

1/14/74

Memorandum 74-3

Subject: Study 23 - Partition Procedure

The staff has concluded that the most efficient way to proceed with the partition study is for the Commission to review Mr. Elmore's draft of the proposed partition chapter section by section before the staff commences the process of redrafting and revision. Attached is a copy of Mr. Elmore's draft (yellow) along with the existing chapter (white).

This memorandum contains a few staff comments on particular sections and offers alternative staff drafts in areas where the Commission has previously made policy decisions.

Since we plan to redraft the entire statute after the meeting, we do not raise in this memorandum various technical deficiencies that do not involve policy. Nevertheless, we hope that at the meeting members of the Commission will call to our attention any technical drafting deficiencies they have noted or will mark those technical deficiencies on the statute draft and hand in the draft to the staff after the meeting.

§ 753.10

Subdivision (c). Subdivision (c) permits partition compelled by the holder of a lien that is "on a parity with that on which the owner's title is based." This provision is based on a portion of existing Section 752 that was enacted in 1943. It has been used, insofar as the appellate reports indicate, almost exclusively by one litigant. See, e.g., Elbert, Ltd. v. Nolan, 32 Cal.2d 610, 197 P.2d 537 (1948); Elbert, Ltd. v. Clare, 40 Cal.2d 498, 254 P.2d 20 (1953); Elbert, Ltd. v. San Diego, 116 Cal. App.2d 660, 254 P.2d 98 (1953); Paules v. Elbert, Ltd., 136 Cal. App.2d 326, 288 P.2d 948 (1955).

The situation that typically arises in these cases is that the plaintiff seeking partition of the property has a lien derived from unpaid bonds for improvement assessments. The defendant acquired title to the property through a tax sale. When the defendant objects to partition of his property at the instance of plaintiff lienholder on the ground that foreclosure of the lien is barred by the statute of limitations, plaintiff points to this 1943 provision and shows that his lien is on a "parity" with the lien upon which the owner's title is based, thereby entitling him to partition.

The staff suggests that this provision be repealed. It appears from the cases to be simply a clever device whereby the bondholder who is precluded from foreclosing by the statute of limitations may nevertheless enforce his lien. If it is the policy of the state to provide a lengthened statute of limitations, this should be done directly rather than by making partition a tool for accomplishing it indirectly.

§ 754.30

As the Comment to this section indicates, the section merely reiterates authority and standards given to the court in other sections. The staff sees no point in duplicating these statements of authority, particularly since partition actions (unlike eminent domain proceedings) are located in the part of the code relating to civil actions and are clearly governed by the general provisions of that part of the code.

§ 754.40

This section incorporates portions of Code of Civil Procedure Section 1245.3, a provision which the Commission has proposed to replace in connection with its eminent domain recommendations. The staff therefore recommends

that this section parallel the Commission's proposed replacement section:

754.40. (a) If a person described in Section 754.10 is dead and the plaintiff knows of a duly qualified and acting personal representative of such person, the plaintiff shall name such personal representative as a defendant. If a person described in Section 754.10 is dead or is believed by the plaintiff to be dead and if plaintiff knows of no duly qualified and acting personal representative of the estate of such person and states these facts in an affidavit filed with the complaint, plaintiff may name as defendants "the heirs and devisees of _____ (naming such deceased person), deceased, and all persons claiming by, through, or under said decedent," naming them in that manner and, where it is stated in the affidavit that such person is believed by the plaintiff to be dead, such person may also be named as a defendant.

(b) In addition to those persons described in Section 754.10, the plaintiff may name as defendants "all persons unknown claiming any right, title, or interest in or to the property," naming them in that manner.

The provisions relating to manner of service and the effect of the judgment should be included in the service and judgment sections. as was done in the Eminent Domain Law.

§§ 755.10-755.20

Except for the portion placing jurisdiction in the superior court, these sections relating to lis pendens are unnecessary. Section 755.10 duplicates the general lis pendens requirements of Code of Civil Procedure Section 409. Moreover, as we discovered in connection with eminent domain, the provision that the plaintiff "must" record a lis pendens is directory only, for the plaintiff's own protection. See, e.g., Rutledge v. Rutledge, 119 Cal. App.2d 114, 259 P.2d 79 (1953)(lis pendens not a prerequisite to valid judgment in partition proceeding). The provision approved by the Commission for eminent domain proceedings is:

The plaintiff, at the time of the commencement of an eminent domain proceeding, or at any time thereafter, may record a notice of the pendency of the proceeding in the office of the county recorder of any county in which property described in the complaint is located.

The Comment refers to the effect of failure to file a lis pendens.

§ 756.10

The requirement in this section that the summons name the parties merely duplicates the general requirements of Code of Civil Procedure Section 412.20. The requirement of a description of the property is unnecessary since a description will appear in the complaint that accompanies the summons. The provision approved by the Commission for eminent domain reads:

(a) Except as provided in subdivision (b), the form and contents of the summons shall be as in civil actions generally.

(b) Where process is served by publication, in addition to the summons, the publication shall describe the property sought to be taken in a manner reasonably calculated to give persons with an interest in the property actual notice of the pending proceeding.

§ 756.20

This section is based on an eminent domain section that the Commission has proposed to repeal since the summons will no longer duplicate the description of property in the complaint.

§ 757.10

The duplication of general service provisions in this section is unnecessary. The Commission's proposed eminent domain section reads:

Where the court orders service by publication, it shall also order the plaintiff (1) to post a copy of the summons and complaint on the property sought to be taken and (2), if not already recorded, to record a notice of the pendency of the proceeding in the manner provided by Section [755.10]. Such posting and recording shall be done not later than 10 days after the date the order is made.

The Comment to the eminent domain section indicates that, where the identity or location of a defendant is not known, so that service by other means is not possible, the court will order service by publication pursuant to Section 415.50.

§ 759.10

Since partition actions are civil actions, this section incorporating the rules governing civil actions is unnecessary.

§ 760.10

The Commission has previously determined that the partition statute should maintain a moderate preference for physical division of property while moving to liberalize the ability of the court to order a sale where appropriate. The staff offers the following section, based on Massachusetts Ann. Laws, Ch. 241 § 31:

(a) Except as otherwise provided by statute, the court shall order that property be partitioned by division as provided in this article.

(b) If the court finds that the property cannot be divided advantageously to the coowners, the court shall order that the property be partitioned by sale as provided in Article 4 (commencing with Section 764.10).

§ 764.30

If the staff proposal for the standard for determining when a sale may be ordered is acceptable, this section should be rephrased:

If the court finds that the property to be partitioned includes property that cannot be divided advantageously to the coowners ~~while~~ the remainder can be so divided, the court shall order that such property be severed and partitioned by sale as provided in this article and the remainder partitioned by division as provided in Article 3 (commencing with Section 760.10).

New Sections

Right to partition. The Commission has previously determined that the partition statute should codify the right to partition unless partition is shown to be inequitable under the circumstances of the case. The staff offers the following draft, based in Kansas Stats. Ann., Code Civ. Proc. § 60-1003:

The court shall order partition of property as provided in this chapter upon application of any person entitled thereto unless it is shown that partition of the property would result in extraordinary hardship or oppression.

Sales procedures agreed to by the parties. The Commission has previously determined that the statute should include express authority for the court to order any sales procedures, such as appointment of an exclusive broker, that the parties agree to. Here is a staff draft of such a provision:

Notwithstanding any other provision of this chapter, in case of a sale of the property, the court shall order any sale procedures expressly agreed to in writing by all the parties to the action.

Division by parcel. The Commission has previously determined that, where property is to be divided, if it consists of several parcels, the parcels should not be split up but should be distributed among the coowners with appropriate payment of owelty. Here is a staff draft of such a provision:

Where real property to be divided consists of more than one known lot or parcel, the court shall, if practicable, order that the property be divided by known lot or parcel, without other internal division, and distributed to the persons entitled thereto. The court shall further order that compensation be made among such persons if necessary to satisfy their proportionate interests in the property so divided.

To facilitate this type of division by parcel, the Commission also requested that the following type of joinder provision be added:

If property not joined in a partition action is owned exclusively by the parties to the action, the court shall, upon motion of any defendant, order that such property be joined in the partition action.

Accrual of interest on amounts due for services of third persons in case of delay in payment. The Commission requested that the staff consider the possibility of providing for the accrual of interest where persons such as appraisers, surveyers, brokers, and the like have rendered services but must wait a long time for compensation. The staff believes that such a provision

might help in obtaining competent services. The referee should be able to provide in the contract for interest not to exceed the legal rate:

A contract for the services of an expert in the partition action may provide for the accrual of interest at a rate not in excess of the legal rate for amounts due under the contract that are not paid within three months after the time they become due and payable.

Respectfully submitted,

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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 not 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 change 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 Neftzer, 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 probat  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 766, last paragraph.

Article 12

Costs Of Partition-Apportionment 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.

§ 751.61. [Court's considerations in reaching conclusions.] In reaching the conclusions called for by Section 751.60, the court shall give effect to the changes in land boundaries caused by the disaster, mitigated, however, so far as can equitably be done by adjustment of land boundaries and by allocating to contiguous lots parts of the land released by a city, county or the state by its voluntary vacation of areas formerly constituting public ways, which vacatings of streets shall be approved by the judgment. [1972 ch 936 § 2.]

§ 751.62. [Conclusiveness of judgment.] The judgment shall be conclusive with respect to land boundaries upon every entity who at the commencement of the action had or claimed an estate, right, title or interest in or to or lien upon a part of the entire area of real property described in the complaint as intended to be affected by the action, and upon every entity claiming under any such person by title subsequent to the commencement of the action. [1972 ch 936 § 2.]

§ 751.63. [Recording copy of judgment: Notice therefrom.] A certified copy of the judgment shall be recorded, at the expense of the plaintiff or plaintiffs in the action, in the office of the recorder of the county in which the affected land is situated and shall constitute constructive notice of the findings therein and of the official plat or plats referred to therein, which findings and plats shall supersede and control all prior plats, maps and documents to the extent inconsistent therewith. [1972 ch 936 § 2.]

§ 751.64. [Cumulative remedies.] The remedies provided for by this chapter are cumulative and in addition to any other remedy provided by law for quieting or establishing title to real property or the boundaries of it. [1972 ch 936 § 2.]

§ 751.65. [Citation of chapter.] This chapter may be cited as the Cullen Earthquake Act. [1972 ch 936 § 2.]

CHAPTER 4

Actions for Partition of Real and Personal Property

- § 752. When and by whom action may be brought for partition of realty.
- § 752a. Action for partition of personal property: Provisions governing.
- § 752b. Partition action by condominium owners: Grounds.
- § 753. Showing interest of all persons: Setting forth unknown parties, interests, etc.
- § 753.1. Same: Property subject to oil or gas lease, etc.: Absence of effect of sale or judgment on persons not made parties defendant.
- § 754. Lien-holders not of record need not be made parties.
- § 755. Lis pendens: Plaintiff to record: Contents of notice and effect of filing.
- § 756. Summons: To whom directed: Contents.
- § 757. Same: Service upon absent or unknown party: Description in published summons.
- § 758. Answer: Effect of failure to make: What to contain.
- § 759. Rights of all parties may be determined: Proof of title: Consideration of rights of unknown persons.
- § 760. Partial partition.
- § 761. Lien-holders not made parties: Bringing in or appointment of referee: Questions to be ascertained.
- § 762. Notice to lien-holders prior to appearance before referee: Report of referee.
- § 763. Sale in lieu of partition: Designation of portion for owners with unknown interests: Appointment of referees: Procedure for partition.
- § 764. Partition must be according to rights of parties.
- § 765. Referees must make report of proceedings: Motion to confirm, etc.
- § 766. Court may confirm, etc., report: Judgment binding on whom: Conveyance pending action.
- § 767. Judgment not to affect tenants for years to the whole property.
- § 768. Expenses of partition must be apportioned among the parties.

- § 769. A lien on an undivided interest of any party is a charge only on the share assigned to such party.
- § 770. Estate for life or years may be set off in a part of the property not sold, when not all sold.
- § 771. Application of proceeds of sale of encumbered property.
- § 772. Party holding other securities may be required first to exhaust them.
- § 773. Proceeds of sale, disposition of.
- § 774. Continuance for determination of claims to proceeds of sale.
- § 775. Sales by referees: How made.
- § 776. The court must direct the terms of sale or credit.
- § 777. Referees may take securities for purchase money.
- § 778. Tenant whose estate has been sold shall receive compensation.
- § 779. The court may fix such compensation.
- § 780. The court must protect tenants unknown.
- § 781. Securing value of contingent future rights or estates or life estates.
- § 782. Terms of sale must be made known at the time: Lots must be sold separately.
- § 783. Who may not be purchasers.
- § 784. Referees' report of sale to court: Confirmation or vacation of sale.
- § 785. Order to execute conveyances, etc.: Resale on refusal of purchaser to pay bid: Action to recover for such refusal.
- § 786. Proceeding if a lien-holder becomes a purchaser.
- § 787. Recording and effect of conveyances.
- § 788. Proceeds of sale belonging to parties unknown must be invested for their benefit.
- § 789. Investment must be made in the name of the clerk of the county.
- § 790. When the interests of parties are ascertained, securities must be taken in their names.
- § 791. Duties of the clerk making investments.
- § 792. When unequal partition is ordered, compensation may be adjudged in certain cases.
- § 793. The share of an infant may be paid to his guardian.
- § 794. Guardian of insane person may receive proceeds of such party's interest.
- § 796. Costs of partition a lien upon shares of parceners.
- § 798. Apportionment of expenses of litigation.
- § 799. Abstract of title, title insurance policy, or certificate of title, etc., in action for partition: Inspection and use: Allowance of expense.
- § 800. Same: How made and verified.
- § 801. Interest allowed on disbursements made under direction of the court.

§ 752. [When and by whom action may be brought for partition of realty.] When several cotenants own real property as joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, or when real property is subject to a life estate with remainder over, an action may be brought by one or more of such persons, or, where property is subject to a life estate with remainder over, by the life tenant, or where real property is subject to a lien on a parity with that on which the owner's title is based, by the owner or by the holder of such lien, for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appears that a partition can not be made without great prejudice to the parties. [1872; 1919 ch 216 § 1; 1927 ch 755 § 1; 1943 ch 892 § 1.] *Cal Jur 2d Ex & Ad § 412; High § 331, Life § 31, Mtg § 421, Partit §§ 3, 12, 15, 16, 24, 34, 35, 42, 55, 81; Cal Practice §§ 210:2, 210:5, 210:13, 215:19, 393:2, 393:14, 393:28, 430:2, 430:7; Witkin Procedure 2d p 2188; Summary pp 715, 954, 961, 967, 971, 972.*

§ 752a. [Action for partition of personal property: Provisions governing.] Where several persons are co-owners of any personal property, an action may be brought by any one or more such co-owners for a partition thereof; or in case partition cannot be had without great prejudice to the owners, for the sale thereof, and partition of the proceeds according to the respective interests of the parties. In all such actions the provisions of this chapter shall

govern whenever applicable. Real and personal property may be partitioned in the same action. [1919 ch 49 § 1.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 15, 33; Cal Practice § 210:9; Witkin Summary p 971.*

§ 752b. [Partition action by condominium owners: Grounds.] Where several persons own condominiums, as defined in Section 783 of the Civil Code, in a condominium project, as defined in Section 1350 of the Civil Code, an action may be brought by one or more of such persons for partition thereof by sale of the entire project, as if the owners of all of the condominiums in such project were tenants-in-common in the entire project in the same proportion as their interests in the common areas, provided, however, that a partition shall be made only upon the showing that (1) three years after damage or destruction to 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 (2) that three-fourths or more of the project has been destroyed or substantially damaged, and that condominium owners holding in aggregate more than a 50 percent interest in the common areas are opposed to repair or restoration of the project, or (3) that the project has been in existence in excess of 50 years, that it is obsolete and uneconomic, and that condominium owners holding in aggregate more than a 50 percent interest in the common areas are opposed to repair or restoration of the project, or (4) that 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 Second of the Civil Code have been met. [1963 ch 860 § 2.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 34; Witkin Procedure 2d 2190.*

§ 753. [Showing interest of all persons: Setting forth unknown parties, interests, etc.] Except as provided in Section 753.1 and 754, the interests of all persons in the property, whether such persons are known or unknown, must be set forth in the complaint, as far as known to the plaintiff; and if one or more of the parties, or the share or quantity of interest of any of the parties, is unknown to the plaintiff, or is uncertain or contingent, or the ownership of the inheritance depends upon an executory devise, or the remainder is a contingent remainder, so that such parties cannot be named, that fact must be set forth in the complaint. [1872; 1907 ch 329 § 1; 1959 ch 741 § 1.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 55; Cal Practice §§ 429:8, 430:8; Witkin Procedure 2d p 2189; Summary p 1633.*

§ 753.1. [Same: Property subject to oil or gas lease, etc.: Absence of effect of sale or judgment on persons not made parties defendant.] When the property is subject to a lease, community lease, unit agreement or other pooling arrangement with respect to oil or gas or both, it shall not be necessary to name as parties defendant persons whose only interest in the property 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 any of them, and no sale or judgment shall affect the interest of such persons not made parties defendant. [1959 ch 741 § 2.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 49, 55; Witkin Procedure 2d p 2189.*

§ 754. Lien-holders not of record need not be made parties. No person having a conveyance of or claiming a lien on the property, or some part of it, need be made a party to the action, unless such conveyance or lien appear of record. [1872.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 50, 51, 55; Cal Practice §§ 393:10, 393:11; Witkin Procedure 2d p 2189.*

§ 755. [Lis pendens: Plaintiff to record: Contents of notice and effect of filing.] Immediately after filing the complaint in the superior court, the plaintiff must record in the office of the recorder of the county, or of the several counties in which the property is situated, a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of filing such notice for record all persons shall be deemed to have notice of the pendency of the action. [1872; 1873-74 ch 383 § 98; 1880 ch 22 § 2.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 48; Cal Practice § 393:8; Witkin Procedure 2d p 1067.*

§ 756. [Summons: To whom directed: Contents.] The summons must contain a description of the property sought to be partitioned, and must be directed to all of the persons named as defendants in the complaint, and when it shows that some 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. [1872; 1907 ch 329 § 2.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 47; Cal Practice §§ 14:6, 210:10, 210:21, 215:9, 393:18; Witkin Procedure 2d p 1407.*

§ 757. [Same: Service upon absent or unknown party: Description in published summons.] If a party having a share or interest or lien is unknown and such fact is made to appear by affidavit, the summons may be served on such unknown party by publication. When publication is made pursuant to this section or as to a known party, pursuant to Section 415.50, the summons, as published, shall contain the description of the property which is the subject of the action. [1872; 1939 ch 516 § 1; 1943 ch 892 § 2; 1969 ch 1611 § 11.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 47; Cal Practice §§ 210:10, 393:18; Witkin Procedure 2d pp 1389, 1407.*

§ 758. [Answer: Effect of failure to make: What to contain.] 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 must controvert such of the allegations of the complaint as he does not wish to be taken as admitted, and must set forth his estate or interest in the property, and if he claims a lien thereon must state the date and character of the lien and the amount remaining due, and whether he has any additional security therefor, and if so, its nature and extent, and if he fails to disclose such additional security, he must be deemed to have waived his lien on the property to be partitioned. [1872; 1907 ch 329 § 3.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 59; Cal Practice §§ 210:15, 215:13, 393:16, 429:10, 430:10.*

§ 759. [Rights of all parties may be determined: Proof of title: Consideration of rights of unknown persons.] The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried, and determined in such action; and when a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the court before the sale can be ordered; except that where there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not as between themselves. [1872; 1907 ch 329 § 4.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 19, 54, 81; Cal Practice §§ 210:23, 393:38.*

§ 760. Partial partition. Whenever from any cause it is, in the opinion of the court, impracticable or highly inconvenient to make a complete partition, in the first instance, among all the parties in interest, the court may first ascertain and determine the shares or interest respectively held by the original co-tenants, and thereupon adjudge and cause a partition to be made, as if such original co-tenants were the parties, and sole parties, in interest, and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof, as they may desire. [1872.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 18.*

§ 761. [Lien-holders not made parties: Bringing in or appointment of referee: Questions to be ascertained.] If it appears to the court that there are outstanding liens or encumbrances of record upon such real property, or any part thereof, which existed and were of record at the time of the commencement of the action, and the persons holding such liens are not made parties to the action, the court must either order such persons to be made parties to the action, by an amended or supplemental complaint, or appoint a referee to ascertain whether or not such liens or encumbrances have been paid, and if not paid, what amount remains due thereon, and their order among the liens or encumbrances severally held by such persons and the parties to the action, and whether the amount remaining due thereon has been secured in any manner, and if secured, the nature and extent of the security. [1872; 1907 ch 329 § 5.]

Cal Jur 2d Mtg § 421, Partit §§ 12, 28, 51, 63, 64, 65; Cal Practice §§ 210:19, 215:7, 215:16, 393:20-393:22.

§ 762. [Notice to lien-holders prior to appearance before referee: Report of referee.] The plaintiff shall cause a notice to be served, a reasonable time previous to the day for appearance before the referee appointed as provided in Section 761, on each person having outstanding liens of record, who is not a party to the action, to appear before the referee at a specified time and place, to make proof, by his own affidavit or otherwise, of the amount due, or to become due, contingently or absolutely thereon. The notice shall be served in the manner provided by law for the service of a summons in a civil action, but, if service cannot otherwise be made with the exercise of reasonable diligence, service may be made by publication or notice to his agents, under the direction of the court, in such manner as may be proper. The report of the referee thereon must be made to the court, and must be confirmed, modified, or set aside, and a new reference ordered, as the justice of the case may require. [1872; 1969 ch 1611 § 12.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 65, 67; Cal Practice §§ 210:20, 215:17, 393:22, 393:25.*

§ 763. [Sale in lieu of partition: Designation of portion for owners with unknown interests: Appointment of referees: Procedure for partition.] If it appears by the evidence, whether alleged in the complaint or not, that the property or any part of it is so situated that partition cannot be made without great prejudice to the owners, or where property is subject to a life estate and the remainder is a contingent remainder, the court may and in the latter case must order the sale thereof; otherwise, upon the requisite proofs being made it must order a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees therefor, and must designate the portion to remain undivided for the owners whose interests remain unknown, or are not ascertained; or the court may with the consent of the parties appoint one referee instead of three, and he, when appointed, has all the powers and may perform all the duties required of three referees; and the court must appoint as referee any person or persons to whose appointment all the parties have consented, provided that in the case of an incompetent or minor party the duly appointed guardian or conservator or guardian ad litem of said defendant may so consent, and provided further that no person shall be appointed as referee who is a clerk of the court or deputy clerk, or partner or employee of the judge, or person related to the judge or to his wife within the third degree, or who is married to a relative of the judge within the third degree, or who owns any interest or estate in the property.

Where the property or an interest therein is subject to an express trust the court, notwithstanding the foregoing provisions of this section respecting property subject to a life estate and contingent remainder, may but shall not be required to order a sale thereof; and in the event of either a partition or sale, the property or proceeds of sale allotted to the trustee of such express trust shall be held by him upon the trust therein stated, and no further action by the court pursuant to Section 781 of this code shall be required.

When the site of an incorporated city or town is included within the exterior boundaries of the property to be partitioned, the court must direct the referees to survey and appraise the entire property to be partitioned by actual lots and subdivisions then existing in the actual possession of the several tenants in common, exclusive of the value of improvements thereon, first setting apart necessary portions of the property for ways, roads and streets, as in Section 764 provided, and to report such survey and separate appraisement on each lot and subdivision to the court.

The court may confirm, change, modify, or set aside the report in whole or in part, and, if necessary, appoint new referees.

When, after the final confirmation of the report of such survey and appraisement, it appears by evidence to the satisfaction of the court that an equitable partition of the whole property is impracticable, and a sale of the site of such city or town, or any portion thereof, will be for the best interests of the owners of the whole property, it must order a sale thereof; provided, that within 60 days thereafter any tenant in common or tenants in common, having

improvements erected on any town or city lot or subdivision included in such order of sale, shall have the prior right to purchase the same at such appraised valuation, and may pay into court the amount so appraised as the value thereof, and upon such payment the title shall vest in such purchaser or purchasers, and the court shall cause to be executed by such referees a deed for such lot or subdivision in fee and in severalty to such purchaser or purchasers; such further proceeding shall then be had as to the remainder of the property, and the money so paid to the court, as by this chapter provided.

If, during the pendency of the action, any of the parties die, or become insane, or otherwise incompetent, the proceedings shall not for that cause be delayed or suspended, but the attorney who has appeared for such party may continue to represent such interest; and in case any such party has not appeared by an attorney, the court must appoint an attorney to represent the interest which was held by such party, until his heirs or legal representatives, or successors in interest, shall have appeared in the action; and an attorney so appointed must be allowed by the court a reasonable compensation for his services, which may be taxed as costs against the share or interest represented by such attorney, and may be adjudged a lien thereon in the discretion of the court. [1872; 1880 ch 55 § 1; 1907 ch 329 § 6; 1913 ch 154 § 1; 1927 ch 756 § 1; 1931 ch 717 § 1; 1943 ch 892 § 3; 1955 ch 1501 § 1; 1965 ch 1687 § 1.] *Cal Jur 2d Appeal § 397, Attys § 83, Life Est § 31, Mtg § 421, Partit §§ 12, 27, 63, 64, 66, 70, 77, 79, 82, 83; Cal Practice §§ 210:13, 210:17, 210:19, 210:23, 215:16, 393:14, 393:20, 393:21, 393:24, 393:29, 393:33, 393:36, 393:38, 393:40, 429:12; Witkin Procedure 2d pp 37, 84, 1909, 2189, 3193; Summary pp 971, 972.*

§ 764. [Partition must be according to rights of parties.] In making partition, the referees must divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistants to aid them. Before making partition or sale, the referees may, whenever it will be for the advantage of those interested, set apart a portion of the property for a way, road, or street, and the portion so set apart must not be assigned to any of the parties or sold, but must remain an open and public way, road, or street, unless the referees shall set the same apart as a private way for the use of the parties interested, or some of them, their heirs and assigns, in which case it shall remain such private way. Whenever the referees have laid out on any tract of land roads sufficient in the judgment of said referees to accommodate the public and private wants, they must report that fact to the court, and upon the confirmation of their report all other roads on said tract cease to be public highways.

Whenever it appears, in an action for partition of lands, that one or more of the tenants in common, being the owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds out of the common land, and executed to the purchaser a deed of conveyance, purporting to convey the whole title to such specific tract to the purchaser in fee and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs and assigns, or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts of land can be so allotted or set apart without material injury to the rights and interests of the other co-tenants who may not have joined in such conveyance.

In all cases it is the duty of the referees, in making partition of land, to allot the share of each of the parties owning an interest in the whole or in any part of the premises sought to be partitioned, and to locate the share of each co-tenant, so as to embrace as far as practicable the improvements made by such co-tenant upon the property, and the value of the improvements made by the tenants in common must be excluded from the valuation in making the allotments, and the land must be valued without regard to such improvements, in case the same can be done without material injury to the rights and interests of the other tenants in common owning such land. [1872; 1873-74 ch 383 § 99; 1875-76 ch 513 § 1; 1907 ch 329 § 7.] *2 Cal Jur 3d Adjoining Landowners § 55; Cal Jur 2d Bound § 6, Coten § 39, Mtg § 421,*

Partit §§ 12, 21, 22, 66, 67; Cal Practice §§ 210:19, 215:16, 393:24, 393:25; Witkin Summary p 971.

§ 765. [Referees must make report of proceedings: Motion to confirm, etc.] The referees must make a report of their proceedings, specifying therein the manner in which they executed their trust, and describing the property divided, and the shares allotted to each party, with a particular description of each share. Any party to the action, after giving at least ten days' notice in writing to the other parties who have appeared therein of his intention to do so, may move the court to confirm, change, modify, or set aside such report. [1872; 1907 ch 329 § 8.] *2 Cal Jur 3d Adjoining Landowners § 58; Cal Jur 2d Bound § 7, Mtg § 421, Partit §§ 12, 67, 68; Cal Practice §§ 210:20, 393:25, 393:26.*

§ 766. [Court may confirm, etc., report: Judgment binding on whom: Conveyance pending action.] The court may confirm, change, modify, or set aside the report, and if necessary, appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive:

1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, 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 therein, 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;

2. On all persons not in being at the time said judgment is entered, who have any interest in the property divided, 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 therein, and who by any contingency may be entitled to a beneficial interest in the property; provided, that in case sale has been made under the provisions of this chapter the judgment shall provide for keeping intact 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;

3. On all persons interested in the property, who may be unknown, to whom notice has been given of the action for partition by publication;

4. On all other persons claiming from such parties or persons, or either of them.

And no judgment is invalidated by reason of the death of any party before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representatives, or assigns of such decedent, as if it had been entered before his death.

If during the pendency of the action, and before final judgment therein, any of the cotenants has conveyed to another person his interest, or any part of his interest, such conveyance, whatever its form, shall be deemed to have passed to the grantee any lands which, after its execution, may have been set aside to the grantor in severalty, or such proportionate interest in such lands as the interest so conveyed bears to the whole interest of the grantor. [1872; 1907 ch 329 § 9; 1911 ch 189 § 1.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 67, 77, 103; Cal Practice §§ 210:21, 215:18, 393:25, 393:35.*

§ 767. Judgment not to affect tenants for years to the whole property. The judgment does not affect tenants for years less than ten to the whole of the property which is the subject of the partition. [1872.] *Cal Jur 2d Mtg § 421, Partit § 12; Cal Practice § 51:9.*

§ 768. Expenses of partition must be apportioned among the parties. The expenses of the referees, including those of a surveyor and his assistants, when employed, must be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by the court, in its discretion, to the referees, must be apportioned among the different parties to the action, equitably. [1872.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 69; Cal Practice § 393:28.*

§ 769. A lien on an undivided interest of any party is a charge only on the share assigned to such party. When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such

party; but such share must first be charged with its just proportion of the costs of the partition, in preference to such lien. [1872.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 78, 80, 100; Cal Practice § 215:1; Witkin Summary p 970.*

§ 770. Estate for life or years may be set off in a part of the property not sold, when not all sold. When a part of the property only is ordered to be sold, if there be an estate for life or years, in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold. [1872.] *Cal Jur 2d Life Est § 31, Mtg § 421, Partit § 12.*

§ 771. [Application of proceeds of sale of encumbered property.] The proceeds of the sale of encumbered property must be applied under the direction of the court, as follows:

1. To pay its just proportion of the general costs of the action;
2. To pay the costs of the reference;
3. To satisfy and cancel of record the several liens in their order of priority, if entitled to priority over the lien under which the owner's title was obtained, by payment of the sums due and to become due; the amount due to be verified by affidavit at the time of payment;
4. The residue among the parties, according to their respective shares therein, as found by the court. [1872; 1943 ch 892 § 4.] *Cal Jur 2d Mtg § 421, Partit § 12; Cal Practice § 215:1; Witkin Summary p 970.*

§ 772. Party holding other securities may be required first to exhaust them. Whenever any party to an action, who holds a lien upon the property, or any part thereof, has other securities for the payment of the amount of such lien, the court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property, on account thereof. [1872.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 80.*

§ 773. Proceeds of sale, disposition of. The proceeds of sale and the securities taken by the referees, or any part thereof, must be distributed by them to the persons entitled thereto, whenever the court so directs. But in case no direction be given, all of such proceeds and securities must be paid into court, or deposited therein, or as directed by the court. [1872.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 87.*

§ 774. [Continuance for determination of claims to proceeds of sale.] When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action, whether known or unknown, are paid into 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, at 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. [1872; 1907 ch 329 § 10.] *Cal Jur 3d Actions § 159; Cal Jur 2d Mtg § 12, Partit §§ 12, 87; Cal Practice § 29:91; Witkin Procedure 2d p 2878.*

§ 775. [Sales by referees: How made.] 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 the most beneficial to all parties interested. If sold at public auction the notice must state the terms of sale and if the property or any part thereof is to be sold subject to a prior estate, charge or lien, that must be stated in the notice. If the sale is ordered made at either public auction or private sale, the sale at private sale shall be conducted in the manner required in private sales of real property of estates of deceased persons. [1872; 1907 ch 329 § 11; 1909 ch 666 § 1.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 82-84; Cal Practice §§ 210:25, 215:19, 393:38, 393:41; Witkin Procedure 2d p 3209; Summary p 972.*

§ 776. The court must direct the terms of sale or credit. The court must, in the order for sale, direct the terms of credit which may be allowed for the purchase-money of any portion of the premises of which it may direct a sale on credit, and for that portion of which the purchase-money is required, by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants, or parties out of the state. [1872.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 82; Cal Practice §§ 210:23, 393:34, 393:38.*

§ 777. Referees may take securities for purchase money. The referees may take separate mortgages and other securities for the whole, or convenient portions of the purchase money, of such parts of the property as are directed by the court to be sold on credit, for the shares of any known owner of full age, in the name of such owner; and for the shares of an infant, in the name of the guardian of such infant; and for other shares, in the name of the clerk of the county and his successors in office. [1872.] *Cal Jur 2d G & W § 91, Mtg §§ 127, 421, Partit §§ 12, 83, 84; Cal Practice §§ 210:25, 393:34, 393:41.*

§ 778. Tenant whose estate has been sold shall receive compensation. The person entitled to a tenancy for life, or years, whose estate has been sold, is entitled to receive such sum as may be deemed a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing, filed with the clerk of the court. Upon the filing of such consent, the clerk must enter the same in the minutes of the court. [1872.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 87; Cal Practice § 393:35.*

§ 779. The court may fix such compensation. If such consent be not given, filed, and entered as provided in the last section, at or before a judgment of sale is rendered, the court must ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate, and must order the same to be paid to such party, or deposited in court for him, as the case may require. [1872.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 77, 87; Cal Practice §§ 210:21, 393:35.*

§ 780. The court must protect tenants unknown. If the persons entitled to such estate for life or years be unknown, the court must provide for the protection of their rights in the same manner, as far as may be, as if they were known and had appeared. [1872.] *Cal Jur 2d Mtg § 421, Partit § 87.*

§ 781. [Securing value of contingent future rights or estates or life estates.] In all cases of sales, when it appears that any person has a vested or contingent future right or estate in any of the property sold, the court must ascertain and settle the proportional value of such contingent or vested right or estate, and must direct such proportion of the proceeds of the sale to be invested, secured, or paid over, in such manner as to protect the rights and interests of the parties; or where property is subject to a life estate with remainder over, the court may direct the entire proceeds of the sale of such interests to be paid to a trustee to be appointed by the court, upon security satisfactory to the court, to be invested and reinvested, the income thereof to be paid to the life tenant and the corpus of the trust estate, upon the termination of the life 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 such trust and final distribution of the trust fund. [1872; 1927 ch 757 § 1.] *Cal Jur 2d Acctg § 85, Life Est § 31, Mtg § 421, Partit §§ 12, 77, 87; Cal Practice §§ 210:22, 393:35; Witkin Summary p 972.*

§ 782. Terms of sale must be made known at the time: Lots must be sold separately. In all cases of sales of property the terms must be made known at the time; and if the premises consist of distinct farms or lots, they must be sold separately. [1872.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 84; Cal Practice §§ 210:25, 393:34, 393:41.*

§ 783. Who may not be purchasers. Neither of the referees, nor any person for the benefit of either of them, can be interested in any purchase; nor can a guardian of an infant party be interested in the purchase of any real property, being the subject of the action, except for the

benefit of the infant. All sales contrary to the provisions of this section are void. [1872.] *Cal Jur 2d G & W § 105, Mtg § 421, Partit §§ 12, 84; Cal Practice §§ 210:25, 393:41.*

§ 784. [Referees' report of sale to court: Confirmation or vacation of sale.] After completing a sale of property, or any part thereof ordered to be sold, the referees must report the same to the court, with a description of the different parcels of land sold to each purchaser; the name of the purchaser; the price paid or secured; the terms and conditions of the sale, and the securities, if any, taken. The report must be filed in the office of the clerk of the county in which the action is brought. Thereafter any purchaser, the referee, or any party to the action, may, upon 10 days' notice to the other parties who have appeared therein, and also to the purchaser if he be not the moving party, move the court to confirm or set aside any sale or sales so reported. Upon the hearing, the court must examine the return and report and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appears that a sum exceeding such bid at least 10 percent, exclusive of the expenses of a new sale, may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given, and the sale conducted in all respects as if no previous sale had taken place. If an offer of 10 percent more in amount than that named in the return be made to the court, in writing, by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale. [1872; 1907 ch 329 § 12; 1909 ch 667 § 1; 1955 ch 1501 § 2; 1959 ch 1320 § 1.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 83, 85, 86; Cal Practice §§ 210:26, 210:27, 215:19, 215:20, 393:42, 393:44; Witkin Summary p 972.*

§ 785. [Order to execute conveyances, etc.: Resale on refusal of purchaser to pay bid: Action to recover for such refusal.] If the sale is confirmed by the court, an order must be entered, directing the referees to execute conveyances and take securities pursuant to such sale, which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of the sale. If the purchaser, after the confirmation of the sale, refuses to pay the amount of his bid, the referees may again sell the property at any time to the highest bidder, and if any loss is occasioned thereby the referees may recover the amount of such loss and the cost from the bidder so refusing, or the referees, without making a resale, may maintain an action against the purchaser for the amount of his bid. [1872; 1907 ch 329 § 13.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 77, 85-87; Cal Practice §§ 210:21, 210:26, 210:27, 215:19, 393:42, 393:44; Witkin Procedure 2d p 4332; Summary p 759.*

§ 786. Proceeding if a lien-holder become[s] a purchaser. When a party entitled to a share of the property, or an encumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him. [1872.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 84; Cal Practice §§ 210:25, 215:19, 393:41.*

§ 787. [Recording and effect of conveyances.] The conveyances must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way who shall have been named as parties in the action, and against all such parties and persons as were unknown, if the summons was served by publication, and against all persons claiming under them, or either of them, and against all persons having unrecorded deeds or liens at the commencement of the action. [1872; 1873-74 ch 383 § 100.] *Cal Jur 2d Mtg § 421, Partit § 12, Recds §§ 42, 45.*

§ 788. Proceeds of sale belonging to parties unknown must be invested for their benefit. When there are proceeds of a sale belonging to an unknown owner, or to a person without the state, who has no legal representative within it, the same must be invested in bonds of this state or of the United States, for the benefit of the persons entitled thereto. [1872.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 87.*

§ 789. Investment must be made in the name of the clerk of the county. When the security of the proceeds of sale is taken, done, except as herein otherwise provided, in the

name of the clerk of the county where the papers are filed, and his successors in office, who must hold the same for the use and benefit of the parties interested, subject to the order of the court. [1872.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 87.*

§ 790. When the interests of parties are ascertained, securities must be taken in their names. When security is taken by the referees on a sale, and the parties interested in such security, by an instrument in writing, under their hands, delivered to the referees, agree upon the shares and proportions to which they are respectively entitled, or when shares and proportions have been previously adjudged by the court, such securities must be taken in the names of and payable to the parties respectively entitled thereto, and must be delivered to such parties upon their receipt therefor. Such agreement and receipt must be returned and filed with the clerk. [1872.] *Cal Jur 2d Mtg § 421, Partit §§ 12, 87.*

§ 791. Duties of the clerk making investments. The clerk in whose name a security is taken, or by whom an investment is made, and his successors in office, must receive the interest and principal as it becomes due, and apply and invest the same as the court may direct; and must deposit with the county treasurer all securities taken, and keep an account in a book provided and kept for that purpose, in the clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof. [1872.] *Cal Jur 2d Mtg § 421, Partit § 12.*

§ 792. When unequal partition is ordered, compensation may be adjudged in certain cases. When it appears that partition cannot be made equal between the parties, according to their respective rights without prejudice to the rights and interests of some of them, and a partition be ordered, the court may adjudge compensation to be made by one party to another, on account of the inequality; but such compensation shall not be required to be made to others by owners unknown, nor by an infant, unless it appears that such infant has personal property sufficient for that purpose, and that his interest will be promoted thereby. And in all cases the court has power to make compensatory adjustment between the respective parties, according to the ordinary principles of equity. [1872.] *Cal Jur 2d Mtg § 421, Partit § 12; Witkin Summary p 971.*

§ 793. The share of an infant may be paid to his guardian. When the share of an infant is sold, the proceeds of the sale may be paid by the referee making the sale to his general guardian, or the special guardian appointed for him in the action, upon giving the security required by law or directed by order of the court. [1872.] *Cal Jur 2d G & W § 91, Mtg § 421, Partit §§ 12, 87.*

§ 794. [Guardian of insane person may receive proceeds of such party's interest.] The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property has been sold, may receive in behalf of such person his share of the proceeds of such real property from the referees, on executing with sufficient sureties an undertaking approved by a judge of the court, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled or to his legal representative. [1872; 1880 ch 22 § 3.] *Cal Jur 2d Ins Per § 85, Mtg § 421, Partit §§ 12, 87.*

§ 796. [Costs of partition a lien upon shares of parceners.] The costs of partition, including reasonable counsel fees, expended by the plaintiff or either of the defendants, for the common benefit, fees of referees, and other disbursements, must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. When, however, litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them. [1872; 1873-74 ch 383 § 101.] *Cal Jur 2d Judgm*

§ 283, *Mtg* § 421, *Partit* §§ 12, 78, 79; *Cal Practice* §§ 51:192, 52:31, 393:37; *Witkin Procedure 2d* pp 3251, 3276.

§ 798. [Apportionment of expenses of litigation.] If it appear that other actions or proceedings have been necessarily prosecuted or defended by any one of the tenants in common, for the protection, confirmation, or perfecting of the title, or setting the boundaries, or making a survey or surveys of the estate partitioned, the court shall allow to the parties to the action, who have paid the expense of such litigation or other proceedings, all the expenses necessarily incurred therein, except counsel fees, which shall have accrued to the common benefit of the other tenants in common, with interest thereon from the date of making the said expenditures, and in the same kind of money expended or paid, and the same must be pleaded and allowed by the court, and included in the final judgment, and shall be a lien upon the share of each tenant respectively, in proportion to his interest, and shall be enforced in the same manner as taxable costs of partition are taxed and collected. [1872; 1873-74 ch 383 § 102; 1875-76 ch 48 § 1.] *Cal Jur 2d Coten* § 41, *Mtg* § 421, *Partit* §§ 12, 78; *Cal Practice* §§ 210:13, 393:14; *Witkin Procedure 2d* pp 2189, 3251, 3276.

§ 799. [Abstract of title, title insurance policy, or certificate of title, etc., in action for partition: Inspection and use: Allowance of expense.] If it is necessary to have an abstract of title, policy of title insurance or certificate of title of the property to be partitioned, or a litigation report or guarantee as to the necessary parties to the action, the plaintiff may procure one before commencing the action, and may, in his complaint, state that he has done so, and that the abstract, policy, certificate, report or guarantee is subject to the inspection and use of all the parties to the action, designating a place where it will be kept for such inspection. Otherwise the court may, upon application of any one of the parties, authorize him to procure an abstract, policy, certificate, report or guarantee, which, when made, shall be kept at some place designated by the court for the inspection and use of all parties, any of whom is entitled to make a copy thereof. The expense reasonably incurred in procuring such abstract, policy, certificate, report or guarantee must be allowed to the party incurring it, with interest thereon from the commencement of the action, if it had been procured before that time, otherwise from the time of payment. [1872; 1907 ch 329 § 16; 1949 ch 651 § 1.] *Cal Jur 2d Mtg* § 421, *Partit* §§ 12, 58, 70, 78; *Cal Practice* §§ 210:13, 393:14, 429:8, 430:8; *Witkin Procedure 2d* pp 2189, 3251.

§ 800. Same: [How made and verified]. The abstract mentioned in the last preceding section may be made by any competent searcher of records, and need not be certified by the recorder or other officer, but instead thereof it must be verified by the affidavit of the person making it, to the effect that he believes it to be correct; but the same may be corrected from time to time if found incorrect, under the direction of the court. [1872.] *Cal Jur 2d Mtg* § 421, *Partit* § 12.

§ 801. Interest allowed on disbursements [made under direction of the court]. Whenever, during the progress of the action for partition, any disbursements shall have been made, under the direction of the court or the judge thereof, by a party thereto, interest must be allowed thereon from the time of making such disbursements. [1872.] *Cal Jur 2d Mtg* § 421, *Partit* §§ 12, 78.

CHAPTER 4A

Actions Concerning Real Property Titles Affected by Public Improvement Assessments

- § 801.1. Actions to determine adverse interests, etc., in real property arising out of public improvement assessments and bonds.
- § 801.2. Joinder with other causes of action: Allegations and verification of complaint.
- § 801.3. Defendants: Persons to be included as.
- § 801.4. Unknown persons as defendants.
- § 801.5. Lis pendens: Filing and contents: Effect.