

#23

10/27/75

Memorandum 75-81

Subject: Study 23 - Partition of Real and Personal Property

At the October 1975 meeting, the Commission requested information relating to findings and appeals in partition actions. This memorandum presents that information, along with one technical matter the staff wishes to dispose of at this time.

Findings and appeals. Attached as Exhibit I (green) is the analysis of the Commission's consultant, Mr. Elmore, of the problems involved in attempting to create special appeals and findings provisions for partition actions. Mr. Elmore's conclusion is that to create such special provisions would be undesirable; however, the statute could be clarified by making a number of technical changes, indicated on page 1 and the top of page 6 of his analysis.

Service of summons on unknown defendants. The staff recommends that Section 872.310(b) be amended to read:

872.310. (b) Service on persons named as parties pursuant to Sections 872.530(b) and 872.550, and on other persons named as unknown defendants, shall be by publication pursuant to Section 415.50.

This amendment will assure that, should the court order joinder of unknown persons, for example, pursuant to Section 872.520 (where defendant is unascertained person or class member), service may be by publication.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT I

October 22, 1975

23

Subject: Study 23- Partition

Consultant's Memorandum On (i) Appeal Provisions,
and (ii) Findings of Fact Provisions.

Background. At the October 9, 1975, meeting, there was discussion of the desirability of adding provisions to the proposed Act on each of these subjects. The matter was referred to staff. This memorandum represents Consultant's views.

Appeal Provisions. First, it is believed that changes should be made in proposed Sections 873.290, 873.960 and 874.240. See Ex. A. The change in Section 873.290 would refer to Judgment of Partition (which it is technically when property is divided) rather than to Judgment of Confirmation. The change in Section 873.960 would make a minor wording change and also add a sentence to provide expressly for a Judgment after the order for transfer stating conditions, in partition by appraisal. There is a procedural gap in present wording (drafted by the writer). But, in addition, the added wording will resolve any uncertainty as to whether the order for transfer itself is appealable. By providing for a Judgment, the Act, in my opinion, makes applicable the "single judgment" rule in this situation. Thus, appeal would be only from the Judgment. There appears no reason for multiple appeals in this situation. It is necessary to refer also to "order" to take care of situations where the appraisal procedure is invoked in a pending partition action. The "order" therefore would be one terminating the appraisal procedure and permitting the

main action to continue, if the conditions were not met. Such an order, in my opinion, would be equivalent to a "final judgment" for appeal purposes. Lastly, Section 874.240, relating to the binding effect of a conveyance made under court order to a purchaser at a partition sale, would be re-written to delete its definition as a "judgment" (for the purposes of Chapter 9), and to provide that it has the same binding and conclusive effect as a judgment under Chapter 9.

These three changes are designed to improve the Act, in relation to appeals-statutory and case law.

Second, in the opinion of Consultant, an attempt at this time to write in new provisions as to appeals in partition cases for guidance of the bench and bar encounters practical difficulties and is not justified by the present statutory and case law. The practical difficulties arise from the varied practices of courts in calendaring and handling matters subsequent to the interlocutory judgment determining interests and ordering partition and the large number of potential orders. Which of the orders should be appealable? For example, should an order relating to referee's fees be appealable or should an appeal be limited to an order awarding such fees or, more narrowly, to an order directing payment of such fees? The same questions arise in connection with claims of third persons such as surveyors or brokers under contracts made with the referee. New provisions of detailed nature, in the writer's belief, would give rise to a host of new questions of statutory interpretation and, more

importantly, bring to the fore the wisdom of statutory provisions requiring or encouraging multiple appeals. Finally, it is doubtful whether it is good legislative policy to legislate piece-meal in this area. Partition is not a greatly used remedy. The same general uncertainties exist in other equity proceedings, e. g., marital actions, mortgage foreclosure actions, actions for specific performance, receiverships, actions for partnership dissolution and accounting. Each has its own typical interlocutory judgment and orders.

In sum, Consultant believes that the law must be rather general in general as to appeals, and that established principles as to what orders after judgment are appealable should continue to govern. If such rules are to be made more specific by statute, the project is one that should not be limited to problems encountered in a particular action or actions.

Under present law, it is clear that the interlocutory judgment determining interests and ordering partition and the "final" judgment are appealable. CCP § 904.1, subd. (a), (1). The so-called "special order after final judgment" rule applies, in partition actions, to orders made after the interlocutory judgment mentioned. *Dunn v. Dunn*, 1902, 137 Cal. 54; *Holt v. Holt*, 1901 131 Cal. 610 (orders confirming or refusing to confirm partition sale), *Heller Properties, Inc. v. Rothschild*, 1970, 11 C. A. 3d 705 (order confirming report of referee as to lien), *Gordon v. Graham*, 1909, 153 Cal. 297 (writ of assistance to place purchaser at partition sale in possession). A particular order

at the time of confirmation of sale providing that the sales' proceeds were to be divided in certain percentages did not amount to an order allocating costs of partition; failure to appeal therefore did not preclude a later fixing of allocation of costs of partition. Southern California Title Clearing Co. v. Laws, 1969, 2 C. A. 3d 586. On the other hand, where costs of partition were fixed and allocated at time of interlocutory judgment ordering sale, failure to appeal made the matter res judicata and precluded a different amount and allocation in the "final" judgment. Riley v. Turpin, 1960, 53 C. 2d 598. Alleged errors in or prior to the interlocutory judgment must be challenged by appeal from that judgment. Oliver v. Sperry, 1939, 220 Cal. 327.

In the writer's belief, present law is reasonably clear. Though it does not answer all questions that can arise, it appears more definite, for example, than in equity actions for specific performance where various types of interlocutory decrees may be entered. Considering the large number of problems in endeavoring to provide certainty by statute, the writer believes the balance is in favor of non-legislative intervention.

It has been suggested that legislation might take the form of specifying the two or three judgments that are appealable and then specifically naming certain common orders after judgment that are appealable and adding catch-all wording, i. e., "and other orders made after judgment." After some work on this possible approach, the writer believes it is not desirable.

First, singling out particular orders after judgment involves an arbitrary selection and is not a desirable form. Second, even if certain types of orders were agreed upon, considerable judgment is required in drafting. For example, to what extent are orders denying, instead of granting, relief to be appealable. For example, a referee may apply for fees and expenses; the court may deny the petition without prejudice to a later petition. Again, in this example, is an appeal to be allowed from any order relating to referee's fees, or from an order "fixing" fees, or from an order "directing payment" of fees? Thus, a new body of statutory law requiring interpretation would be created.

Another alternative is to remove partition provisions in CCP § 904.1 (1) and add new but generally stated provisions to the Partition Act. See Ex. B for illustrative draft. This would have the advantage of a somewhat more specific statement as to appeals in partition actions, contained within the Act. On the other hand, partition is a civil action and, generally, both appeals and stays during appeal are now covered in CCP §§ 901 et seq. and 916 et seq. In the opinion of the writer, the slight advantage that would be gained under this alternative is outweighed by the precedent it sets (i. e., by taking a particular civil action out of the general appeal provisions) and by the fact that the related subject of stays is left in the general sections of the Code of Civil Procedure. The writer does not favor this change.

Findings of Fact. The views of Consultant (based upon general knowledge and not upon a specific study) may be summarized:

1. Technical amendments should be made to Sections 873.960 (appraisal partition) and 874.010 (defining costs of partition) to remove "finds" or similar expression. Such words may imply a legislative intent for findings. *Bostick v. Martin*, 1966, 247 C. A. 2d 179 (application for savings and loan charter).

2. Partition is a civil action in which findings have traditionally been required as to issues of fact raised by the pleadings or actually litigated at the trial. As to such issues the requirement and procedure provided by CCP § 632 apply unless waived in the statutory manner. (Such a waiver may not always been obtained.) It is immaterial that one or more of such issues may be deferred or severed for trial. If, for example, the appropriate mode of partition is in issue and is not determined by the interlocutory judgment, it is the writer's view that CCP § 632 applies to a later determination, even though it is based upon a referee's report. Once the "trial issues" have been determined and a partition ordered, it is the writer's view that CCP § 632 does not apply. In the case of action upon a referee's report on division in kind or upon sale, the Act itself provides what the court shall do, i. e., confirm, modify, set aside, without making any requirement for findings. In the cases of costs of partition, action upon referee's fees, third party claims, and orders for security, to cite examples, it is believed these are not "trial issues" and therefore not within CCP § 632. A caveat is to be noted. In recent years, decisions of the Sup-

reme Court of California in other areas, for example, administrative law, have stressed the need for and value of findings; S 632 is phrased generally ("upon the trial of a question of fact by the court") and there may be developing case law in the probate field that arguably would apply in post-trial partition matters. A court of appeal has held that the court, in acting upon a referee's report as to the location of an easement, is not required to make its own findings, and confirmation of the report which contained facts was sufficient. Worcester v. Worcester, 1965, 246 C. A. 2d 56. At the same time, even apart from the litigant's right to findings on "trial issues," the court has a duty to make determinations as to interests in the property and liens thereon, so that a proper interlocutory judgment may be made. Larsen v. Thoresen, 1951, 36 C. 2d 666.

3. A policy problem is posed as to whether, in view of the paucity of decisions in the partition field and possible future changes in case law generally, the Act should include provisions on the subject, and, if so, in what form. In favor of such provisions are considerations of certainty and "preventive" measures to avoid attacks upon real property titles or liens. Opposed are the points that the problem goes to equity cases generally and (under burgeoning provisions for attorney's fees) to the proper procedure when attorney's fees are awarded in civil litigation; that sponsoring legislation unsuccessfully could be used later to argue that the Legislature intended S632 to apply, and that the courts would not be apt to

make any new court-declared rule as to post-trial findings jurisdictional (though a judgment entered without findings and conclusions, when required, is said to be void). On balance, the writer individually would determine the policy question against inclusion of provisions in the Act. In part, this individual view is based upon the fact that a new procedure should be developed as to findings or no findings in post-trial motions or proceedings in civil actions generally; partition should not be the guinea pig.

4. If the policy problem is decided in favor of legislation, a draft of a new section (§ 872.125) is attached for consideration. See Ex. C.

Garrett Elmore

Proposed Technical Amendments- See Page 1 of Memorandum

§ 873.290. Hearing on report and entry-of judgment of partition.
873.290.

(a) Any party, upon notice to the other parties who have appeared, may move the court to confirm, modify, or set aside the report.

(b) At the hearing, the court may either confirm or modify the report and enter judgment of partition accordingly, or it may set aside the report and order preparation of a new report and, if necessary, appoint a new referee for this purpose.

(c) The division is effective and title vests in accordance therewith upon entry of judgment of confirmation partition.

§ 873.960. Hearing on referee's report and judgment.
873.960:

At the hearing, the court shall examine the report and witnesses. If the court finds- determines that the proceedings have been regularly conducted, that transfer of title to the interests may regularly be made, and that no facts appear which would make such transfer inequitable, it shall confirm the report and order the interests transferred to the acquiring parties in proportion to their respective interests, or in such other proportion as is set out in the agreement. The court- order is-contingent shall be conditioned upon payment of the amounts fixed as the purchase price and any other amounts required by the agreement, the giving of any required security, and payment by the parties of the expense of the proceeding authorized by this chapter and of the general costs of the-action partition or an appropriate share thereof. Thereafter the court, upon motion of a party to the agreement, or of the referee, upon not less than 10 days' notice of motion to the parties who have appeared, shall determine whether the conditions have been fulfilled and, if so, shall enter a judgment confirming the transfer; otherwise, upon such further proceedings as may be ordered, the action or proceeding shall be ordered terminated.

§ 874.240. Judgment-defined Effect of conveyance or transfer (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:A conveyance or transfer pursuant to Sections 873.650 and 873.790 or Section 873.960 shall be binding and conclusive, in the same manner as a judgment.

Illustrative Appeal Provisions. See Page 5 of Memorandum.

CCP 904.1. An appeal may be taken from a superior court in the following cases:

.....
.....

~~(i) From an interlocutory judgment in an action in an action for partition determining the rights and interests of the respective parties and directing partition to be made;~~

.....

Note: (j) and (k) to be re-lettered.

Add:

Chapter 10. APPEALS

§ 874.270. Appealable judgments and orders.

874.270. An appeal may be taken in the following cases:

(a) From the interlocutory judgment described in Section 872.720 (other than an interlocutory judgment which is preliminary in nature under subdivision (b) thereof).

(b) From the judgment, or the order terminating the action or proceeding, described in Section 873.960.

(c) From the judgment (other than a judgment described in (b)) which terminates the action as to the parties or a party.

(d) From an order made after a judgment or order which is appealable under (a), (b) or (c).

(e) In the cases specified in subdivisions (c) to (g), inclusive, of Section 904.1.

Comment: Section 874.270 replaces former subdivision (i) of Section 904.1. It states more explicitly provisions contained in former subdivision (i) and in other provisions of Section 904.1, for greater clarity.

Illustrative Findings of Fact Provisions. See Page 8 of Memorandum.

Draft

Add:

§ 872.125. When Findings of Fact Required.

872.125. (a) Section 632 of this code applies to the trial of all contested questions of fact as to the rights and interests of the parties in the property, the right to and method of partition, and claims to incidental relief.

(b) In other matters, the court shall make its determinations in such manner and form as it deems proper, subject to the specific provisions of this title.

Comment: Section 872.125 is new. Its purpose is to clarify the general requirements of CCP § 632, relating to findings of fact and conclusions of law upon a court trial, in the context of a partition action. Under subdivision (b), the court may, but is not required to, permit the parties to request findings of fact in contested matters not included in subdivision (a). The statutory procedure for confirmation of a referee's report on location of an easement is sufficient. Worcester v. Worcester, 1965, 246 C. A. 2d 56; see also Larsen v. Thoresen, 1951, 36 C. 2d 666 (duty of court to make findings required by statute to insure a proper judgment).