

Memorandum 74-21

Study 23 - Partition Procedure

Background

The California Land Title Association has agreed to help us with our partition study, and the California Bankers Association has expressed an interest. Mr. R. E. Allen, former partition referee, and Mr. J. D. Cooper, an Oakland attorney who corresponded with the Commission extensively concerning partition some years ago, have also agreed to help. Mr. Cooper has written a letter with several suggested reforms that we will present at a future meeting. Mr. DeMeo will send his partition forms for Commission use when he has reduced them to master formats.

Draft Statute

In accordance with the Commission's prior directive, the staff has reorganized and redrafted the partition statute. Attached to this memorandum (pink) are the chapters of the statute that relate to the right to partition, pleadings, service, parties, and judgment, matters previously discussed by the Commission. These portions of the draft statute incorporate prior Commission decisions. Staff remarks and policy questions on a few of the sections are noted following the section Comments.

Also attached to this memorandum are a copy of the existing partition law (yellow) and a draft of superseded sections with Comments indicating their disposition (green).

The remainder of the staff draft of the partition statute is not attached in order to allow the Commission's consultant adequate time to work it over before it is presented for Commission review. The remainder of the statute will be presented to the Commission at the next meeting.

Meeting Objective

We hope at the meeting to cover every section of the attached draft with the object of approval for inclusion in a tentative recommendation relating to partition.

Respectfully submitted,

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Staff Counsel

CODE OF CIVIL PROCEDURE

PART 2. CIVIL ACTIONS

TITLE 11. PARTITION ACT

Comment. The Code of Civil Procedure provisions relating to partition were formerly found in Chapter 4 (commencing with Section 752) of Title 10. The Partition Act has been moved to a new Title 11 (commencing with Section 875.010), and the provisions formerly occupying Title 11 (Releases From Contribution Among Joint Tortfeasors) have been moved to a new Title 12 (commencing with Section 885).

Note. In order to do the sort of overall reorganization and revision requested by the Commission, we had to elevate partition from a chapter to a title.

CHAPTER 1. GENERAL PROVISIONS

Article 1. Preliminary Provisions

§ 875.010. Short title

875.010. This title shall be known and may be cited as the Partition Act.

Comment. Section 875.010 is similar to comparable provisions in recently enacted California laws. E.g., Civil Code § 4000 (The Family Law Act).

§ 875.020. Definitions

875.020. As used in this title:

(a) "Co-owner" means a person described in Section 875.110.

(b) "Guardian" includes conservator.

(c) "Lien" means a mortgage, deed or trust, or other security interest in property whether arising from contract, statute, common law, or equity.

(d) "Action" means an action for the partition of property under this title.

(e) "Remainder" includes reversion.

(f) "Title report" includes an abstract or certificate of title; a preliminary title, chattel lien, or litigation report; policy of title insurance; or guarantee as to necessary parties.

Comment. Section 875.020 provides definitions for terms used throughout the Partition Act.

The term "co-owner" in subdivision (a) refers to Section 875.110 which describes persons authorized to commence a partition action.

The term "lien" is defined broadly in subdivision (c) to apply to any encumbrance on property, including security interests in personal property.

§ 875.030. Scope of title

875.030. The provisions of this title govern the partition of interests in real property and, to the extent applicable, the partition of interests in personal property.

Comment. Section 875.030 is derived from the second sentence of former Section 752a. The Partition Act permits co-owners of both real and personal property to maintain a partition action. See Section 875.110.

405-785

§ 875.040. Rules of practice in partition actions

875.040. The statutes and rules governing practice in civil actions generally do not apply to actions under this title where they are inconsistent with the provisions or purposes of this title.

Comment. Section 875.040 makes clear that, although partition is nominally a civil action, the Partition Act contains some special procedural provisions that apply to partition despite general rules to the contrary.

405-789

Article 2. Right of Partition

§ 875.110. Persons authorized to commence partition action

875.110. A partition action may be commenced and maintained by any of the following persons:

- (a) A co-owner of personal property.
- (b) A life tenant or remainderman of a life estate in real property.
- (c) A joint tenant or tenant in common of any of the following interests in real property:

- (1) An estate of inheritance.
- (2) An estate for life.
- (3) An estate for years.

Comment. Section 875.110 specifies the interests in property the owners of which may require partition of the property. The owners of such interests are collectively termed "co-owners." See Section 875.020(a).

Subdivision (a) continues the first portion of former Section 752a relating to personal property. Subdivisions (b) and (c) continue the first portion of former Section 752 relating to real property.

Each subdivision in this section states an independent basis for partition. Thus, for example, an owner of a life estate in personal property would be able to maintain a partition action under subdivision (a) while an owner of a life estate in real property would be able to maintain a partition action under subdivision (c)(2).

The provision formerly found in Section 752 for partition by a lienholder "on a parity with that on which the owner's title is based" is not preserved. The provision was of extremely limited application and was an exception to the rule stated in this section that only a substantial property interest is entitled to demand partition. THE LAW REVISION COMMISSION PARTICULARLY SOLICITS COMMENTS CONCERNING THE DELETION OF THE LIEN PROVISION FROM FORMER SECTION 752.

Note. Pursuant to the Commission's request that the staff conduct further research into the consequences of deletion of the provision enabling a lienholder to obtain partition, the staff notes the following. In Riley v. Turpin, 47 Cal.2d 152, 301 P.2d 834 (1956), the court permitted partition by a person who had paid taxes to prevent forfeiture of the property, thereby acquiring the lien of the taxing entities. We note, however, that the lien provision is not necessary to obtain this result since the person paying the taxes was a contingent remainderman upon a life estate and would be entitled to maintain partition under the terms of the statute on that basis.

§ 875.120. Right to partition

875.120. A co-owner is entitled to partition as a matter of right under the provisions of this title unless the partition would be clearly inequitable under the circumstances of the case to the owners of other interests in the property.

Comment. Section 875.120 is new. If the defendant opposes the partition on hardship grounds, he must raise the issue by appropriate pleading (see Section 875.730) and bears the burden of proof on the issue (see Section 876.110).

In addition to instances where partition would be "clearly inequitable," the right to partition is subject to case law and statutes relating to waiver of the right to partition. See, e.g., Annot., Contractual Provisions as Affecting Right to Judicial Partition, 37 A.L.R.3d 962 (1971); see also Civil Code § 1468 (covenants not to partition). For a limitation on the right to partition in the case of condominium property, see Section 879.040.

Note. This section is the result of a prior Commission directive. Mr. Elmore objects to inclusion of such a section, noting:

(i) It takes no account of the waiver, agreement, and estoppel cases. If the intent is to declare such agreements void as a matter of public policy, the statute should so state; moreover, a constitutional question is involved insofar as such provisions would apply to pending agreements carte blanche.

(ii) What is "clearly inequitable"? If one co-owner has ample means to bid in the property and the others do not, is this, without more, within the new terms? Can this change in law be applied to existing ownerships?

(iii) Provisions for delay in sale on the grounds stated might be considered, but again there may be a constitutional question if the delay is unduly long.

405-786

§ 875.130. Right to partition successive estates

875.130. Notwithstanding any other provision of this article, where the interests of the co-owners in the property are solely successive estates, a partition shall be ordered only pursuant to Chapter 11 (commencing with Section 879.910).

Comment. Section 875.130 is new. It refers to Sections 879.910-879.940, which provide standards for the right to partition solely successive interests that differ from the standards provided in this article.

Note. The staff notes that, while the effect of this section is to expand the instances when owners of successive estates may demand partition, it would also remove the right of a life tenant or remainderman under existing law to obtain partition as a matter of right. In effect, if the Commission adopts this section and its implementing provisions which may be found at the end of this draft, it must also repeal Section 875.110(b) (partition may be maintained by life tenant or remainderman) as implemented by Section 875.120 (partition by such person a matter of right).

405-793

Article 3. Powers of Court

§ 875.210. Superior court

875.210. The superior court has jurisdiction of actions under this title.

Comment. Section 875.210 continues a portion of former Section 755.

While partition actions in California are a creature of statute (Capuccio v. Caire, 207 Cal. 200, 277 P. 475 (1932)), they are nonetheless equitable in nature (Elbert Ltd. v. Federated Income Properties, 120 Cal. App.2d 194, 261 P.2d 783 (1953)), and the statutory provisions are to be liberally construed in aid of the court's jurisdiction. See Sections 4 and 187.

§ 875.220. General authority to make orders and decrees

875.220. In the conduct of the proceeding, the court may make any decrees and orders necessary or incidental to carrying out the purposes of this title and to effectuating its decrees and orders.

Comment. Section 875.220 is new. Generally, its purpose is to give the broadest possible statutory authorization to powers that the court, to a large extent, probably already had. The succeeding sections of this article elaborate on, but do not exhaust, the court's power in partition actions.

405-794

§ 875.230. Temporary restraining orders and injunctions

875.230. The court may make temporary restraining orders and injunctions, with or without bond, for the purpose of:

- (a) Preventing waste.
- (b) Protecting the property and title thereto.
- (c) Restraining unlawful interference with a division or sale of the property ordered by the court.

Comment. Section 875.230 is new. 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 injunctions.

405-795

§ 875.240. Referee

875.240. With respect to the referee, the court may:

- (a) Appoint and remove the referee, including a new referee.

(b) Instruct the referee.

(c) Fix the reasonable compensation for the services of the referee and his reasonable expenses.

(d) Provide for the date of commencement of the lien of the referee allowed by law.

(e) Require the filing of interim or final accounts of the referee, settle the accounts of the referee, and discharge the referee.

Comment. Section 875.240 sets out some, but not all, of the court's powers with respect to the referee.

Subdivision (a) is intended to state the substance of the introductory portion of former Section 766. Subdivision (a) broadens this provision to apply to the referee for sale as well as for division.

Subdivision (b) is new; it gives express recognition to the instructions procedure. It is a valuable tool for resolving ambiguities and matters not otherwise covered and, if properly used, serves to expedite the proceeding.

Subdivision (c) states the substance of former Section 768 in providing for court allowance of fees and expenses of referees. Cf. Section 878.020 and Comment thereto.

Subdivision (d), providing for the court to fix the date of commencement of the lien, is new. It avoids the possibility of later settlement and dismissal of the proceeding.

Subdivision (e) is new. It 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.

405-796

§ 875.250. Services of third persons

875.250. The court may:

(a) Authorize or approve contracts for the services and expenses of surveyors, engineers, appraisers, attorneys, real estate brokers, and others.

(b) Allow or reject claims under such contracts.

(c) Provide for the date of commencement of any lien provided by law or contract for such claims.

Comment. Section 875.250 is new. It recognizes that the court is the supervising entity in carrying out the partition. It removes from the referee, acting alone, the authority to engage the services of "third parties" for his assistance. It contemplates that the court will authorize or approve contracts of the referees for "third party" services and expenses, allow or reject claims thereunder, and in proper cases specify the priority of any lien therefor.

Former Sections 766 and 768 provided only for employment by the referee of surveyors and necessary assistants and allowance of their fees and expenses. For particular provisions relating to employment of third persons, see Sections 876.620-876.640.

Section 875.250 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 proceeding.

So also, in a particular case, employment of a real estate broker by the referee may be desirable. Under Section 875.250, such employment may be authorized or approved and the terms of the contract prescribed or approved by the court.

405-797

§ 875.260. Sale procedures

875.260. With respect to a sale, the court may:

(a) In advance of sale:

(1) Prescribe any additional terms and conditions of sale which it deems proper for the particular property or sale, including adoption of the procedure of Section 877.750.

(2) Fix a minimum bid, to be effective a reasonable time, not exceeding six months from the date of fixing the bid.

(3) Permit rejection of all bids upon a first sale.

(4) Require additional notice of sale to be given.

(b) Approve or prescribe the terms of security to be taken upon the sale, including the manner in which title to the security is to be taken, whether in a single instrument or several instruments, according to the interests of the co-owners.

(c) Order the distribution, deposit, or securing of sale deposits and sale proceeds.

(d) Make 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.

Comment. Section 875.260 is intended merely to supply some detail with respect to the powers of the court in a partition sale.

Subdivision (a) implements Section 877.750, 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 877.750 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 in 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 Ill. Stats., Ch. 106, § 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 disposed of, 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.

Subdivision (b) states the court's authority over purchase-money security in general terms. The subject was covered in former Sections 773 and 776, which appeared to divide the authority between the court and the referee.

Subdivision (c) states the court's authority over monies involved in a sale transaction in broader terms than former Section 773, which referred 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. 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.

Subdivision (d) recognizes that modern day transactions often involve, at closing, minor deviations or adjustments. The court is expressly authorized to pass upon them.

405-799

§ 875.270. Compensatory adjustment

875.270. The court may, in all cases, make compensatory adjustment among the parties according to the ordinary principles of equity.

Comment. Section 875.270 continues the last sentence of former Section 792. It includes such matters as accountings and other incidental relief. For a provision for payment of owelty in cases of unequal division, see Section 877.060.

CHAPTER 2. COMMENCEMENT OF ACTION

Article 1. Complaint and Lis Pendens

§ 875.510. Contents of complaint

875.510. The complaint shall contain all of the following information:

(a) A description of the property that is the subject of the action.

The description shall include:

(1) In the case of tangible personal property, its usual location.

(2) In the case of real property, both its legal description and street address or common designation.

(b) All right, title, or interest the plaintiff has or claims in the property.

(c) All right, title, or interest of record or actually known to the plaintiff that persons other than the plaintiff have or claim in the property, whether the names of such persons are known or unknown to the plaintiff.

(d) The interests as to which partition is sought.

(e) A prayer for partition of the interests and for division or sale of the property.

(f) Where the plaintiff seeks sale of the property, he shall allege the facts justifying such relief.

Comment. Section 875.510 is new. In addition to the information required by this section, proceedings as to particular property may necessitate other information. See, e.g., Sections 875.820 (interest uncertain), 879.020 (state a co-owner), 879.030 (state a lienholder), 879.040 (condominium property). See also Section 876.050 (information relating to title report).

Subdivision (a) requires a description of the property that is the subject of the action. It should be noted that several properties may be joined in one complaint even though located in different counties. See, e.g., Murphy v. Superior Court, 138 Cal. 69, 70 P. 1070 (1902). And, real and personal property may be joined in one action. Section 875.520.

Subdivision (b) requires an allegation of all the plaintiff's interest in the property, including such interests as liens. For interests sufficient to maintain the action, see Section 875.110.

Subdivision (c) continues the first portion of former Section 753. There are no exceptions to subdivision (c); all interests must be set out for the benefit of the court regardless whether the plaintiff intends to affect those interests.

Partition of some or all of the interests in the property may be obtained. Subdivision (d) requires the plaintiff to make an election and to indicate which interests are intended to be affected by the action. For provisions relating to parties defendant, see Article 4 (commencing with Section 875.810).

Under former Section 763, the court could order a sale of property in lieu of division "whether alleged in the complaint or not." Subdivision (e) requires the plaintiff to select the remedy he desires and to allege the basis for sale in the complaint. Cf. Section 876.220 (standard for permitting sale). Since the allegations of the pleading are deemed admitted if not denied (see Section 875.710 and Comment thereto), the effect of subdivisions (e) and (f) is to require partition in the manner prayed for in the complaint unless expressly contested.

405-802

§ 875.520. Joinder of property

875.520. Real and personal property may be joined in one action.

Comment. Section 875.520 continues the last sentence of former Section 752a.

§ 875.530. Lis pendens

875.530. (a) Immediately upon filing the complaint, the plaintiff shall record a notice of the pendency of the action in the office of the county recorder of any county in which real property described in the complaint is located.

(b) If other real property is thereafter joined in the action, the plaintiff or other person joining the property shall promptly record a supplemental notice.

(c) From the time of filing such notice for record, all persons shall be deemed to have notice of the pendency of the action as to the property described in the notice.

Comment. Subdivisions (a) and (c) of Section 875.530 continue provisions formerly found in Section 755. The detailed listing of the contents of the lis pendens formerly found in Section 755 is omitted since Section 409 covers this matter.

Subdivision (b) is new. The duty under subdivision (b) is upon the person joining the property to record the lis pendens; this might be either the plaintiff or a cross-complainant.

§ 875.540. Stay where lis pendens not filed

875.540. If the notice required by Section 875.530 is not recorded, the court, upon its own motion or upon the motion of any party at any time, shall do the following:

(a) Stay the action until the notice is recorded.

(b) Order the plaintiff or person joining the property, or another party on behalf of the plaintiff or other person, to record the notice. The recordation shall be at the expense of the plaintiff or other person joining the property.

Comment. Section 875.540 is new. The recording of the lis pendens is an essential step in the partition action. Prompt recording enables the court to deal with the title with certainty. The person required to record might be either the plaintiff or a cross-complainant.

405-805

Article 2. Summons

§ 875.610. Summons

875.610. The form, contents, and manner of service of summons shall be as in civil actions generally.

Comment. Section 875.610 supersedes former Section 756.

The provision of former Section 756 that the summons must contain a description of the property is not continued since the property will already be described in the complaint that accompanies the summons.

The provision of former Section 756 that the summons be directed to all persons "named" as defendants and to all persons "unknown" is continued by Section 875.610 which incorporates Section 412.20 (general provision governing contents of summons in civil actions). Section 412.20(2) requires the summons to contain the names of the parties to the action; the named parties may include "all persons unknown." See Section 875.860.

For additional requirements where service is by publication, see Section 875.620.

§ 875.620. Requirements where service is by publication

875.620. Where the court orders service by publication, including service on persons joined pursuant to Sections 875.830 and 875.860, the court shall further order that:

(a) The plaintiff post, not later than 10 days after the date the order is made, a copy of the summons and complaint on the property that is the subject of the action.

(b) The plaintiff record, if not already recorded, a notice of the pendency of the action.

(c) The publication describe the property that is the subject of the proceeding in a manner reasonably calculated to give persons having an interest in the property actual notice of the action.

Comment. Section 875.620 supersedes former Section 757. While publication will be pursuant to Section 415.50, subdivisions (a) and (b) are new requirements that supplement the publication provisions of Section 415.50 in order to increase the likelihood that persons interested in the property will receive notice of the proceeding. Subdivision (c) continues a comparable provision in the last sentence of former Section 757.

Note. The requirement in subdivision (c) of publication "in a manner reasonably calculated . . ." is included to satisfy due process requirements. An open-ended provision such as this, however, may create title problems. Perhaps subdivision (c) should make express provision for publication of street address or other common designation.

§ 875.630. Publication as to certain defendants

875.630. (a) Where the court orders service by publication, the publication may:

(1) Name only the defendants to be served thereby.

(2) Describe only the property in which the defendants to be served thereby have or claim interests.

(b) Judgment based on failure to appear and answer following service under this section shall be conclusive against the defendants named in respect only to property described in the publication.

Comment. Section 875.630 is new. It is derived from Section 1245.2 (eminent domain).

Article 3. Answer

§ 875.710. Contents of answer

875.710. The answer shall contain all of the following information:

(a) All right, title, or interest the defendant has or claims in the property.

(b) Facts controverting such material allegations of the complaint as the defendant does not wish to be taken as true.

Comment. Section 875.710 continues portions of former Section 758. The provision of former Section 758 that the defendant's failure to answer within the time allowed by law would result in the allegations of the

complaint being taken as true is continued in Section 431.20. It should be noted that the requirement in subdivision (a) that the defendant list his interest in the property includes liens as well as other interests claimed by the defendant.

405-809

§ 875.720. Requirements where defendant is lienholder

875.720. (a) Where the defendant has or claims a lien on the property, his answer shall indicate:

(1) The date and character of the lien.

(2) The amount remaining due thereon.

(3) If there is any additional security therefor, its nature and extent.

(b) If the defendant fails to disclose any additional security, he shall be deemed to have waived his lien on the property.

Comment. Section 875.720 continues a portion of former Section 758.

405-810

§ 875.730. Pleading hardship and oppression

875.730. If the defendant opposes the partition on the ground it would be clearly inequitable under the circumstances of the case, he shall so state in his answer and shall set forth the facts concerning such inequity upon which he relies.

Comment. Section 875.730 is new. It implements the general exception to the right to partition in cases of inequity. See Section 875.120. The defendant has the burden of proof on this issue. See Section 876.110.

405-811

Article 4. Parties

§ 875.810. Mandatory joinder of defendants

875.810. The plaintiff shall join as defendants in the action:

(a) All persons, of record or actually known to the plaintiff, having or claiming a conveyance of or lien upon the property or part thereof.

(b) All persons having or claiming interests as to which partition is sought.

Comment. Subdivision (a) of Section 875.810 supersedes former Section 754. Subdivision (a) converts the rule of Section 754 (no person having a lien or conveyance need be made a party unless of record) to an affirmative joinder requirement and extends the requirement to persons not of record but known to the plaintiff. For the effect of failure to join recorded liens or conveyances, see Section 878.530; for the effect of failure to join liens or conveyances actually known to the plaintiff, see Section 878.540. For the definition of "lien," see Section 875.020.

Subdivision (b) is new. This provision is elaborated in the succeeding sections of this article.

Note. The required joinder of all liens and conveyances in subdivision (a) is derived from existing law. It should be noted, however, that the policy of mandatory joinder of such interests is rather inflexible and appears to oppose the policy of the Commission expressed in subdivision (b) permitting the plaintiff to choose the interests he wishes to affect and to determine whether he wants the property sold free of or subject to a lien.

§ 875.820. Where defendant is unknown or interest uncertain

875.820. (a) If the name of a person described in Section 875.810 is not known to the plaintiff, or if the ownership or the share or quantity of the person's interest is unknown, uncertain, or contingent, the plaintiff shall so state in the complaint.

(b) If the lack of knowledge, uncertainty, or contingency is caused by a transfer to a member of a designated class who is not ascertained or is unborn, or by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory devise, or similar disposition, the plaintiff shall also state in the complaint, so far as is known to him, the name, age, and legal disability (if any) of the person in being who would be entitled to ownership of the interest had the contingency upon which his right depends occurred prior to the commencement of the action.

(c) The court shall upon its own motion or upon motion of any party make such orders for joinder of additional parties and for appointment of guardians ad litem pursuant to Sections 372, 373, and 373.5 as is necessary or proper.

Comment. Section 875.820 is derived from the last portion of former Section 753. Subdivision (b) adds the requirement of an indication of possible additional parties, and subdivision (c) provides for joinder of such parties and protection of their interests.

Note. Mr. Elmore believes that the portion of subdivision (a) permitting the plaintiff to state that the name of a party is not known to him should be deleted. If it is kept, he feels it should be expanded to prevent abuse:

The problem is the thorny one of what efforts a plaintiff must make to ascertain names of owners. The fact that the plaintiff does not

know the name of B, a remainderman with an absolute estate, should not be sufficient to use the publication method. At the minimum, such allegation should be permitted only after affidavit of due diligence, and the Doe procedure should be used. On the other hand, if the name is not known because the interest is contingent, new (b) is intended to take care of this situation.

405-813

§ 875.830. Where defendant is deceased

875.830. (a) If a person described in Section 875.810 is dead and the plaintiff knows of a duly qualified and acting personal representative, the plaintiff shall join such personal representative as a defendant.

(b) If a person described in Section 875.810 is dead, or is believed by the plaintiff to be dead, and the plaintiff knows of no duly qualified and acting personal representative:

(1) The plaintiff shall state these facts in an affidavit filed with the complaint.

(2) The plaintiff may join 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. In the case of personal property, reference shall be made to the legatees of the decedent. Where it is stated in the affidavit that such person is believed to be dead, such person may also be named as a defendant.

Comment. Section 875.830 is new. It is derived from Section 1245.3 (eminent domain).

405-815

§ 875.840. Oil and gas interests

875.840. Where property is subject to a lease, community lease, unit agreement, or other pooling arrangement with respect to oil or gas or both, the plaintiff need not join as defendants 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 them.

Comment. Section 875.840 continues the substance of the first portion of former Section 753.1. The interests of persons not joined in the action are not affected by the judgment of partition as to the parties. See Section 875.530.

405-816

§ 875.850. Court ordered joinder of additional parties

875.850. The court shall order the joinder of any persons not parties to the action to the extent necessary to grant the relief sought or other appropriate relief.

Comment. Section 875.850 is new. Cf. former Section 761 (requiring the joinder of lienholders of record). Section 875.850 expands this provision to cover any necessary persons not previously made parties by the plaintiff, who determines the interests to be affected in the action. See Sections 875.510 (contents of complaint) and 875.810 (mandatory joinder of defendants). Section 875.850 states the mandatory joinder principles of Section 389 as applied to partition actions.

§ 875.860. Permissive joinder of "all persons unknown"

875.860. The plaintiff may, in cases where partition is sought as to all interests in the property, join as defendants "all persons unknown claiming any right, title, or interest in the property," naming them in that manner.

Comment. Section 875.860 is new. It is derived from Section 1245.3 (eminent domain) and provides a means whereby the plaintiff may give the partition action an in rem effect. For provisions relating to service by publication, see Section 875.620. For the effect of the judgment, see Section 878.520.

CHAPTER 8. JUDGMENT

§ 878.510. Entry of judgment

878.510. Upon confirmation of a sale or of the referee's report of division of the property, the court shall enter judgment that such sale or division be effectual forever.

Comment. Section 878.510 continues the substance of the introductory portion of former Section 766 and is made expressly applicable upon confirmation of sale as well as division. The provisions of this article relating to the judgment and its effect supplant the provisions of former Section 787 which was phrased in terms of the effect of a conveyance pursuant to sale rather than in terms of the judgment.

§ 878.520. Persons bound by judgment

878.520. The judgment is binding and conclusive on all of the following:

(a) All persons known and unknown, whether or not in being at the time of entry of judgment, who were joined as parties in the action and who have or claim any interest in the property, whether present or future, vested or contingent, legal or beneficial, several or undivided.

(b) All persons who were not joined as parties in the action and who have or claim any unrecorded interest in the property at the time the action is commenced and a lis pendens filed.

(c) All persons claiming under any of the foregoing persons.

Comment. Section 878.520 supersedes portions of former Sections 766 and 787.

Subdivision (a) makes clear that all parties to the action are bound by the judgment, including the heirs of a decedent joined pursuant to Section 875.830 and unknown persons joined pursuant to Section 875.860. Subdivision (a) supersedes former Section 766(1)-(3) and the first portion of former Section 787.

Subdivision (b) supersedes the last portion of former Section 787. Subdivision (c) supersedes former Section 766(4) and the middle portion of former Section 787.

404-371

§ 878.530. Persons not bound by judgment

878.530. The judgment does not affect any persons who were not joined as parties in the action and who have or claim any recorded interest in the property or part thereof at the time the action is commenced and a lis pendens filed.

Comment. Section 878.530 supersedes the last portion of former Section 753.1, relating to the effect of the judgment on persons "not made parties defendant." Section 878.530 expands this portion to state the rule applicable to all interests of record not made parties to the action.

404-372

§ 878.540. Holder of lien or conveyance known to plaintiff

878.540. Notwithstanding Section 878.520, where a person having or claiming an unrecorded conveyance of or lien upon the property or

part thereof is not joined as a party in the action but is actually known to the plaintiff at any time before entry of the interlocutory judgment of partition, the judgment shall not affect the interest of such person in the portion of the property or proceeds of sale thereof allocated to the plaintiff.

Comment. Section 878.540 is new. It is intended to implement the requirement of Section 875.810(a), making mandatory on the plaintiff the joinder of all persons "actually known" to the plaintiff having or claiming a conveyance of or lien upon the property or part thereof.

Section 878.540 is an exception to the rule stated in Section 878.520(b) that the judgment binds all persons having unrecorded interests in the property. It should be noted that Section 878.540 makes the judgment not conclusive only with respect to the share of the plaintiff. The portions of the property allocated to other parties in case of a division, or the entire property in case of a sale to a bona fide purchaser, are free of the unrecorded interests.

404-373

§ 878.550. Effect of death or incompetency of party before judgment

878.550. (a) No judgment is invalidated by reason of the death or incompetency of a party before entry of judgment.

(b) The judgment is as conclusive against the heirs, legal representatives, or assigns of a decedent as if it had been entered before his death.

Comment. Section 878.550 continues the fifth paragraph of former Section 766 relating to decedents and extends the provisions of subdivision (a) to incompetents. For provisions relating to protection of the interest of a person who dies or becomes incompetent during the proceeding, see Section _____.

§ 878.560. Effect of conveyance before judgment

878.560. If, during the pendency of the action and before entry of judgment, any party conveys or transfers to another person his interest or any part thereof, the transfer or conveyance shall be deemed to have passed to the grantee:

(a) In the case of a division of the property, the portion set aside to the grantor in severalty or a proportionate share thereof.

(b) In the case of a sale of the property, the proceeds of sale allocated to the grantor or a proportionate share thereof.

Comment. Section 878.560 supersedes the last paragraph of former Section 766. The principle stated in the former section is expanded to apply to the interest of any party, not simply cotenants, to any property rather than simply to land, and to sale as well as division of the property.

CHAPTER 9. PARTITION INVOLVING SPECIAL PROPERTIES

§ 879.010. Scope of chapter

879.010. This chapter contains special provisions relating to partition involving particular types of property or property interests that vary from or are inconsistent with the general provisions of this title.

Comment. Section 879.010 makes clear that the variant provisions of this chapter apply notwithstanding the general partition statute.

§ 879.020. Where state is a co-owner

879.020. (a) Where the state has an undivided fractional interest or a remainder interest in real property, whether contingent or vested, which it acquired by gift, under the will of a decedent, through a decree of distribution in the estate of a decedent, or by means other than purchase or condemnation, the holder of other undivided fractional interests or of precedent estates in the property may join the state as a defendant in a partition action.

(b) Where the state is joined under this section:

(1) The complaint shall describe the nature of the interest of the state and the manner in which the interest was acquired.

(2) Process shall be served upon the Attorney General and the Director of Finance.

(3) The Attorney General shall represent the state and may on behalf of the state execute such stipulations, disclaimers, or consents as may be appropriate.

Comment. Section 879.020 continues the substance of the provisions of Government Code Section 956 that were applicable to partition actions.

404-377

§ 879.030. Where state is a lienholder

879.030. (a) Where the state has a lien upon real property that is the subject of a partition action and the lien secures the payment of taxes or other obligations, other than taxes upon the property, the state may be joined as a defendant in the action.

(b) Where the state is joined under this section:

(1) The complaint shall describe the lien sufficiently to enable certain identification of the tax or other obligation whose payment it secures.

(2) Process shall be served upon the Secretary of State and the Attorney General, and a copy of the complaint shall be delivered to the officer, board, commission, department, division, or other body charged with collection of the tax or obligation.

(3) The court may determine the priority and effect of the liens on the property, but the jurisdiction of the court does not include a determination of the validity of the tax or other obligation giving rise to the lien.

(4) The Attorney General shall represent the state and may, if the property is sold, bid upon and purchase the property with the consent of the Department of Finance.

Comment. Section 879.030 continues the substance of the provisions of Civil Code Sections 2931a and 2931b that were applicable to partition actions.

405-981

§ 879.040. Partition of condominiums

879.040. (a) As used in this section, the terms "condominium," "project," and "common areas" have the meanings given them in Civil Code Section 1350.

(b) The owner of a condominium in a condominium project may maintain a partition action as if the owners of all of the condominiums in the project were tenants in common in the entire project in the same proportion as their interests in the common areas.

(c) The court shall order disposition of property under this section only by sale of the entire condominium project and only upon a showing of one of the following:

(1) More than three years before the filing of the action, the project was damaged or destroyed so that a material part was rendered unfit for its prior use, and the project has not been rebuilt or repaired substantially to its state prior to the damage or destruction.

(2) Three-fourths or more of the project is destroyed or substantially damaged and condominium owners holding in aggregate more than a 50-percent interest in the common areas oppose repair or restoration of the project.

(3) The project has been in existence more than 50 years, is obsolete and uneconomic, and condominium owners holding in aggregate more than a 50-percent interest in the common areas oppose repair or restoration of the project.

(4) The conditions for such a sale, set forth in restrictions entered into with respect to the project pursuant to Civil Code Section 1355, have been met.

Comment. Section 879.040 continues the substance of former Section 752b.

405-982

§ 879.050. Where property includes site of incorporated city or town

879.050. (a) Where the site of an incorporated city or town is included within the exterior boundaries of property to be divided in a partition action, the court shall direct the referee to survey and appraise the entire property to be divided by actual lots and subdivisions then existing in the actual possession of the co-owners, exclusive of the value of improvements thereon, first setting apart necessary portions of the property for ways, roads, and streets.

(b) The referee shall report such survey and separate appraisal 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 a new referee.

(c) Where, after final confirmation of the report of the survey and appraisal, the court determines that an equitable division of the whole property is impracticable and that a sale of the site of the city or town, or any portion thereof, will be in the best interests of the co-owners, it shall order a sale thereof.

(d) Within 60 days after the court orders a sale of property under this section, any co-owner, 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 lot or subdivision at its appraised value by paying into court the amount. Upon payment, the title vests in the purchaser, and the court shall order the referee to execute a deed for the lot or subdivision in fee and in severalty to the purchaser. The remainder of the property shall be sold and the money divided as provided in this title.

Comment. Section 879.050 continues the substance of the second, third, and fourth paragraphs of former Section 763.

Note. The coverage of this section is quite limited, and the cases where it might be applied would seem to be rare. Perhaps this section should be deleted.

CHAPTER 11. SUCCESSIVE ESTATES

Comment. This chapter is new. It replaces certain 1927 amendments to former Sections 752, 763, and 781 and implements Section 875.130 (right to partition successive estates).

406-457

§ 879.910. Court order for partition of successive estates

879.910. Where the interests of the co-owners of the property are solely successive estates, partition as to all or part of the property 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. The court shall consider whether the estate in possession has become unduly burdensome by reason of taxes or other annual charges, expense of ordinary or extraordinary repairs, a change in the character of the property since the creation of the interests, the circumstances under which the interests were created, and all other factors which would be considered by a court of equity in the case of trust property.

Comment. Section 879.910 is new. It vests the court with jurisdiction to order a partition and specifies generally the guidelines for severing the interests of the co-owners as to the entire property or a part of the property.

§ 879.920. Sale or division of property

879.920. When all the interests of co-owners are held in absolute ownership by persons in being, the court, in its discretion, may order a partition as to all or part of the property by division, sale, or appraisal.

Comment. Section 879.920 is new. Unlike cases of concurrent ownership, where partition by division is favored, 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.

§ 879.930. When property must be sold

879.930. When all the interests of co-owners are not held as provided in Section 879.920, the property shall be sold.

Comment. Section 879.930 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 ordering a 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 879.910, partition may be ordered as to a part only of the property. It would seem that many problems can be resolved by a sale of part only of the property.

§ 879.940. Proceeds

879.940. In, or prior to making, the order for sale, the court shall determine whether the sales' proceeds are to be placed in trust as provided in this title for the benefit of the co-owners. If the proceeds are not to be placed in trust, the court shall determine the value of the proportional interest of the tenant for life or years entitled to possession of the property sold.

Comment. Section 879.940 is new in procedural detail. It is a companion section to Section 879.910, infra. If the court determines not to order the entire proceeds placed in trust (see former Section 781 as amended in 1927), such determination should be made in advance of the sale.

§ 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 partition 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 courts, 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, 87-89; 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 on 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 §§ 210:25, 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 successor in office. [1872.] *Cal Jur 2d G & W § 91, Mtg §§ 127, 421, Partit §§ 12, 83, 84; Cal Practice §§ 210:25, 393:24, 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 Acctn § 88, Lit Est § 31, Mtg § 421, Partit §§ 12, 77, 87; Cal Practice §§ 210:22, 393:35; Within Summary p 272.*

§ 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, Mig § 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 Mig § 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 Mig § 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 Mig § 421, Partit §§ 17, 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 Mig § 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 Mig § 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* §§ 31:192, 52:31, 393:37; *Within Procedure 2d* pp 3251, 3270.

§ 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 settling 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 costs and 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; *Within 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; *Within 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.

Code of Civil Procedure § 752 (repealed)

~~752. 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.~~

ALL
IN
STRIKEOUT

Comment. The portion of former Section 752 that specified the interests in real property entitled to maintain a partition action is continued in Section 875.110. However, the provision enabling partition by the owner of a lien on a parity with that on which the owner's title is based is not continued. It had extremely limited application and represented a departure from the general rule that only substantial interests in property may compel partition.

The portion of former Section 752 that provided a standard for sale or division of property in a partition action is superseded by Sections 876.210 and 876.220.

Code of Civil Procedure § 752a (repealed)

~~752a. 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.~~

ALL IN STRIKEOUT

Comment. The portion of former Section 752a that specified that the co-owner of personal property is entitled to maintain a partition action is continued in Section 875.110. The portion that provided a standard for sale or division of the property is superseded by Sections 876.210 and 876.220.

The second sentence of former Section 752a is continued in Section 875.030.

The third sentence of former Section 752a is continued in Section 875.520.

Code of Civil Procedure § 752b (repealed)

~~752b. 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.~~

ALL IN STRIKEOUT

Comment. Former Section 752b is continued in Section 879.040.

Code of Civil Procedure § 753 (repealed)

~~753. 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.~~

ALL
IN
STRIKED OUT

Comment. The first portion of former Section 753, requiring that the interests of all persons in the property be set forth in the complaint, is continued without limitation in Section 875.510. The last portion of former Section 753, requiring that the complaint set forth additional information as to parties who are unknown or whose interests are uncertain, is continued and broadened in Section 875.820.

Code of Civil Procedure § 753.1 (repealed)

~~753.1. 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.~~

ALL IN
STRIKED OUT

Comment. The first portion of former Section 753.1, making it unnecessary to name as defendants certain persons owning oil and gas interests, is continued in Section 875.840. The last portion of former Section 753.1, relating to the effect of the judgment upon such persons, is continued in Section 878.530.

Code of Civil Procedure § 754 (repealed)

~~754. 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 appears of record.~~

Comment. Former Section 754 is superseded by Section 875.810.

Code of Civil Procedure § 755 (repealed)

~~755. 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.~~

ALL IN
STRIKEOUT

Comment. The portion of former Section 755, placing jurisdiction over partition actions in the superior court, is continued in Section 875.210. The portion of former Section 755 relating to the lis pendens is continued in Section 875.530.

Code of Civil Procedure § 756 (repealed)

~~756. 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.~~

ALL IN
STRIKEOUT

Comment. Former Section 756 is superseded by Section 875.610.

Code of Civil Procedure § 757 (repealed)

~~757.
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.~~

ALL IN
STRIKED OUT

Comment. The first sentence of former Section 757 is superseded by Section 875.610. The second sentence of former Section 757 is superseded by Section 875.620.

Code of Civil Procedure § 758 (repealed)

~~758.
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.~~

ALL IN
STRIKED OUT

Comment. The first sentence of former Section 758 is not continued; the consequence of the failure of a defendant to answer is covered generally in Section 431.20.

The portion of the second sentence of former Section 758, requiring the defendant to controvert material allegations of the complaint and to allege his interest in the property, is continued in Section 875.710. The portion of the second sentence, requiring the defendant to state information relating to any lien he may have, is continued in Section 875.720.

Code of Civil Procedure § 766 (repealed)

~~766.~~

~~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.

ALL

IN

STRIKED OUT

Comment. The first sentence of former Section 766 is continued in Section 877.210. Subdivisions (1)-(4) are continued in Section 878.510 with the exception of the last portion of subdivision (2) relating to preservation of the share of parties not in being, which is continued in Section 877.999.

The paragraph of former Section 766, relating to the effect of a judgment on persons who die or become incompetent, is continued in Section 878.550. The last paragraph, relating to the effect of the judgment in case of a conveyance, is continued in Section 878.560.

Code of Civil Procedure § 787 (repealed)

~~787. 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.~~

ALL IN
STRIKEOUT

Comment. The portion of former Section 787 that provided for recordation of conveyances is continued in Section 877.860. The portion of former Section 787 that specified the effect of the recorded conveyances is continued in Section 878.520, which is phrased in terms of the effect of the judgment.