or by another party upon approval of the court if the plaintiff has not procured the report, but in either such case the report must be declared available for inspection, use and copying at a designated place, by all parties;
- (e) Expenses incurred or disbursements made, exclusive of counsel fees, in another action or proceeding necessarily prosecuted or defended for the protection, confirmation, or perfecting of title to, or setting boundaries or making a survey or surveys of, the property, when such action has accrued to the common benefit;
- (f) Other expenses or disbursements, of a like or different kind, found by the court to have been incurred or paid for the common benefit.

Comment. Section 785.10 is new. It states, in different wording, the "common benefit" principle in present Sections 796, 798-801; see also present Section 768. Subd. (a) is based on present Section 796, first sentence. Subd. (b) and (c) are based on present Section 768. Subd. (d) is based on present Sections 799-801. Subd. (e) is based on present Section 798. Subd. (f)--an omnibus subdivision--is new.

785.20. The court shall allow interest from a date specified by it on a disbursement made by a party under its direction, and upon disbursements described in subdivisions (d) and (e) of Section 785.10.

Comment. Section 785.20 continues the substance of provisions for interest in present Sections 798 and 801, but permits the court to fix the date as of which the interest shall commence to accrue.

785.30. Costs of partition shall be apportioned equitably between the parties, in such manner as the court may direct, in accordance with the following principles:

(a) In the absence of special circumstances, the parties shall respectively be liable for pro rata shares thereof, in proportion to their respective ownership interests;

(b) When the interests of the owners are not identical in each parcel, piece and lot, or when litigation has arisen or a proceeding been had between some of the parties only, the court shall segregate such costs, so far as practicable, and apportion a part among particular parties only;

(c) When part of the ownership interests consist of a future estate or right not held in absolute ownership, the pro rata share of costs apportioned to such estate or right may be ordered paid by other parties to the action or by the parties who are then the presumptive takers of the future estate or right, subject to a right of reimbursement, with interest, secured by a charge upon the future estate or right;

(d) When property is sold, the proceeds of sale shall first be allocated to expenses of sale and next to the payment of other costs of partition, or of allowances on account thereof, when the same can be done without prejudice to the rights of the parties and interested persons.

Comment. Section 785.30 is new. Subd. (a) expresses the principle stated in present Section 796, first sentence. Subd. (b) expresses, in expanded wording, the principle of present Section 796, last sentence. See Southern Cal. Title Clearing Co. v. Laws, 2 Cal. App.3d 586, 83 Cal. Rptr. 8 (1969) (fact that one co-owner does not have an interest in some of the property sold made improper a percentage allocation of costs to be paid from combined sales' proceeds). Subd. (c) and (d) are new.

785.40. Costs of partition which are not paid as provided in subdivision (d) of Section 785.30 shall be a lien on the respective shares of the co-owners, according to the apportionments made by the court. Upon application of one or more persons entitled to such lien, the court, for good cause, prior to or after

final judgment, may order a sale of the share of the co-owner to satisfy such lien. The final judgment shall include the amount of apportioned costs, if any, unpaid by each co-owner. In lieu of such lien sale, the judgment may be enforced by a person or persons entitled to its benefit by execution against the share of the party in the property or its proceeds and against any other property of the party. The lien provided for by this section is an inchoate lien from the time fixed by the court, not earlier than the commencement of the action, or if not time is fixed, from the time services were commenced or other expense incurred.

Comment. Section 785.40 is new. It is intended to provide a more effective means of securing and enforcing payment of costs of partition. The effect of the lien stated in present Section 786 is unclear and the enforcement remedy of execution is inadequate. A settlement and requested dismissal of the action may endanger rights of referees and others. It may be suggested that the "inchoate lien" provisions may cloud title, and make it difficult for title insurers to determine whether there are unpaid liens. A balancing of interests seems involved. If required, wording could be added so that in case of sale, bona fide purchasers and encumbrancers would be protected, if the lien were not established or reflected or recorded in a prescribed manner.

Sec. 3. This act shall apply to actions pending on its operative date; provided, first, Article 5 (commencing with Section 770.10) shall be inapplicable to pending actions, unless adopted by agreement of the parties who have appeared in the action; second, particular applications, proceedings and matters which were commenced prior to such date, including but not limited to referees' proceedings, shall be completed under the law as it existed immediately prior to such date; third, summons issued to a party or parties not served on all the parties named therein may be served in the form and manner provided by such prior law; and, fourth, any part or provision of this act not otherwise applicable may be adopted by agreement of such appearing parties.

Comment. Section 3 is a transitional section. It adopts the view that changes made by the new act are procedural and may be applied constitutionally to pending actions. However, this may not be true as to new Article 5, relating to partition where there are successive estates only. For both policy and legal reasons, Article 5 applies only to future actions, unless the parties agree.

Sec. 4. If any provision of this act, or the application thereof to any person or circumstance, is held invalid or unconstitutional, the remainder of this act, and the application thereof to other persons and circumstances, shall not be affected thereby and the rights and duties of persons, as to whom the act was held invalid or unconstitutional, and the procedure, shall be governed by the applicable law in effect immediately prior to such operative date.

Comment. Section 4, apart from usual provisions as to severability, is intended to preserve the former law as to any person or persons, or circumstance, as to which the new act cannot govern.