

## Memorandum 75-60

Subject: Study 23 - Partition of Real and Personal Property

Background

The Commission has published its recommendation relating to partition of real and personal property, and Assemblyman McAlister has introduced the Commission's statute as AB 1671 of the 1975-76 regular session. The bill will be set for hearing by the Assembly Judiciary Committee in January 1976.

At the past several meetings, the Commission has reviewed the bill to determine what amendments, if any, are needed in it. Exhibit I (green) contains the changes the Commission has determined to make, along with necessary adjustments to Comments. Exhibit I also contains a few technical changes the staff plans to make based on suggestions of Commissioners on copies of the report that were returned to the staff.

There remain several major points that require resolution. This memorandum discusses these points and proposes draft language to resolve them. We hope to dispose of them finally at this meeting.

Partition as to Particular Interests in Property

Typically in a partition action, there will be many interests that will be unaffected by the action. A partition between two remaindermen, for example, would not normally affect such interests in the property as an existing leasehold, a life estate, or easement. See, e.g., Geary v. De Espinosa, 51, Cal. App. 52 (1921) (partition among remaindermen does not affect life tenant); Jameson v. Hayward, 106 Cal. 682 (1895) (partition among owners of estate for years does not affect remainderman).

For this reason, the Commission's partition statute requires the complaint to set forth the interests as to which partition is sought (Section 872.230(d))

and requires the plaintiff to join as defendants all persons having interests as to which partition is sought (Section 872.510). The problem that has concerned the Commission at the past several meetings is the possibility that these provisions might be used by a cotenant to seek partition as against only one of several cotenants. The partition would then be of only the interest of the one cotenant, which, if sold, would bring an unduly low price. The Commission requested the staff to prepare further research on this problem, with an indication of how it is handled in other jurisdictions.

Generally speaking, other jurisdictions follow the rule that all parties whose interests will be affected by the proceeding are necessary parties. In the case of partition among cotenants, all must be parties--"In proceedings for partition, whether at law or in equity, all of the cotenants are indispensable parties, and such of them as do not join as plaintiffs must be made defendants." 68 C.J.S. Partition § 73 (1950)(footnotes omitted). This is also the law in California. Solomon v. Redona, 52 Cal. App. 300, 305 (1921)("In a suit for partition it is indispensable that all cotenants who have not united in the complaint be made parties defendant.")

The reason for this requirement is that, in a partition among cotenants, all cotenants are necessarily affected, since their undivided interest in the whole property is inevitably disturbed. With all the affected parties before the court, the court may order such disposition of the property on partition as will be equitable. When a sale is ordered, it is a sale of the entire estate being partitioned, and not of the individual interests of owners of the estate. Schwartz v. Shapiro, 229 Cal. App.2d 238, 40 Cal. Rptr. 189 (1964).

The staff believes the foregoing rules are preserved in the Commission's statute. The statute requires the plaintiff to set forth in the complaint interests that will be materially affected by the action. Section 872.230(c).

The Comment to the provision requiring joinder of persons having interests as to which partition is sought notes that joinder of parties may be necessary under Section 389 of the Code of Civil Procedure relating to mandatory joinder. See Comment to Section 872.510. The defendant can require joinder of additional parties by cross-complaint pursuant to Section 428.10 or Section 389.

The staff believes that the problems that have arisen under the Commission's statute are due to an ambiguity in draftsmanship. It is not the interests of particular persons that should be singled out for partition, but the estate (life tenancy, remainder, and the like) as to which partition is sought. The staff suggests the following amendments to resolve the problems:

§ 872.230. Contents of complaint

872.230. The complaint shall set forth:

(a) A description of the property that is the subject of the action. In the case of tangible personal property, the description shall include its usual location. In the case of real property, the description shall include both its legal description and its street address or common designation.

if any

(b) All interests the plaintiff has or claims in the property.

(c) All interests of record or actually known to the plaintiff that persons other than the plaintiff have or claim in the property and that the plaintiff reasonably believes will be materially affected by the action, whether the names of such persons are known or unknown to the plaintiff.

(d) The interests as to which partition is sought and a prayer for partition of the interests.

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therein

(e) Where the plaintiff seeks sale of the property, an allegation of the facts justifying such relief in ordinary and concise language.

**Comment.** Section 872.230 is new. In addition to the information required by this section, other information may be necessary. See, e.g., Section 872.220 (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 872.240. As to joinder of property under varying ownership, see *Middlecoff v. Cronise*, 155 Cal. 185, 100 P.232 (1909).

Subdivision (b) requires an allegation of all the plaintiff's interest in the property. For interests sufficient to maintain the action, see Section 872.210. Where the plaintiff has a lien on the property as well as an interest sufficient to maintain the action, he must allege his lien as well as his other interest.

Subdivision (c) supersedes the first portion of former Section 753. Unlike the former provision that required all interests to be set out regardless of whether the interests would be affected, subdivision (c) limits the requirement to only those interests the plaintiff reasonably believes will be materially affected by the partition action. Incorporation of a title report should be sufficient to satisfy this requirement as to recorded interests but not as to unrecorded interests known to the plaintiff. It should be noted that there may be interests of record in personal property filed to perfect a security interest under the Commercial Code.

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 872.510).

Subdivision (e) requires an allegation of facts justifying a sale of the property where the plaintiff seeks sale. Should the plaintiff fail to seek sale at the time of filing the complaint, he may do so thereafter by amending the complaint subject to the general rules governing amendment. See Sections 471.5, 472, and 473. The defendant may request sale by appropriate pleading in the answer. See Section 872.410.

Note. The language relating to the street address or common designation, if any, is taken from the notes of one of the Commissioners that were returned to the staff.

#### § 872.510. Joinder of defendants

872.510. The plaintiff shall join as defendants in the action all persons having or claiming interests of record or actually known to the plaintiff as to which partition is sought.

estate is

if fewer than all interests are to be partitioned.

or reasonably apparent from an inspection of the property, in the estate

Consent. Section 872.210 (part deleted). Section 734 no person having a lien or "conservancy" need be made a party unless of record. Under Section 872.210, one person having interests as to which partition or sale might be joined. This provision is elaborated in the accompanying sections of this article. It should be noted that "interest" includes lien and that joinder of additional parties may be necessary under Section 389 (mandatory joinder).

in the estate

For the effect of failure to join a recorded interest, see Section 874.220; for the effect of failure to join interests actually known to the plaintiff, see Section 874.230.

or reasonably apparent from an inspection of the property.

Note. The Commission has previously determined to add to this section the language relating to interests reasonably apparent from an inspection.

### Partition of Community Property

Section 872.210 is sufficiently broad to permit partition of community property, although existing law precludes partition of community property. The Commission requested the staff to prepare an analysis of the effect of the right to partition community property on a currently pending dissolution of marriage proceeding. The staff analysis is attached as Part I of Exhibit II (yellow); it reveals that permitting partition of community property may deprive the trial court of the discretion it possesses in dissolution of marriage proceedings and allow piecemeal litigation of property issues. The analysis indicates that these problems may be met by addition of a provision, such as the following:

#### § 872.730. Partition of community, quasi-community, and quasi-marital property (new)

872.730. (a) Where the court finds that the action is between spouses for partition of their community, quasi-community, or quasi-marital interest in property, the court shall order partition only subject to the provisions of this section.

(b) The court shall not order partition if it finds either of the following:

(1) There is at the time of trial a pending proceeding for dissolution or annulment of marriage, or for legal separation of the spouses.

(2) The controversy between the spouses will require an adjudication under the Family Law Act.

(c) In the action, the court may:

(1) Condition the partition upon such terms as will protect marital rights, rights of minor children, and rights of creditors of the community.

(2) Allow, apportion, or withhold attorney's fees, notwithstanding Article 1 (commencing with Section 874.010) of Chapter 8, taking into consideration the earning capacity and financial condition of the spouses and the extent, if any, to which the fees were incurred for services for the common benefit. Upon a showing that the defendant spouse is without means to defend the action or is able to do so only at a substantial financial sacrifice, the court may order the plaintiff spouse to advance or pay to the defendant spouse reasonable amounts for attorney's fees and costs in defending the action.

Comment. Section 872.730 is new. Under former law, community property was not subject to partition. See Jacquemart v. Jacquemart, 142 Cal. App.2d 794, 299 P.2d 281 (1956). Although partition of community property is authorized by Section 872.210 (see Comment to Section 872.210), Section 872.730 makes clear that partition of the community interest is not a matter of right. Contrast Section 872.710(b)(partition as to concurrent interests a matter of right).

Subdivision (a) provides that quasi-community and quasi-marital property receive the same treatment as community property. The quasi-community and quasi-marital property are subject to division under the Family Law Act in the same manner as community property. See Civil Code §§ 4452 (quasi-marital property) and 4800 (community and quasi-community property).

Subdivision (b)(1) precludes partition of the community, quasi-community, or quasi-marital property if there is a currently pending dissolution, annulment, or separation proceeding. The policy of the subdivision is to prefer division of such property by the family law court whether the family law action was commenced before or after the commencement of the partition action. If the property is not divided by the family law court, a subsequent partition action may be appropriate.

Subdivision (b)(2) precludes partition of the community, quasi-community, or quasi-marital property even though there is no pending proceeding under the Family Law Act, if the court determines that such a proceeding is a more appropriate forum for division of the property. Factors which might influence such a determination include the need for discretion in making a conditional award of the property to one of the spouses, or the need to award the home to one spouse while making an offsetting award of other community property to the other spouse.

Subdivision (c) is intended to preclude the partition action from derogating and weakening the provisions of the Family Law Act, and thereby becoming an "alternative" to it.

After having worked through this provision, however, it is the staff's opinion that partition of community property should not be permitted. The staff analysis indicates that no other community property jurisdiction permits partition of community property apart from a divorce proceeding. Community property is of such a character that it cannot be mechanically divided in the same way that joint tenancy property or tenancy in common property (in which the proportionate interests of the parties are known) can be divided. In dividing community property, the family law court must take into account the comparative needs of the parties to the community (including which of the parties is to have custody of children) and must use its discretion in allocating the property. These sorts of considerations are incorporated in the draft provision set out above; but the staff believes that such considerations are really inappropriate in a partition action.

§ 872.740. Partition of partnership property

The Commission requested a staff analysis of the relation between partition and dissolution of partnership with respect to partnership property. The Commission's consultant, Mr. Elmore, has supplied the staff with the following analysis based on the rough draft of an article for CEB, for confidential use by the Commission, preserving copyright.

Decisional law permits use of the partition remedy, or more accurately, partition procedure, in cases involving partnership property. Under code provisions, co-ownership of property in partnership interests is distinct from co-ownership of property in joint interests or interests in common. Civil Code Sections 682, 684-686. However, early, as well as more recent, decisions affirm the power of the trial court, in situations involving liquidation of partnership property, where claims of third-person creditors are not involved, to proceed by partition or to use partition procedure in an equity suit for dissolution. *Larson v. Thoreson*, ( ) 36 Cal.2d 266; *Hughes v. Devlin* (1863) 23 Cal. 501; *Logoluso v. Logoluso* (1965) 233 Cal. App.2d 523; *Brown v. Fairbanks* (1953) 121 Cal. App.2d 432; *Hooper v. Barranti* ( ) 81 Cal. App.2d 570.

The staff believes that the right to make use of partition procedures for disposing of partnership property in appropriate cases is inherent in the Commission's statute. However, to avoid any implication that the rephrasing in Section 872.210 destroys this right, the staff suggests the inclusion of the following section:

§ 872.740. Partition of partnership property (new)

872.740. To the extent that the court determines that the provisions of this title are a suitable remedy, such provisions may be applied in a proceeding for partnership accounting and dissolution, or in an independent action for partition.

Comment. Section 872.740 is new; it is an exception to the rule of Section 872.710 that partition as to concurrent interests is a matter of right. Section 872.740 codifies prior case law to the effect that partition is an appropriate remedy when the affairs of the partnership are otherwise sufficiently settled and what remains is the division or sale of the property. See, e.g., Hughes v. Devlin, 23 Cal. 501 (1863); Logoluso v. Logoluso, 233 Cal. App.2d 523, 43 Cal. Rptr. 678 (1965). Thus, under Section 872.740, partition would not be a suitable remedy if there are unsecured creditors of the partnership.

Persons Authorized to Commence Partition Action

The foregoing discussions of community and partnership property, the staff believes, indicate that Section 872.210 (persons authorized to commence partition action) is not adequately drafted. The intent of the Commission in the section is to grant broad authorization to partition property. However, to what concurrent interests it extends, and whether it extends to successive interests at all is unclear from the text of the section; it is too condensed and succinct. The staff recommends that the section and Comment be expanded in the following manner, which should improve the section without altering its intent:

§ 872.210. Persons authorized to commence partition action

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

(a) A coowner of personal property.

(b) An owner of an estate of inheritance, and estate for life, or an estate for years in real property where such property or estate therein is owned by several persons or in successive estates .



Comment. Subdivision (a) of Section 872.210 continues the first portion of former Section 752a relating to personal property.

Subdivision (b) supersedes the first portion of former Section 752 relating to real property. The former provision, while covering many of the usual cases, was unduly restrictive.

Under subdivision (b), where property is owned by several persons, whether or not joint tenants or tenants in common, partition is available to sever their interests. Thus, subdivision (b) permits partition of partnership property. It should be noted, however, that partition of partnership property is subject to the limitations of Section 872.740.

Subdivision (b) also permits partition of community property, which was not permitted under the prior law. See Jacquemart v. Jacquemart, 142 Cal. App.2d 294, 299 P.2d 281 (1956). For limitations on the right to partition community property, see Section 872.730.

Under subdivision (b), where property is owned in successive estates, partition is likewise available. Former law limited partition of such estates to actions by a life tenant against the remainderman. See Akagi v. Ishioka, 47 Cal. App.3d 426, \_\_\_ Cal. Rptr. \_\_\_ (1975) (remainderman may not obtain partition against life tenant). Subdivision (b) removes any such limitations. It should be noted, however, that unlike partition of concurrent interests which may be partitioned as of right (subject to the doctrine of waiver), partition of successive interests is permitted only if it is in the best interest of all the parties. See Section 872.710.

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 continued by Section 872.210. The provision was special legislation of extremely limited application. See, e.g., Elbert, Ltd. v. Nolan, 32 Cal.2d 610, 197 P.2d 537 (1948); Elbert, Ltd. v. Clare, 40 Cal.2d 498, 254 P.2d 20 (1953). Moreover, it was an exception to the rule that only the holder of a substantial property interest is entitled to demand partition.

Note. The Commission has previously requested addition of the portions of the Comment relating to the Jacquemart, the Akagi, and the Elbert, Ltd. cases.

### Partition of Property Subject to Homestead

The Commission requested a staff analysis of the effect of the right to partition community property on the homestead exemption. The staff analysis is attached as Part II of Exhibit II (yellow); it concludes that not only does a wife's declaration of homestead on the husband's separate interest in property preclude partition of the property, but a wife's declaration of homestead on the community interest in property would likewise preclude partition.

The staff believes that this result is proper; it has not been the Commission's intent to alter the law relating to the homestead exemption. The staff suggests that language be added to the Comment to Section 872.710 to make this clear. (Conforming changes should also be made if the sections relating to community and partnership property are adopted.)

§ 872.710. Court determination of right to partition

872.710. (a) At the trial, the court shall determine whether the plaintiff has the right to partition.

Except as provided in Sections 872.730 and 872.740,

(b) ~~Partition~~ as to concurrent interests in the property shall be as of right unless barred by a valid waiver.

partition

(c) Partition as to successive interests in the property shall be allowed if it is in the best interest of all the parties. The court shall consider whether the possessory interest has become unduly burdensome by reason of taxes or other charges, expense of ordinary or extraordinary repairs, character of the property and change in the character of the property since creation of the interests, circumstances under which the interests were created and change in the circumstances since creation of the interests, and all other factors that would be considered by a court of equity having in mind the intent of the creator of the successive interests and the interests and needs of the successive owners.

**Comment.** Subdivision (a) of Section 872.710 continues in substance the portion of former Section 763 which provided for partition "upon the requisite proofs being made." It applies to both contested and uncontested trials. In order to make the determination that the plaintiff has the right to partition, the court must find that the plaintiff has an interest in the property sufficient to maintain the action. See Section 872.210. In addition, the court must find the existence of any special conditions prerequisite to partition of interests in particular types of property. See, e.g., Civil Code § 1354 (limitations on partition of interests in condominium property).

Subdivision (b) is based on existing case law. See generally discussion in 3 B. Witkin, *Summary of California Law*, Real Property § 227 (8th ed. 1973). Subdivision (b) does not determine whether a purported waiver of the right to partition is valid but only that a valid waiver is a sufficient defense to the right of partition. The validity of a waiver is determined by case law. The introductory proviso of subdivision (b) makes reference to two situations where partition of concurrent interests is not a matter of right--community property (Section 872.730) and partnership property (Section 872.740).

Subdivision (b) does not affect the law relating to partition of cotenancy property on which a homestead has been declared. See, e.g., Squibb v. Squibb, 190 Cal. App.2d 766, 12 Cal. Rptr. 346 (1961)(partition available to one cotenant where homestead declared on interest of other cotenant); contrast Walton v. Walton, 59 Cal. App.2d 26, 138 P.2d 54 (1943) (partition not available to husband where homestead declared on husband's separate interest by wife). Nor does subdivision (b) preclude application of these principals to community property on which a homestead has been declared.

Subdivision (c) is new. It is designed to give the court fairly broad discretion in the case of successive interests.

#### Partition of Successive Interests in Personal Property

The Commission requested a staff analysis of the right to partition successive interests in personal property. The staff analysis, attached as Part III of Exhibit II (yellow), concludes that the right to partition successive interests in personalty exists under present law and will continue to exist under the Commission's proposed statute. The staff suggests the addition of language to the Comment to Section 872.210 to make this clear:

Subdivision (a) of Section 872.210 continues the first portion of former Section 752a relating to personal property. Under former law, successive interests in personal property were subject to partition. See former Section 752a (law governing partition of realty applies to partition of personalty) and 4 L. Simes & A. Smith, The Law of Future Interests § 1777, at 108 n.28 (2d ed. 1956). Subdivision (a) continues the right to partition successive interests in personal property. See also Sections 872.020 (partition of personalty governed by provisions of partition statute) and 872.710 (right to partition successive interests in property). As to personal property held on an express trust, see Section 872.840.

#### Definition of Judgment

The staff has previously noted a technical gap in the partition statute: Sections 874.210-874.230 deal with the conclusive effect of the judgment, but where the property is sold or transferred, there may be no formal "judgment." The staff proposed a definition of "judgment" to include sale or transfer, but the Commission pointed out the anomaly of an appeal from a sale or transfer and directed further staff study of the problem.

The staff has concluded that the simplest way of filling the gap is to define judgment not in terms of the sale or transfer, but in terms of the court order of sale or transfer. Thus, the staff proposes addition of the following section:

§ 874.240. Judgment defined (new)

874.240. As used in this chapter, "judgment" includes a court order of conveyance or transfer of the property pursuant to Section 873.750 or Section 873.960.

Comment. Section 874.240 continues the substance of former Section 787 which provided the effect of a conveyance of property in the partition action.

Respectfully submitted,

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Assistant Executive Secretary

EXHIBIT I

Code of Civil Procedure § 392 (new)

392. (1) Subject to the power of the court to transfer actions and proceedings as provided in this title, the county in which the real property, which is the subject of the action, or some part thereof, is situated, is the proper county for the trial of the following actions:

(a) For the recovery of real property, or an estate or interest therein, or for the determination in any form, of such right or interest, and injuries to real property;

~~(b) For partition of real property;~~

~~(c)~~ (b) For the foreclosure of all liens and mortgages on real property.

(2) The proper court for the trial of any such action, in the county hereinabove designated as the proper county, shall be determined as follows:

If there is a municipal or justice court, having jurisdiction of the subject matter of the action, established in the city and county or judicial district in which the real property which is the subject of the action, or some part thereof, is situated, such court is the proper court for the trial of such action; otherwise any court in such county having jurisdiction of the subject matter of the action, is a proper court for the trial thereof.

Comment. The provision formerly found in subdivision (1)(b) of Section 392 is continued in Section 872.110(b)(1)(partition).

• Code of Civil Procedure § 774 (repealed). Proceeds of sale; payment into court

774. 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.

Comment. Former Section 774 is continued in Section 873.850.

§ 872.010. Definitions

872.010. As used in this title:

(a) "Action" means an action for partition under this title.

(b) "Guardian" includes conservator.

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

(d) "Property" includes real and personal property, and ~~any right, title, estate, lien, or other interest therein.~~

(e) "Remainder" includes reversion, reversionary interest, right of entry, and executory interest.

(f) "Title report" means includes a preliminary report, guarantee, binder, or policy of title insurance.

Comment. Section 872.010 provides definitions for terms used in this title.

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

The term "title report" in subdivision (f) is drawn using the terminology employed in the title insurance industry.

§ 872.040. Compliance with laws governing property transactions (new)

872.040. Nothing in this title excuses compliance with any applicable laws, regulations, or ordinances governing the division, sale, or transfer of property.

Comment. Section 872.040 codifies the rule that the partition statute cannot be used to avoid any applicable laws governing property transactions. See, e.g., Pratt v. Adams, 229 Cal. App.2d 602, 40 Cal. Rptr. 505 (1964) (subdivision map act). Whether a particular law, regulation, or ordinance is applicable in a partition action is determined by the terms or a construction of that law, regulation, or ordinance.

§ 872.110. Superior court Jurisdiction and venue

872.110. (a) The superior court has jurisdiction of actions under this title.

(b) The proper county for the trial of actions under this title is:

(1) Where the subject of the action is real property or real property and personal property, the county in which the real property, or some part, is situated.

(2) Where the subject of the action is personal property, the county in which the personal property is principally located or in which the defendants, or any of them, reside at the commencement of the action.

(c) Upon motion, the court may change the place of trial to another county which is a proper county for trial, for the convenience of witnesses or the expeditious determination of the action.

Comment. Subdivision (a) of Section 872.110 continues a portion of former Section 755. Subdivision (b)(1) continues language formerly found in Section 392 as to real property and broadens it to apply to cases involving real and personal property. Subdivision (b)(2) is new. Compare Section 395 (venue). Subdivision (c) limits the grounds for venue change as well as the counties to which venue may be changed. Compare Section 392 et seq. (transfer of action).

§ 872.250. Lis pendens

872.250. (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 each county in which any real property described in the complaint is located.

(b) If, thereafter, partition of other real property is sought in the same action, the plaintiff or other person seeking such relief shall immediately record a supplemental notice.

(c) If the notice is not recorded, the court, upon its own motion or upon the motion of any party at any time, shall order the plaintiff or person seeking partition of the property, or another party on behalf of the plaintiff or other person, to record the notice and shall stay the action until the notice is recorded. ~~The recordation shall be at the expense of the plaintiff or other person seeking partition of~~

~~the property.~~ The expense of recordation shall be allowed to the party incurring it.

(d) From the time of filing the 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.

§ 872.310. Summons

872.310. (a) The form, content, and manner of service of summons shall be as in civil actions generally.

(b) Service on persons named as parties pursuant to Sections 872.530(b) and 872.550 shall be by publication pursuant to Section 415.50 and the provisions of this article.



§ 872.430. Claim for affirmative relief (new)

872.430. The answer may set forth any claim the defendant has for contribution or other compensatory adjustment.

Comment. Section 872.430 is new. It avoids the need of the defendant to file a cross-complaint for affirmative relief. Compare Section 431.30(c)(affirmative relief may not be claimed in the answer).

**§ 872.720. Interlocutory judgment**

872.720. (a) If the court finds that the plaintiff is entitled to partition, it shall make an interlocutory judgment that determines the interests of the parties in the property and orders the partition of the property and, unless it is to be later determined, the manner of partition.

(b) If the court determines that it is impracticable or highly inconvenient to make a single interlocutory judgment that determines, in the first instance, the interests of all the parties in the property, the court may first ascertain the interests of the original concurrent or successive owners and thereupon make an interlocutory

judgment as if such persons were the sole parties in interest and the only parties to the action. Thereafter, the court may proceed in like manner as between the original concurrent or successive owners and the parties claiming under them or may allow the interests to remain without further partition if the parties so desire.

**§ 873.010. Court authority concerning referee**

873.010. (a) The court shall appoint a referee to divide or sell the property as ordered by the court.

(b) The court may:

(1) Determine whether a referee's bond is necessary and fix the amount of the bond.

(2) Instruct the referee.

(3) Fix the reasonable compensation for the services of the referee and provide for payment of the referee's reasonable expenses.

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

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

(6) Remove the referee.

(7) Appoint a new referee

**Comment.** Section 873.010 sets out some, but not all, of the court's powers with respect to the referee.

Subdivision (a), providing for court appointment of a single referee, supersedes provisions of former Section 763 that required the consent of the parties for the appointment of a single referee.

Subdivision (b) (1) is new. Whether a bond is required depends on the circumstances of the case.

Subdivision (b) (2) 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 action. See also Section 873.070 (petition for instructions).

Subdivision (b) (3) states the substance of former Section 768 in providing for court allowance of fees and expenses of referees. See Section 874.010 and Comment thereto (costs incurred in partition action).

Subdivision (b) (4), permitting the court to fix the date of commencement of the lien of the referee (see Section 874.120),

is new. It protects the referee in case of later settlement and dismissal of the action. For authority of the court to fix the date of commencement of liens of third persons furnishing services, see Section 873.110.

Subdivision (b) (5) is new. It recognizes the need for and practice of the court to receive and pass upon the account and final report of the referee and thereafter to discharge the referee. This applies particularly in, but is not limited to, sales transactions.

Subdivision (b) (6) restates the substance of the introductory portion of former Section 766. It broadens this provision to apply to the referee for sale as well as for division.

Subdivision (b) (7) is new; for specific provisions authorizing appointment of a new referee, see Sections 873.290 (division) and 872.630 (new reference for determination of interests of lienholders). See also Sections 873.730 and 873.740 (authority of court to order new sale).

~~§ 873.080. Disposition in accordance with law~~

~~873.080. The division or sale of the property by the referee shall comply with all laws, regulations, and ordinances governing such transactions including where applicable, but not limited to, the following:~~

- ~~(a) Zoning requirements.~~
- ~~(b) Environmental impact report and similar requirements.~~
- ~~(c) Subdivision and parcel map requirements.~~
- ~~(d) Land dedication requirements.~~
- ~~(e) Street opening and closing provisions.~~

~~Comment. Section 873.080 is new. It makes clear that the actions of the referee in disposing of the property and of the court in confirming the referee's actions must conform to any applicable laws.~~

**§ 873.230. Division involving purported conveyance**

873.230. Where prior to the commencement of an action a party has executed a deed purporting to convey to a purchaser a portion of the property to be divided, to the extent it can be done without material injury to the rights of the other parties, the property shall be so divided as to allot that portion to the purchaser, the purchaser's heirs or assigns, or such other action shall be taken as to make the deed effectual as a conveyance of that portion of the property.

**§ 873.640. Manner of notice of sale**

873.640. (a) Notice of the sale of real or personal property shall be given in the manner required for notice of sale of like property upon execution. Such notice shall also be given to every party who has appeared in the action and to such other interested persons as may have in writing requested the referee for special notice.

(b) Where real and personal property are to be sold as a unit, notice of the sale may be in the manner required for notice of sale of real property alone.

(c) The court may order such additional notice as it deems proper.

(d) Where the court orders a new sale of property pursuant to Section 873.730 or Section 873.740, notice of sale shall be as provided in this section.

#### § 873.770. Taking setoff from party purchaser

873.770. Where the purchaser is a party or lienholder entitled to a share of the proceeds of sale, the referee may:

(a) Take the purchaser's receipt for so much of the proceeds of sale as belongs to the purchaser.

(b) Take security, or other arrangement satisfactory to the referee, for payment of amounts which are or may become due from the purchaser on account of the expenses of sale, general costs of the action, and costs of the reference.

#### § 873.820. Application of proceeds of sale

873.820. The proceeds of sale for any property sold shall be applied in the following order:

(a) Payment of the expenses of sale.

(b) Payment of the other costs of partition in whole or in part or to secure any cost of partition later allowed.

(c) Payment of any liens ~~of parties~~ on the property in their order of priority except liens which under the terms of sale are to remain on the property.

(d) Distribution of the residue among the parties in proportion to their shares as determined by the court.

**Comment.** Section 873.820 continues the substance of former Section 771 and extends it to the sale of unencumbered as well as encumbered property. The provision formerly found in

Section 771, requiring payment of liens prior to the lien upon which the owner's title is based, is not continued since the provision formerly found in Section 752 for partition by a lienholder is not continued. See Comment to Section 872.210.

The preference for payment of the expenses of sale in subdivision (a) is new. For the costs of partition (subdivision

(b)), see Chapter 8 (commencing with Section 847.010). Subdivision (c) provides for payment of liens on the property (including liens on undivided interests in the property) regardless whether the lien holder is a party unless the property has been sold subject to the lien. In case of a dispute concerning payment of a lien, the proceeds may be deposited in court pursuant to Section 873.810 pending resolution of the dispute.

§ 873.850. Where proceeds have not been allocated between parties (new)

873.850. When the proceeds of the sale belonging to persons who are parties to the action, whether known or unknown, have not been allocated between such parties, 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.

Comment. Section 873.850 continues the substance of former Section 774.

**§ 874.110. Payment by parties**

874.110. (a) The costs of partition as apportioned by the court may be ordered paid in whole or part prior to judgment.

(b) Any costs that remain unpaid shall be included and specified in the judgment.

Comment. Section 874.110 supersedes portions of former Section 796. While subdivision (a) requires payment by the parties, it should be noted that, in the case of sale of the property, the proceeds are to be applied first to discharge the costs of partition before disbursement to the parties. Section 873.820.

Subdivision (b) requires the judgment to list only amounts remaining unpaid rather than all amounts apportioned to the parties under the former provision. See also former Section 798.

The judgment referred to in this and the succeeding sections of this article is the judgment entered at the conclusion of the case in the trial court.

**§ 874.130. Enforcement of lien**

874.130. Upon application of a person entitled to a lien imposed under this article and upon a showing of good cause, the court may order a sale of all or a portion of the property before or after judgment for the benefit of all such lien claimants without priority among them.

**§ 874.210. Persons bound by judgment**

874.210. The judgment in the action is binding and conclusive on all of the following:

(a) All persons known and unknown who were parties to 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 not in being or not ascertainable at the time judgment is entered who have any remainder interest in the 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 the judge shall make appropriate provision for the protection of such interests.

(c) All Except as provide in Section 874.230, all persons who were not parties to the action and who have or claim any interest in the property which was not of record at the time the lis pendens was filed, or if none was filed, at the time the judgment was recorded.

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

**§ 874.230. Unrecorded interests known to plaintiff**

874.230. ~~Notwithstanding Section 874.210, where an occupant-or-other~~ Where a person having or claiming an unrecorded

interest in the property or part thereof was not a party to the action but ~~the occupancy reasonably should have been known or~~ the existence or claim of the interest was actually known to the plaintiff at any time before entry of the

interlocutory judgment or would have been reasonably apparent from an inspection of the property ,

the judgment does not affect the interest of such ~~occupant or other~~ person in the portion of the property or proceeds of sale thereof allocated to the plaintiff.

Comment. Section 874.230 is new. It is intended to implement the requirement of Section 872.510, making mandatory on the plaintiff the joinder of all persons "actually known" to the plaintiff or reasonably apparent from an inspection of the property having or claiming an interest in the property or part thereof as to which partition is sought.

Section 874.230 is an exception to the rule stated in Section 874.210(c) that the judgment binds all persons having unrecorded interests in the property. It should be noted that Section 874.230 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.

### OPERATIVE DATE; APPLICATION TO PENDING ACTIONS

SEC. 7. (a) This act becomes operative January 1, 1977.

(b) Subject to subdivisions (c), (d), and (e), in the case of an action commenced prior to the operative date, this act upon the operative date applies to the action unless in the opinion of the trial court application of a particular provision would be materially inconsistent with the proceedings theretofore had or would substantially interfere with the effective conduct of the action or the rights of the parties or other interested persons, in which case the particular provision does not apply and the law applicable thereto prior to the operative date applies.

(c) Code of Civil Procedure Sections 872.210 and 872.710 do not apply to an action commenced prior to the operative date and the law applicable thereto prior to the operative date applies .

(d) If, on the operative date, summons was issued but not served in an action, service and proof of service may be made pursuant to the law applicable thereto prior to the operative date.

(e) If, on the operative date, securities have been taken, investments made, or funds deposited pursuant to former Code of Civil Procedure Sections 771, 788, 793, or 794, or a trust has been established pursuant to former Code of Civil Procedure Section 784, the trial court retains jurisdiction as provided under the law applicable thereto prior to the operative date. The trial court, upon reasonable notice and opportunity to be heard and if it appears in the best interests of the parties and other interested persons, may order that securities, investments, or funds held by the county clerk be assigned, delivered, or paid over to a trustee or agent, or otherwise transferred from the name or custody of the county clerk.

(f) An action for partition by the owner or holder of a lien on a parity with that on which the owner's title is based shall be commenced prior to the operative date.



EXHIBIT II

SELECTED PROBLEMS IN PARTITION

by Robert J. Murphy III

Part I. Partition of Community Property

The Commission's Recommendation Relating to Partition of Real and Personal Property would allow a partition action to be commenced and maintained by a "co-owner" of personal property or an "owner" of specified estates in real property.<sup>1</sup> The staff has advised that this provision will probably allow partition of community property, not presently allowed under California law.<sup>2</sup> Where the family residence is the only real property asset of the parties, the question whether partition of community property should be allowed is largely academic, since the wife can always prevent partition of such property by filing a homestead declaration even after this partition action has been commenced.<sup>3</sup>

To allow partition of community property will permit a spouse to obtain division of property over the objection of the nonconsenting spouse without the necessity of filing an action for dissolution of marriage or legal separation, or, if a decree of legal separation has been made which fails to divide the community property,<sup>4</sup> to obtain division without dissolving the marriage. On the other hand,

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1. Proposed Code Civ. Proc. § 872.210.
  2. Jacquemart v. Jacquemart, 142 Cal. App.2d 794, 299 P.2d 281 (1956). Similarly, a common law cotenancy may not be divided by the court in an action for dissolution; partition is the proper remedy. E.g., Maher v. Maher, 261 Cal. App.2d 30, 31-32, 30 Cal. Rptr. 516 (1963); Barba v. Barba, 103 Cal. App.2d 395, 396, 229 P.2d 465, \_\_\_ (1951).
  3. See Walton v. Walton, 59 Cal. App.2d 26, 138 P.2d 865 (1942).
  4. The court is required to divide the community property in a decree of legal separation, or must reserve jurisdiction to do so. Civil Code § 4800(a). A decree of legal separation may nonetheless fail to divide all of the community property, in which case the property retains its community character until the marriage is dissolved. See Jacquemart v. Jacquemart, 142 Cal. App.2d 794, 299 P.2d 281 (1956).

in a partition action, the court lacks the discretion<sup>5</sup> it has in a Family Law Act proceeding to make a conditional award of the property, for example, to a wife with minor children,<sup>6</sup> or to award the home to the wife while making an offsetting award of other community property to the husband.<sup>7</sup> Thus, to allow partition of community property when an action for dissolution of marriage or legal separation is pending gives a tactical advantage to the noncustodial parent (normally the husband) he does not now possess.

In view of these problems, the staff has examined the law of the seven other community property states<sup>8</sup> with respect to the question of whether community property may be partitioned. In Idaho, Nevada, New Mexico, and Washington, the partition statute is limited to owners of common law cotenancies.<sup>9</sup> In none of these four states has the question of whether community property may be partitioned been considered in a published appellate decision.

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5. Partition is generally a matter of right. 3 B. Witkin, Summary of California Law, Real Property § 227, at 1955 (8th ed. 1973); 59 Am. Jur.2d, Partition § 3, at 773 n.13 (1971).
  6. Supplementary Report on the Family Law Act, Assembly Daily Journal, February 26, 1970.
  7. Civil Code § 4800(b)(1).
  8. These are Arizona, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. 7 B. Witkin, Summary of California Law, Community Property § 1, at 5094 (8th ed. 1974).
  9. Idaho Code § 6-501 (Bobbs-Merrill 1948)(parceners, joint tenants, or tenants in common); Nevada Rev. Stats. § 39.010 (1973)(joint tenants or tenants in common); New Mex. Stats. 1953 § 22-13-1 (Allen Smith 1954)(joint tenants, tenants in common, or coparceners); Rev. Code of Wash. § 7.52.010 (West 1961)(tenants in common).

Arizona, Louisiana, and Texas have more broadly worded partition statutes.<sup>10</sup> However, neither Arizona nor Texas allow partition of community property apart from a divorce proceeding,<sup>11</sup> and Louisiana follows the same rule but makes a statutory exception<sup>12</sup> where the husband has been guilty of mismanagement of the community.<sup>13</sup>

The principal objections to allowing partition of community property seem to have been that (1) it deprives the trial court of the discretion it possesses in dissolution of marriage proceedings,<sup>14</sup> and (2) it allows piecemeal litigation

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10. Ariz. Rev. Stats. §§ 12-1211 ("[t]he owner or claimant of any real property or any interest therein may compel a partition . . ."), 12-1222 ("[p]art owners of personal property may be compelled to make partition . . .")(West 1956); Tex. Civil Stats., Arts. 6082 ("[a]ny joint owner or claimant of any real estate or of any interest therein . . . may compel a partition thereof . . ."), 6101 ("[p]art owners of personal property may be compelled to make partition . . .")(Vernon 1962); La. Civil Code § 1308 (Bobbs-Merrill 1947)("[t]he action of partition will not only lie between coheirs and colegatees, but between all persons who hold property in common, from whatever cause they may hold in common").
  11. *Rodieck v. Rodieck*, 9 Ariz. App. 213, 219 n.6, 450 P.2d 725, 731 n.6 (1969) (" . . . we are unable to find any case in this jurisdiction in which partition of community property has been allowed . . ."); *Mahoney v. Snyder*, 93 S.W.2d 1219, 1221 (Tex. Civ. App. 1936)(" . . . there can be no partition of the community estate between the parties so long as the marriage status continues"); *Martin v. Martin*, 17 S.W.2d 789, 792 (Tex. Comm'n of App. 1929) (" . . . we know of no authority, and have been cited to none, authorizing the partition of community property between the husband and wife except in a divorce proceeding . . . [or] after divorce proceedings have been had").
  12. La. Civil Code § 2404 (Bobbs-Merrill 1947).
  13. *Mitchell v. Commissioner of Internal Revenue*, 430 F.2d 1, 6 n.6 (1970); *Thigpen v. Thigpen*, 231 La. 206, 227, 91 So.2d 12, 19 (1956). Louisiana precedent should be accepted with caution, since Louisiana derives all of its law from the civil tradition and none from the common law tradition. *Creech v. Capitol Mack, Inc.*, 287 So.2d 497, 509 (La. 1974). Also, the Louisiana cases use the term "partition" for division of property, both in and apart from the proceedings for dissolution of marriage. E.g., *Campbell v. Scroggins*, 191 So.2d 154, 157 (La. App. 1966).
  14. See *Becchelli v. Becchelli*, 17 Ariz. App. 280, 283-285, 497 P.2d 396, 399-401 (1972).

of property issues.<sup>15</sup> These objections can be satisfactorily met in our proposed partition statute by adding a provision for a stay of the partition suit while an action for dissolution of marriage, legal separation, or annulment is pending.

## Part II. Partition of Cotenancies Subject to a Homestead

Under existing California law, whether a cotenancy subject to a homestead may be compulsorily partitioned depends on whether the homestead is created merely in the interest of the cotenant opposing partition, or is created in the entire property. A statutory homestead<sup>16</sup> normally may be created only in the interest of the cotenant who executes the homestead declaration, and the right of other cotenants to compel partition is not affected.<sup>17</sup> And, in the case of a probate homestead,<sup>18</sup> the court can create a homestead in the deceased husband's undivided half interest in property held by him and a third person as tenants in common, but cannot reach the interest of the cotenant.<sup>19</sup> The cotenant, therefore, may compel partition of the property even though it is subject to a probate homestead.<sup>20</sup>

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15. See *Daigre v. Daigre*, 230 La. 472, 477, 480-482, 89 So.2d 41, 43-45 (1956).
  16. The homestead which is created by the filing of a declaration of homestead under Civil Code Sections 1237-1304 is commonly referred to as a "statutory" homestead. See *Walton v. Walton*, 59 Cal. App.2d 26, 31, 138 P.2d 54, \_\_\_ (1943).
  17. *Wiltrakis v. Wiltrakis*, 244 Cal. App.2d 257, 259, 53 Cal. Rptr. 97, \_\_\_ (1966); *Squibb v. Squibb*, 190 Cal. App.2d 766, 769-770, 12 Cal. Rptr. 346, \_\_\_ (1961); *Young v. Hessler*, 72 Cal. App.2d 67, 69-70, 164 P.2d 60, \_\_\_ (1945); *Priddel v. Shankie*, 69 Cal. App.2d 319, 325-326, 159 P.2d 438, \_\_\_ (1945). See Civil Code § 1238 ("[i]f the claimant be an unmarried person . . . the homestead may be selected from any of his or her property").
  18. The probate homestead is authorized and governed by Probate Code Sections 660-668.
  19. *Estate of Kachigian*, 20 Cal.2d 787, 792, 128 P.2d 865, \_\_\_ (1942); *Priddel v. Shankie*, 69 Cal. App.2d 319, 325, 159 P.2d 438 \_\_\_ (1945).
  20. Id.

A married woman, however, may declare a homestead in both her and her husband's interest in a cotenancy held by the two of them,<sup>21</sup> and such property is thereafter immune to compulsory partition, at least while the parties remain married.<sup>22</sup> Similarly, a probate homestead may be created in the whole of the deceased husband's separate property and, when so created, binds distributees of the property and prevents partition over the widow's objection.<sup>23</sup> The rule is generally the same in other states.<sup>24</sup>

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21. Civil Code § 1238.

22. *Walton v. Walton*, 59 Cal. App.2d 26, 33-34, 138 P.2d 54, \_\_\_ - \_\_\_ (1943).  
*Accord*, *Johnson v. Brauner*, 131 Cal. App.2d 713, 722, 281 P.2d 50, \_\_\_ (1955) (dictum); *Kaupe v. Kaupe*, 131 Cal. App.2d 511, 514, 280 P.2d 856, \_\_\_ (1955) (wife who had created homestead denied partition). Upon the parties' divorce, the wife's homestead interest in the husband's share of the property terminates and either party may thereafter compel partition. See *Lang v. Lang*, 182 Cal. 765, 770-771, 190 P. 181, \_\_\_ - \_\_\_ (1920); *California Bank v. Schlesinger*, 159 Cal. App.2d Supp. 854, 866-867, 324 P.2d 119, \_\_\_ - \_\_\_ (1958).
23. *Priddel v. Shankie*, 69 Cal. App.2d 319, 325-326, 159 P.2d 438, \_\_\_ - \_\_\_ (1945); *Mills v. Stump*, 20 Cal. App. 84, 128 P. 349 (1912).
24. Annot., 159 A.L.R. 1129 (1945); Annot., 140 A.L.R. 1170 (1942).

One source of confusion in the law of partition, as affected by dower and homestead interests, is the failure to separate and distinguish cases of dower or homestead rights attaching merely to the interest of a cotenant from cases where such rights are held in respect of, or constitute a claim or encumbrance against, all fee interests. For if the dower or homestead exists merely in favor of the spouse or family of a cotenant, it is clear that other cotenants have a right of partition superior thereto, the dower or homestead in such case being no more effectual to prevent partition than the undivided interest to which it is limited. [Annot., 159 A.L.R. 1129 (1945).]

"In the majority of jurisdictions wherein the question has arisen, it is held that a joint tenant or tenant in common of land may acquire homestead rights therein to the extent of his interest, although he may not assert such rights in a manner prejudicial to his cotenants." [Annot., 140 A.L.R. 1170 (1942).] "The cases uniformly hold or assume . . . that the homestead rights of a cotenant, or of his spouse or family, in respect of his interest in the common property are not a bar to partition." [*Id.* at 1171 (cited with approval in *Young v. Hessler*, 72 Cal. App.2d 67, 69, 164 P.2d 65, \_\_\_ (1945), and *Priddel v. Shankie*, 69 Cal. App.2d 319, 325, 159 P.2d 438, \_\_\_ (1945)).] However, where the homestead is created by "the absolute owner" of the property, "the homestead rights . . . attach to the whole property, not merely to a share therein." [140 A.L.R. 1170 (1942).]

It would appear that the Commission's proposed new partition statute<sup>25</sup> effects no change in existing law with respect to partition of land subject to homestead. Since the power of a married woman to declare a homestead extends to community property,<sup>26</sup> the rule of the Walton case<sup>27</sup> barring partition of a cotenancy subject to a homestead would seem to apply equally to community property subject to a homestead.

### Part III. Partition of Successive Interests in Personal Property

"Although the Civil Code is not explicit, it appears from various decisions that valid future interests in personal property may be created in California."<sup>28</sup> In general, the decisions "have recognized the possibility of creating in chattels personal<sup>29</sup> all of the types of future interests which have achieved recognition in connection with land."<sup>30</sup>

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25. A.B. 1617 (1975-76 Reg. Sess.).

26. Civil Code § 1238.

27. 59 Cal. App.2d 26, 138 P.2d 54 (1943).

28. 3 B. Witkin, Summary of California Law, Personal Property § 15, at 1627 (8th ed. 1973).

29. A chattel personal is tangible, movable personal property. Restatement of Restitution § 128, comment b (1937). See Restatement (Second) of Conflict of Laws § 56, comment a (1971).

30. 1 L. Simes & A. Smith, The Law of Future Interests § 360, at 388 (2d ed. 1956). The authors are here referring to legal estates in personalty; "there has never been any question that all varieties of future interests could be created as equitable future interests" by placing a chattel personal in trust. Id. § 351, at 375. There is a "substantial exception" to the rule allowing the creation of future interests in personalty where consumables are concerned. Id. §§ 360, 370, at 389, 405-408. ". . . [T]he whole topic is and long has been a little explored backwater of the law." Id. § 352, at 379.

Future interests have been found to exist in corporate stock and building and loan investment certificates,<sup>31</sup> slaves,<sup>32</sup> money, clothing, farm equipment, wine, livestock, and notes and accounts,<sup>33</sup> a cashier's check, looms in a factory, rents, royalty in oil brought to the surface, ships, stocks of merchandise, and a joint bank account.<sup>34</sup>

The question of whether partition may be had of successive interests<sup>35</sup> in personalty has been the subject of no reported judicial decision in California or elsewhere.<sup>36</sup> A leading treatise suggests that, by statute, partition of successive interests in personalty is available in California to the same extent as partition of successive interests in realty,<sup>37</sup> although this conclusion does not appear to be well supported.<sup>38</sup> If the conclusion is correct, however, then partition of

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31. 3 B. Witkin, Summary of California Law, Personal Property § 15, at 1627 (8th ed. 1973).

32. 1 L. Simes & A. Smith, The Law of Future Interests §§ 356-357, at 381-385 (2d ed. 1956).

33. Id. § 389, at 404 n.89.

34. 68 C.J.S. Partition § 24 (1950).

35. As commonly used, the term "successive interests" appears to mean a present interest followed by a future interest. See, e.g., 4 L. Simes & A. Smith, The Law of Future Interests §§ 1769, 1773, at 100, 105 (2d ed. 1956).

36. 4 L. Simes & A. Smith, The Law of Future Interests § 1776, at 108 (2d ed. 1956).

37. Id. § 1777, at 108 n.28.

38. The authors note that California Code of Civil Procedure Section 752a "in effect" provides that the statute dealing with partition of realty shall be applicable to personalty. However, Section 752a merely provides that "[i]n all such actions [for partition of personalty] the provisions of this chapter shall govern wherever applicable." The conclusion that this language incorporates the provisions of Code of Civil Procedure Section 752 authorizing partition of certain kinds of successive interests in realty seems tenuous. Finally, the fact that Section 752a authorizes partition by "coowners" of personal property sheds little light on the question of whether partition is available to owners of successive interests in personalty.

successive interests in personalty is presently available to a life tenant as against remaindermen, since that is the California law where realty is concerned.<sup>39</sup> Following the same logic, however, partition of successive interests in personalty would not now be available to a remainderman as against a life tenant, since that is the California law where realty is concerned.<sup>40</sup>

It is arguable that the power to partition successive interests is broader with respect to personal property than with respect to real property in California since under Code of Civil Procedure Section 752a "co-owners" of personal property may have partition, and in another statutory section<sup>41</sup> the holder of a future interest is described as "the owner." However, remaindermen lacked the power to partition at common law,<sup>42</sup> and since it is not clear whether the statutory term "co-owners" is intended to include remaindermen where personalty is concerned, such power may well be lacking in California.

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39. Code Civ. Proc. § 752 (authorizing partition of real property "subject to a life estate with remainder over"). See *Garside v. Garside*, 80 Cal. App.2d 318, 326, 181 P.2d 665, 670-671 (1947). California is apparently the only state where successive interests may be partitioned "where there is no concurrent cotenancy." 4 L. Simes & A. Smith, *The Law of Future Interests* § 1773, at 105 (2d ed. 1956). Accord, *Dixon v. Dixon*, 189 Neb. 212, 215, 202 N.W.2d 180, \_\_\_ (1972).

40. *Akagi v. Ishioka*, 47 Cal. App.3d 426, 120 Cal. Rptr. 807 (1975). Accord, 4 L. Simes & A. Smith, *The Law of Future Interests* § 1773, at 105 (2d ed. 1956)(in California ". . . there is a liability to have his interest partitioned on the part of the remainderman but not a power to partition"). The courts have generally distinguished between the liability to partition of owners of future interests and their power to partition, the former being "more extensive" than the latter. 4 L. Simes & A. Smith, supra § 1765, at 89.

41. Civil Code § 690 ("[a] future interest entitles the owner to the possession of the property only at a future period").

42. 4 L. Simes & A. Smith, *The Law of Future Interests* § 1764, at 88 (2d ed. 1956). In no event may the owner of a future interest not indefeasibly vested compel partition: "[e]ven under statutes containing the most sweeping terms this is the construction uniformly made." Id. § 1772, at 103-104. Accord, 68 C.J.S. Partition § 58(d)(1950). The reason for this rule is, of course, that the owner of a contingent future interest may never come into possession, and thus should be given no present interest in severalty. 4 L. Simes & A. Smith, supra § 1772, at 104.



Section 872.210 of the Commission's proposed partition statute will continue the provision of the existing statute<sup>43</sup> authorizing partition by a co-owner of personal property.<sup>44</sup> That the proposed statute will authorize partition of some successive interests in personalty appears clear from proposed Sections 872.710(c)(giving the court discretionary power to order partition of successive interests in "the property") and 872.010(d)(defining "property" as "real and personal property"). Thus, at a minimum, a life tenant in personalty would appear to have the power to compel partition.

Proposed Section 872.020 continues the substance of that portion of present Section 752a making the provisions of the rest of the partition statute govern, where applicable, actions for partition of personal property. It is this language which Simes and Smith have argued makes partition of successive interests in personalty available to the same extent as in realty.<sup>45</sup> Although this view is debatable, it may be helpful to compare the scope of the proposed statute with respect to partition of successive interests in realty.

Proposed Section 872.210(b) affords the right to partition realty to "[a]n owner of an estate of inheritance, and estate for life, or an estate for years . . . ." Whether owners of future interests in realty may compel partition under the proposed statute depends upon whether a future interest may be an "estate of inheritance."

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43. Code Civ. Proc. § 752a.

44. "Subdivision (a) of Section 872.210 continues the first portion of former Section 752a relating to personal property." Comment to proposed Code Civ. Proc. § 872.210.

45. 4 L. Simes & A. Smith, The Law of Future Interests § 1777, at 108 n.28 (2d ed. 1956).

An estate of inheritance is "[a]n estate which may descend to heirs."<sup>46</sup> And under Civil Code Section 699, future interests are inheritable in California.<sup>47</sup> Thus, it would appear that all future interests are "estates of inheritance."<sup>48</sup> This being so, all owners of future interests may well have the power, subject to the court's discretion,<sup>49</sup> to compel partition.

This conclusion, at least with respect to remaindermen, is strengthened by the Law Revision Commission Comment to proposed Section 872.210(b).<sup>50</sup> However, it is the unanimous rule in other jurisdictions that partition is denied to owners

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46. Black's Law Dictionary 646 (4th ed. 1951). See *In re Waltz*, 197 Cal. 263, 266, 240 P. 19 \_\_\_\_ (1925).
47. "Future interests pass by succession, will, and transfer, in the same manner as present interests." Civil Code § 699. Accord, *Estate of Ferry*, 55 Cal.2d 776, 785, 361 P.2d 900, 903, 13 Cal. Rptr. 180, 183 (1961) ("[a]lthough in some respects the distinction between the types of future interests is important, upon the attribute of alienability and descendibility there is no distinction"). See also Restatement of Property §§ 164, 165 (1936)(future interests which do not cease on the death of the owner, whether or not vested, may pass by intestacy or by testamentary disposition); id., Scope Note to Chapter 9, at 605 (future interests may be created as an estate of inheritance).
48. "Estate of inheritance" has a statutory definition in California: "Every estate of inheritance is a fee, and every such estate, when not defeasible or conditional, is a fee simple or an absolute fee." Civil Code § 762. Future interests, if vested, have been described as a fee interest. See *In re Waltz*, 197 Cal. 263, 266, 270 P. 19 \_\_\_\_ (1925); *Williams v. Williams*, 73 Cal. 99, 101-102, 14 P. 394, 396 (1887); *Bernal v. Wade*, 46 Cal. 663, 667 (1873); 1 American Law of Property, § 4.33, at 463 (Little, Brown & Co. 1952).
49. Proposed Code Civ. Proc. § 872.710(c).
50. The owner seeking partition ". . . may, for example, be a sole life tenant seeking partition as against the remainderman or vice versa." Comment to Proposed Code Civ. Proc. § 872.210(b)(emphasis added).

of future interests in realty which are not indefeasibly vested, "[e]ven under statutes containing the most sweeping terms . . . ."51 California courts may well follow this line of decision as a judicial limitation on the proposed statute.

Whether owners of future interests in personalty will have the power to partition under the proposed statute depends on how broadly the term "coowner"<sup>52</sup> will be read. The term "coowner" is arguably broader than the more specific language applicable to realty,<sup>53</sup> but it appears more likely that the court will follow the uniform rule of decision elsewhere<sup>54</sup> and deny partition to owners of future interests not indefeasibly vested.

Under proposed Section 872.710(c), partition of successive interests in both realty and personalty is allowable in the discretion of the court "if it is in the best interest of all the parties." Where trust property is concerned, the court also has discretion to order sale of the property with the sale proceeds placed in trust.<sup>55</sup> This judicial discretion will enable the courts to deal with the problems of partitioning successive interests on a case by case basis.

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51. 4 L. Simes & A. Smith, *The Law of Future Interests* § 1772, at 103-104 (2d ed. 1956). Accord, 68 C.J.S. Partition § 58(d)(1950).

52. Proposed Code Civ. Proc. § 872.210(a).

53. Proposed Code Civ. Proc. § 872.210(b).

54. Note 42, infra.

55. Proposed Code Civ. Proc. § 872.840.