

Date of Meeting: June 13-14, 1958

Date of Memo: June 4, 1958

Memorandum No. 6

Subject: Study No. 21 - Confirmation of Judicial Sales of Real Property.

The 1956 Session of the Legislature authorized the Commission to make a study to determine whether the provisions of the Code of Civil Procedure relating to the confirmation of partition sales and the provisions of the Probate Code relating to the confirmation of sales of real property of estates of deceased persons should be made uniform and, if not, whether there is need for clarification as to which of them governs confirmation of private judicial partition sales.

A Staff study on this topic is attached. The study will be on the agenda of the June meeting of the Commission.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

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June 5, 1958

A STUDY TO ~~DETERMINE THE~~
~~NECESSITY OF~~
~~REVISIONS TO THE~~
RELATING TO THE CONFIRMATION OF
PRIVATE JUDICIAL SALES OF REAL
PROPERTY SHOULD BE REVISED *

*A Study Made by the Staff of the Law Revision
Commission.

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A STUDY TO DETERMINE WHETHER THE
PROVISIONS OF THE CODE OF CIVIL
PROCEDURE AND THE PROBATE CODE
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PRIVATE JUDICIAL SALES OF REAL
PROPERTY SHOULD BE REVISED

Chapter 4 of Title 10 of Part 2 of the Code of Civil Procedure governs actions that may be brought to partition real and personal property. It provides that the court may order a sale of the property where a partition cannot be made without great prejudice to the parties.¹ In such a case the court is required to appoint referees to sell the property.² Sale of real property may be either public or private as Section 775 provides:

§ 775. All sales of real property made by referees under this chapter must be made at public auction to the highest bidder, upon notice given in the manner required for the sale of real property on execution unless in the opinion of the court it would be more beneficial to the parties interested to sell the whole or some part thereof at private sale; the court may order or direct such real property, or any part thereof, to be sold at either public auction or private sale as the referee shall judge to be 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.

Before title to the property passes, the sale must be confirmed by the court having jurisdiction.³ In Chapter 4, Section 784 seemingly governs the confirmation of all partition sales of real property. It provides:

§ 784. 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 it appears that a sum exceeding such bid at least 10 percent, exclusive 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.

On its face, it would appear that this Section applies to both public and private sales.

THE PROBLEM OF AMBIGUITY

As noted above, Section 775 of the Code of Civil Procedure provides that in the case of a private sale of real property in connection with a partition proceeding "...the sale at private sale shall be conducted in the manner required in private sales of real property of estates of deceased persons." Unquestionably, this is meant to incorporate the more stringent notice requirements

that are provided in the Probate Code for private sales.⁴ However, a judge of the superior court has raised the question whether Section 775 is also intended to incorporate the provisions of the Probate Code which govern confirmation of private partition sales of real property, thus confining the application of Code of Civil Procedure Section 784 to confirmation of public partition sales. The pertinent Probate Code Sections provide:

§ 784. No sale of real property at private sale shall be confirmed by the court unless the sum offered is at least 90 percent of the appraised value thereof, nor unless such real property has been appraised within one year of the time of such sale, which value must be the appraised value of such real property within one year prior to the date of such sale. If it has not been so appraised, or if the court is satisfied that the appraisement is too high or too low, a new appraisement must be had. This may be done at any time before the sale or confirmation thereof. Such new appraisement may be made by the appraiser who made the original appraisement without further order of court or further request for the appointment of a new appraiser. In the case of the death, removal or other disability to act of the original appraiser, or if for just cause, a new appraiser is to be appointed, proceedings for his appointment shall be had as in the case of an original appraisement of an estate.

§ 785. Upon the hearing the court must examine into the necessity for the sale, or the advantage, benefit and interest of the estate in having the sale made, and must examine the return and witnesses in relation to the sale; and if it appears to the court that good reason existed for the sale, that the sale was legally made and fairly conducted and complied with the requirements of the previous section, that the sum bid is not disproportionate to the value, and it does not appear that a sum exceeding such bid at least 10 percent on the first ten thousand dollars (\$10,000) bid and 5 percent on the amount of the bid in excess of ten thousand dollars (\$10,000), exclusive of the expenses of a new sale, may be obtained, the court shall make an order confirming the sale and

directing conveyances to be executed; otherwise it shall vacate the sale and direct another to be had, of which notice must be given and the sale in all respects conducted as if no previous sale had taken place. But if a written offer in an amount at least 10 percent more on the first ten thousand dollars (\$10,000) bid and 5 percent more on the amount of the bid in excess of ten thousand dollars (\$10,000) is made to the court by a responsible person, and the offer complies with all provisions of the law, the court shall accept such higher offer, confirm the sale to such person and fix a reasonable compensation for the services to the estate of the agent, if any, producing the successful bidder, or, in its discretion, order a new sale. If more than one written offer in an amount at least 10 percent more on the first ten thousand dollars (10,000) bid and 5 percent more on the amount of the bid in excess of ten thousand dollars (\$10,000) is made to the court by responsible persons, and if any such increased bid complies with all the provisions of the law, the court shall accept such highest increased bid, confirm the sale to the person making such increased bid, and fix a reasonable compensation for the services to the estate of the agent, if any, producing the successful bidder or, in its discretion, order a new sale. The compensation of the agent producing the successful bidder shall not exceed one half of the difference between the amount of the bid in the original return and the amount of the successful bid, but such limitation shall not apply to any compensation of the agent holding the contract with the executor or administrator.

For the purpose of this section the amount of a bid shall be determined by the court without regard to any commission on the amount of such bid to which an agent may be entitled by virtue of a contract with the executor or administrator. It shall be determined without regard to any condition of the bid that a certain amount thereof be paid to an agent by the executor or administrator, but notwithstanding that a bid contains such a condition, only such compensation to an agent as is proper under the preceding provisions of this section shall be allowed, and acceptance of the bid by the court binds the bidder though the compensation so allowed is less than the compensation to which the agent would be entitled had the condition been observed.

Before 1947, it was not important whether Probate Code Section 785 or Code of Civil Procedure Section 734 applied to confirmation of private partition sales because they were then substantially identical.⁵ This fact was noticed by the courts in analogizing rulings under Probate Code § 785 to those under Section 784 of the Code of Civil Procedure.⁶

However, a question could have arisen prior to 1947 as to whether Probate Code Section 784, which requires a bid of 90% of the appraised value, was applicable to private partition sales. There are no cases which shed any light on this matter. This may be explained in several ways, any or all of which may be entirely erroneous:

1) All courts and parties assumed that Section 784 of the Code of Civil Procedure governs the confirmation of both private and public partition sales and that Section 775 of the Code of Civil Procedure does not make the Probate Code confirmation provisions applicable to private partition sales.

2) All courts and parties assumed that Section 775 of the Code of Civil Procedure does make the Probate Code confirmation provisions applicable to private partition sales, but because under this interpretation the requirement that the bid be equal to 90% of the appraised value was applicable only to private sales, no such sales were made.

3) Both procedures were used by different courts without any of the parties questioning the procedure followed in particular cases or at least appealing therefrom.

Whichever, if any, of these explanations is correct, the ambiguity which seems to exist can easily be corrected by the insertion of more specific language in the relevant code sections. Proposed amendments which would accomplish this objective are contained in Appendix A.

UNIFORM CONFIRMATION PROVISIONS

Another problem to be considered is the several dissimilarities between the Probate Code confirmation provisions and those contained in the Code of Civil Procedure.⁷ Should the provisions of both codes be made uniform? It is not clear that the same answer should be given with respect to each dissimilarity. Hence, they will be discussed separately.

1. Minimum Bid. Section 784 of the Probate Code provides that no sale may be confirmed unless the sum offered is at least 90 percent of the appraised value thereof. There is no similar provision in the Code of Civil Procedure. Whether the minimum bid requirement should be made applicable to confirmation of partition sales under Section 784 of the Code of Civil Procedure is difficult to evaluate. If no other protection against an inadequate bid were provided, this provision would be critical. However, Section 784 provides that if the proceedings were unfair, or the sum bid disproportionate to the value the court may vacate the sale and direct another to be had if it appears that an offer higher by at least 10% than that named in the referee's return may

be obtained. Section 784 also authorizes the court, if an offer of 10% more in amount than that named in the referee's return is made to the court to accept such offer or order a new sale. This would seem to offer considerable protection, but conceivably not as much as is offered by the 90% provision of Section 784 of the Probate Code. However, if the considerably broader provisions of Probate Code Section 785 relating to grounds upon which a court may refuse to confirm a sale were incorporated into Code of Civil Procedure Section 784 (see point 4 below) there would be less reason to incorporate the minimum bid provision therein. If the minimum bid principle is to be made applicable to confirmation of partition sales, it will also be necessary to add to Section 784 of the Code of Civil Procedure those provisions of Section 784 of the Probate Code relating to appraisals of the property, appointment of substitute appraisers, etc..

2. Minimum New Offer. Section 784 of the Code of Civil Procedure provides that the court may refuse to confirm a sale under it, if, inter alia, an offer exceeding the proposed sale price by at least 10% has been received. Probate Code Section 785 authorizes refusal of confirmation if an offer exceeding the proposed sale price by at least 10% of the first \$10,000 and 5% of amounts in excess of \$10,000 has been received. It would seem that the provisions of the Probate Code respecting the minimum amount of a new bid, being the latest enactment by the Legislature on the matter, should be incorporated into Section 784 of the Code of Civil Procedure.

3. Agent's Commission. Section 785 of the Probate Code provides that when a higher written offer is accepted by the court it shall fix within specified limits the reasonable compensation, if any, to be paid to any agent producing the successful bidder. Section 784 of the Code of Civil Procedure contains no similar provision. There would appear to be two reasons for this provision in the Probate Code: (1) To provide incentive to agents to find higher bidders and (2) to protect the estate, which must pay any commission involved, as to the amount of commissions imposed on it other than by a contract between the agent and the executor or administrator. It is not clear to what extent, if at all, either of these policy considerations applies to partition sales. If this provision were to be written into Section 784 of the Code of Civil Procedure certain related provisions found in Probate Code Section 785, relating to the effect of the agent's compensation in determining the amount of a bid, etc., would also have to be incorporated therein.

4. Grounds Specified as Sufficient for Refusal to Confirm Sale. Probate Code Sections 785 and Code of Civil Procedure Section 784 contain somewhat different provisions respecting the grounds upon which a court may refuse to confirm a sale of real property. Probate Code Section 785 appears to require the Probate Court to refuse to confirm a sale under any of the following conditions: (1) the sale was not necessary; (2) there was not sufficient advantage, benefit and interest to the estate in having the sale made; (3) good reason did not exist for the sale; (4) the sale

was not legally made or fairly conducted or did not comply with the requirements of Probate Code Section 784; (5) the sum bid is disproportionate to the value of the property or (6) it appears that a sum exceeding the bid by at least 10% on the first \$10,000 and 5% on the balance, exclusive of the expenses of a new sale, may be obtained. Section 784 of the Code of Civil Procedure, on the other hand, appears to authorize the court to refuse to confirm a partition sale only if (1) the proceedings were unfair and a sum exceeding the bid by 10%, exclusive of the expenses of a new sale, may be obtained; (2) the sum bid is disproportionate to the value of the property and a sum exceeding the bid by 10%, exclusive of the expenses of the new sale, may be obtained or (3) an offer exceeding the amount named in the referee's return by 10%⁸ or more is made to the court. Should the broader and mandatory provisions of Probate Code Section 785 be substituted for the narrower and discretionary provisions presently found in Code of Civil Procedure Section 784? An argument might be made that the probate court needs greater power to refuse confirmation than is necessary in the case of partition sales because the protection of a decedent's estate and thus often his dependents is involved. On the other hand, it seems quite possible that the disparity between the two code sections exists, not because of a deliberate policy choice by the Legislature but because the Probate Code provisions are more frequently applied and have been the subject of critical attention by those members of the bench and bar who are largely or exclusively engaged in

handling probate matters.

Appendix B contains proposed amendments to the Code of Civil Procedure which would make the confirmation of sale provisions in both codes uniform. Any action taken in this respect would have to be related to the statutory changes proposed in the first part of the study and contained in Appendix A.

APPENDIX A

1) The following amendment of Section 775 of the Code of Civil Procedure would make it clear that confirmation of private partition sales is to be governed by the applicable provisions of the Probate Code:

775. All sales of real property made by referees under this chapter must be made at public auction to the highest bidder, upon notice given in the manner required for the sale of real property on execution unless in the opinion of the court it would be more beneficial to the parties interested to sell the whole or some part thereof at private sale; the court may order or direct such real property, or any part thereof, to be sold at either public auction or private sale as the referee shall judge to be 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 and confirmation thereof shall be conducted in the manner required in private sales of real property of estates of deceased persons.

2) The following amendment of Section 775 of the Code of Civil Procedure would make it clear that confirmation of private

partition sales is governed by the applicable provisions of the Code of Civil Procedure:

775. All sales of real property made by referees under this chapter must be made at public auction to the highest bidder, upon notice given in the manner required for the sale of real property on execution unless in the opinion of the court it would be more beneficial to the parties interested to sell the whole or some part thereof at private sale; the court may order or direct such real property, or any part thereof, to be sold at either public auction or private sale as the referee shall judge to be 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. The confirmation of the private sale shall be pursuant to Section 784 of this code.

APPENDIX B

The law governing the confirmation of public and private partition sales and of private sales of real property of estates of deceased persons could be made uniform by amending Section 775 of the Code of Civil Procedure in the second of the two ways suggested in Appendix A, supra, and amending Section 784 of the code as follows:

784. 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 the sale was necessary and that it was legally made and

fairly conducted and complied with the requirements of law and that the sum bid is not disproportionate to the value and it does not appear that a sum exceeding such bid at least 10 percent exclusive 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 on the first ten thousand dollars bid and 5 percent on the amount of the bid in excess of ten thousand dollars, exclusive of the expenses of a new sale, may be obtained, the court shall make an order confirming the sale and directing conveyances to be executed; otherwise it shall vacate the sale and direct another to be had, of which notice must be given and the sale in all respects conducted as if no previous sale had taken place.

But if a written offer in an amount at least 10 percent more on the first ten thousand dollars bid and 5 percent more on the amount of the bid in excess of ten thousand dollars is made to the court by a

responsible person, and the offer complies with all provisions of the law, the court shall accept such higher offer, confirm the sale to such person and fix a reasonable compensation for the services of the agent, if any, producing the successful bidder, to be paid out of the proceeds of the sale before the same are distributed, or, in its discretion order a new sale. If more than one written offer in an amount at least 10 percent more on the first ten thousand dollars bid and 5 percent more on the amount of the bid in excess of ten thousand dollars is made to the court by responsible persons, and if any such increased bid complies with all the provisions of the law, the court shall accept such highest increased bid, confirm the sale to the person making such increased bid, and fix a reasonable compensation for the services of the agent, if any, producing the successful bidder or, in its discretion, order a new sale. The compensation of the agent producing the successful bidder which is paid out of the proceeds of the sale shall not exceed one-half of the difference between the amount of the bid in the original return and the amount of the successful bid but such limitation shall not apply to any compensation of the agent which is not paid out of the proceeds of the sale before the same are distributed.

For the purposes of this section the amount of a bid shall be determined by the court without regard to any commission on the amount of such bid to which an agent may be entitled by virtue of a contract with any person. It shall be determined without regard to any condition of the bid that a certain amount thereof be paid to an agent, but notwithstanding that a bid contains such a condition, only such compensation to an agent as is proper under the preceding provisions of this section shall be paid out of the proceeds of the sale, and acceptance of the bid by the court binds the bidder though the compensation so allowed is less than the compensation to which the agent would be entitled had the condition been observed.

No sale of real property shall be confirmed by the court unless the sum offered is at least 90 percent of the appraised value thereof, nor unless such real property has been appraised within one year of the time of such sale, which value must be the appraised value of such real property within one year prior to the date of such sale. If it has not been so appraised, or if the court is satisfied that the appraisement is too high, or too low, a new appraisement must be had. This may be done at any time before the sale or confirmation thereof. Such new appraisement may be made by the appraiser who made the original appraisement

FOOTNOTES

- 1) Cal. Code of Civ. Proc. §§ 752, 763.
- 2) Cal. Code of Civ. Proc. § 763.
- 3) Schoonover v. Eirnbaum, 150 Cal. 734, 89 Pac. 1108 (1907).
- 4) See Probate Code § 782.
- 5) Probate Code Section 785 then read:

785. Upon the hearing the court must examine into the necessity for the sale, or the advantage, benefit and interest of the estate in having the sale made, and must examine the return and witnesses in relation to the sale; and if it appears to the court that good reason existed for the sale, that the sale was legally made and fairly conducted, and complied with the requirements of the previous section, that the sum bid is not disproportionate to the value, and it does not appear that a sum exceeding such bid at least ten percent exclusive of the expenses of a new sale may be obtained, the court shall make an order confirming the sale and directing conveyances to be executed; otherwise it shall vacate the sale and direct another to be had, of which notice must be given and the sale in all respects conducted as if no previous sale had taken place. But if a written offer of ten percent more in amount than that named in the return is made to the court by a responsible person, and the bid complies with all provisions of the law, 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.

- 6) Parker v. Owen, 96 Cal. App.2d 78, 214 P.2d 417 (1950).
- 7) Rev. of 1955 Code Leg. Univ. of Calif. Ext. (1955) at pages 159-160.
- 8) While Section 784 is somewhat ambiguous on its face as to whether it authorizes a refusal to confirm a sale on the sole ground that a higher bid has been received, it has been so interpreted. Parker v. Owen, 96 Cal. App.2d 78, 214 P.2d 417 (1950).