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Date of Meeting: April 17-18, 1959
Date of Memo: April 9, 1959

MEMORANDUM NO. 1

SUBJECT: Study No. 21 - Confirmation of Partition Sales.

The staff study on the above question which was reviewed at the Commission's December meeting has again been revised and rewritten. A copy is attached.

In view of the problems discussed, the Commission may wish to give further consideration to some of the questions raised at the December meeting and particularly the following:

(1) Whether the Probate Code sections dealing with confirmation of sales are intended to apply to private partition sales. At the December meeting the Commission concluded the answers to this was clearly negative. However, further consideration indicates this answer may not be as clearly correct as was first assumed.

(2) Whether the confirmation provisions applicable to both partition sales and sales from estates should be uniform. At the December meeting it was agreed that the provisions with regard to partition sales should not be made to conform with Probate Code confirmation provisions relating to appraisals, commissions, and grounds specified as sufficient for the court's refusal to confirm a sale.

(3) Whether provisions relative to real estate agents and their commissions should be made applicable to partition sales. Further material on this has been added to the study.

Respectfully submitted,

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Revision of April 7, 1959

A STUDY TO DETERMINE WHETHER THE
PROVISIONS OF THE CODE OF CIVIL
PROCEDURE AND THE PROBATE CODE
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
Study #21

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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 Partition sales of real property are governed by Section 775 of the Code of Civil Procedure which 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. [Emphasis added]

In both partition proceedings and the administration of decedents' estates sales of real property must be confirmed by the court having jurisdiction before title passes to the purchaser.³ Section 784 of the Code of Civil Procedure governs the confirmation of partition sales; Sections 784 and 785 of the Probate Code govern the confirmation of sales of property of decedents' estates. As is demonstrated in some

detail at a later point in this study, the Probate Code sections and Code of Civil Procedure section differ considerably.

The questions assigned to the Law Revision Commission and to which this study is directed are:

- (1) whether the last sentence of Section 775 of the Code of Civil Procedure, quoted above, has the effect of making the provisions of Probate Code Sections 784 and 785, rather than of Section 784 of the Code of Civil Procedure, applicable to the confirmation of private partition sales; and
- (2) whether the law respecting the confirmation of partition sales and of sales of decedents' property should be made uniform or more uniform.

I. APPLICATION OF PROBATE CODE PROVISIONS TO PRIVATE PARTITION SALES

Probate Code Sections 780, 782 and 783 prescribe the necessary notice, the time and place of the sale and the manner in which bids may be received for sale of property from decedents' estates. They are quite clearly made applicable to private partition sales by the last sentence of Code of Civil Procedure Section 775.

Section 784 of the Probate Code provides that private sales of real property of decedents' estates may not be confirmed by the court unless the sum offered is at least 90% of the appraised value, makes provision for an appraisal unless the property has been appraised within the last year, and provides for appointment of a new appraiser if the original appraiser is unavailable. Section 785 of the Probate Code contains general provisions with regard to confirmation of sales.

It sets forth the matters which the court must consider in determining whether the sale is to be confirmed, including the availability of higher bids, and makes provision for sales at higher bids made to the court. It is not entirely clear whether these Probate Code Sections are also made applicable to private partition sales by the last sentence of Code of Civil Procedure Section 775.

A. Construction of Existing Statutes

No published decision of a California court has decided whether Probate Code Sections 784 and 785 apply to the confirmation of private partition sales. The following considerations would appear to bear on this question:

1. At first impression and giving the language of Section 771 its most literal interpretation it would appear that Code of Civil Procedure Section 775 refers to the provisions of Probate Code Sections 780, 782 and 783 only and not to the confirmation provisions. The conduct of a sale and the confirmation of a sale are technically different activities and provisions of a statute applying in terms only to one would not appear to include the other. Perhaps some slight weight is added to this view by the fact that some of the language of Probate Code Sections 784 and 785 is more appropriate as applied to decedents' estates than to partition proceedings. Section 784, for example, seems to assume that there has been an appraisal of the property. This is a reasonable assumption in the case of an estate, but not necessarily so in the case of a partition. Section 785 of the

Probate Code requires the court to "examine into the necessity for the sale, of the advantage, benefit, and interests of the estate in having the sale made . . ." This language is more appropriate to the administration of estates, where sales are initiated by the personal representative and merely confirmed by the court, than to partitions, where sales may be initiated only upon court order in the first place.

2. On the other hand, a strong case can be made for the opposite conclusion -- namely, that Section 775 also refers to the confirmation of sales and thus that Probate Code Sections 784 and 785 apply to private partition sales. Two lines of reasoning lead to this conclusion:

(a) The "manner" in which a "sale shall be conducted" refers to an entire process; confirmation is a necessary part of that process. No title passes until that time and thus no sale is actually final until then. ⁵ The sale may be set aside at the hearing and a new sale ordered. Indeed, in the case of a subsequent higher bid the "sale" may take place at the confirmation hearing itself.

(b) Probate Code Section 760 authorizes and provides for contracts with real estate agents to secure purchasers in sales from decedents' estates; such contracts are to become final and binding upon confirmation by the court, with the agents' commissions to be allowed by the court at that time. Section 761 provides for the splitting of commissions in case of a higher successful bid at the confirmation hearing. Section 761.5 provides for payment of a commission to an agent producing a successful higher bidder at the hearing where the original bid returned for confirmation was not made through an agent. These Probate Code sections certainly appear to deal with the "manner . . .

in which a sale shall be conducted." If this is correct, they apply to private partition sales under Code of Civil Procedure Section 775. Yet the picture with regard to agents and commissions is not complete without the provisions of Probate Code Section 785. In addition to other provisions with respect to confirmation of sales, that section provides for the manner in which commissions are to be determined and taken into consideration by the court, and limits the amount of a commission payable in case of a sale at the hearing to a higher bidder. There are no such provisions in Section 784 of the Code of Civil Procedure which govern the confirmation of partition sales. Thus, if Sections 760, 761 and 761.5 do apply to private partition sales, it appears that Probate Code Section 785 must also apply, since it is so closely integrated with those sections.

B. How may any ambiguity be cured?

The following possibilities appear to be available:

(1) If it is decided that the last sentence of Code of Civil Procedure Section 775 does not or should not incorporate the confirmation provisions of the Probate Code, the existing uncertainty could be cured by simply eliminating that sentence and adding a new section to Chapter 4 of Title 10 of Part 2 of the Code of Civil Procedure substantially identical with Probate Code Sections 780, 782 and 783. An alternative method would be to add the following sentence to Code of Civil Procedure Section 775:

Confirmation of a private sale is governed by Section 784 of this code.

Both of these would, however, leave unresolved the question of the application to private partition sales of Probate Code Sections 760, 761 and 761.5, relating to agents and commissions.

2. On the other hand, if it is concluded that the last sentence of Civil Procedure Section 775 does or should incorporate both the confirmation provisions of the Probate Code (Sections 784 and 785) and the provisions with respect to agents and commissions (Sections 760, 761 and 761.5) then the existing ambiguity could be eliminated by amending the language of the last sentence of Civil Procedure Section 775 to read:

If the sale is ordered made at either public auction or private sale, the sale at private sale shall be conducted in a manner required in private sales of real property of estates of deceased persons as provided in sections 760, 761, 761.5, 780, 782, 783, 784 and 785 of the Probate Code.

3. Another, and perhaps preferable alternative, discussed below, would be to eliminate all cross reference to the Probate Code and add new sections to the Code of Civil Procedure containing the substance of Probate Code Sections 760, 761, 761.5, 780, 782, 783, 784 and 785, couched in language more appropriate to partition sales.

II. UNIFORM CONFIRMATION PROVISIONS

There is considerable substantive difference between Sections 784 and 785 of the Probate Code, which govern the confirmation of private sales of real property of decedents'⁶ estates, and Section 784 of the Code of Civil Procedure which governs the confirmation of at least public and possibly also private sales of real property in

connection with partition proceedings. This raises the question of whether there are substantial reasons for these differences of whether the provisions governing the confirmation of partition sales and probate sales should be identical or nearly so.

The Probate Code provisions are considerably more complete. They have also been more frequently and more recently revised. It would appear, therefore, that if confirmation provisions in the two codes should be made uniform or more uniform, this should be done by conforming the provisions of the Code of Civil Procedure governing partition sales to those of the Probate Code governing sales of property of decedents' estates. Whether this should be done may depend, it is believed, on whether Section 775 of the Code of Civil Procedure makes the Probate Code provisions applicable to private partition sales. Hence, the desirability and form of making the confirmation provisions uniform is discussed below on the basis of the two possible constructions of Section 775 discussed above.

A. If the Code of Civil Procedure Section 775 makes the Probate Code provisions applicable to private partition sales.

If Code of Civil Procedure Section 775 does incorporate the confirmation provisions of the Probate Code, the Code of Civil Procedure section would, of course, apply only to public partition sales since all private sales would be covered by the Probate Code provisions. Should the provisions applicable to confirmation of public partition sales be made to conform with those applicable to private partition sales and all probate sales?

Probate Code Section 784 (which provides that no sale is to be confirmed unless the price equals at least 90% of the appraised value) applies by its terms only to private sales. There would not appear to be any necessity or justification for making a similar provision applicable to public partition sales if it has not been thought to be necessary in the case of public probate sales.

However, Probate Section 785 applies to both private and public sales of property of decedents' estates. No reason appears why the same provisions should not be made applicable to the confirmation of public partition sales as apply to all private sales and public probate sales. This could be done in any of three ways:

1. Code of Civil Procedure Section 784 could be revised to incorporate the provisions of Probate Code Section 785.
2. Code of Civil Procedure Section 784 could be repealed and Section 775 revised expressly to incorporate the Probate Code confirmation provisions with respect to both public and private partition sales.
3. Both Code of Civil Procedure Sections 784 and 775 could be repealed and provisions inserted in the Code of Civil Procedure similar to Probate Code Sections 760, 761, 761.5, 780, 782, 783, 784 and 785.

The last course of action would appear to be preferable. It would eliminate the necessity of consulting two codes to find the applicable law. Moreover, some of the language found in the Probate Code sections is somewhat awkward as applied to partition sales; new language could be drafted to better deal with problems involved in partition proceedings. In determining in what respects such new provisions should follow or vary from the Probate Code sections,

those same considerations as are discussed below would be pertinent.

B. If the Code of Civil Procedure Section 775 does not make the Probate Code provisions applicable to private partition sales.

If Code of Civil Procedure Section 775 does not incorporate the Probate Code confirmation provisions a substantial question is presented as to whether the Code of Civil Procedure and the Probate Code sections should be made uniform with respect to confirmation and, incidentally, to agents and commissions. It is not clear whether the same answer should be given with respect to each of the several dissimilarities which now exist between the Probate Code confirmation provisions and those contained in the Code of Civil Procedure. Hence they will be discussed separately.

1. Minimum Bid.

Section 784 of the Probate Code provides that in private sales from decedents' estates no sale may be confirmed unless the sum offered is equal to at least 90 per cent of the appraised value of the property. 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 of the Code of Civil Procedure 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 than that named in the referee's return is made to the court to accept such offer or order a new sale. These provisions seem to offer considerable protection. Another factor to be taken into account is that there will have been an appraisal of property in a decedent's estate which can ordinarily be utilized for the purposes of Probate Code Section 784. On the other hand, it would usually, if not always, be necessary to obtain an appraisal solely for purposes of confirmation in the case of a partition sale. If the minimum bid principle is to be made applicable to the confirmation of partition sales, it would be necessary to add special language to that of Section 784 of the Probate Code relating to new appraisals and appointment of substitute appraisers.

2. Minimum New Offer.

Section 784 of the Code of Civil Procedure provides that the court may refuse to confirm a sale if, inter alia, an offer exceeding the proposed sale price by at least 10% has been received. Before 1947 the same provision was found in Probate Code Section 785. In 1947, however, that section was amended to authorize 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 is received. The latter provision, being the latest enactment by the Legislature on the matter, should be incorporated into Section 784 of the Code of Civil Procedure.

3. Grounds Specified as Sufficient for Refusal to Confirm Sale.

Probate Code Section 785 and Code of Civil Procedure Section 784 contain somewhat different provisions as to 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% 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 for two reasons: (1) it is not necessary to obtain a court order authorizing the sale before it is made, as is required in the case of partition sales; and (2) the protection of a decedent's estate and thus often of his dependents is involved. On the other hand, it seems

quite possible that the disparity between the two code sections exists, at least in part, 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.

4. Agent's Commission.

Section 765 of the Probate Code provides that when a higher written offer is accepted by the probate court at the time of the confirmation proceeding it shall fix within specified limits the reasonable compensation, if any, to be paid to a real estate agent who produced the successful bidder. This provision is, of course, directly related to Sections 760, 761 and 761.5 of the Probate Code which govern the use of agents and their commissions. If these Probate Code Sections are made applicable to partition proceedings by the last sentence of Section 775 (and if this is not changed by amendment) it follows that Code of Civil Procedure Section 784 should be amended to incorporate the related provisions of Probate Code Section 785. If Probate Code Sections 760, 761 and 761.5 do not presently apply to private partition sales, a more difficult question is presented: should provision be made in the Code of Civil Procedure authorizing the appointment of real estate agents in connection with private partition sales, governing their commissions, and specifying the effect of such commissions in determining whether increased bids should be accepted? It may be helpful in answering these questions, to consider the history of the Probate Code provisions:

a. In 1909 Section 1559 was added to the Code of Civil Procedure.⁷ It provided that when ordering a sale of real estate the court could authorize an executor or administrator to enter into a contract with a bona fide real estate agent to secure a purchaser and to contract to pay the agent a commission out of the proceeds of the sale. It further provided that if the sale to a purchaser obtained by such an agent were confirmed the contract should be binding and valid as against the estate.

b. In 1919 Section 1559 was amended to (1) authorize an executor or administrator to enter into a contract with a bona fide real estate agent without obtaining prior authorization from the court; and (2) provide, in lieu of the 1909 authorization to the executor to fix the agent's compensation by contract, that the contract should provide for payment out of the proceeds of the sale of a commission "the amount of which must be fixed or allowed by the court on confirmation of the sale."

c. Section 1559 was again amended in 1921, this time to provide that in case of a sale of the property on an increased bid made at the time of confirmation to a purchaser not procured by the agent holding the contract with the executor or administrator, the court could allow a commission to a bona fide real estate agent procuring the purchaser to whom the sale was confirmed, the commission to be on the full amount of the sale.

d. Section 1559 was again amended in 1927. The amendment substituted for the provision enacted in 1929 the following:

In case of sale on an increased bid made at the time of confirmation to a purchaser procured by the agent holding the contract, the court shall allow a commission on the full amount for which the sale is confirmed, one-half of said commission on the additional bid to be paid to the agent whose bid was returned to the court for confirmation and the balance of the commission on the purchase price to the agent, if any, who procured the purchaser to whom the sale is confirmed.

e. In 1945 Section 761.5 was enacted, providing that where the original bid is made directly to the estate without participation of an agent and an agent procures a purchaser who makes a successful increase bid, the agent shall be allowed the reasonable compensation for his services to be fixed by the court.

f. In 1955 Section 761 was amended to provide that if an increased bid is not procured by a bona fide agent, the agent holding the contract with the executor or administrator shall be allowed a full commission on the amount of the original bid.

Thus, the Probate Code presently provides that when only one agent is involved he is to be allowed a full commission, but where two agents are involved the commission on the price at which the sale is confirmed is to be divided between them.

Probate Code Section 785 also provides that the amount of the agent's commission (and other expenses in connection with the sale) shall be disregarded in determining whether an increased bid exceeds the bid returned for confirmation by the required amount and in determining which of two or more increased bids to accept. In considering whether a similar provision should be made applicable to private partition sales it may be well to review some of the background of this provision.

In Estate of Naftzger,⁸ decided in 1944, the return of the sale recited that no broker's commission was payable. The increased bid, which offered exactly ten per cent more than the original bid, stated that a commission was to be paid according to law. The Supreme Court held that in determining whether an increased bid exceeds the original bid by the amount required by Probate Code Section 785 no consideration is to be given to the broker's commission or other expenses incurred in connection with a sale at such bid. The court confirmed the sale to the increased bid, overruling the appellant's contention that it did not amount to an increase of ten per cent because it did not net the estate that amount over what the estate would have realized had the original bid been confirmed. The court stated that there is no sufficient reason for interpreting the requirement that the increased bid be "ten per cent more in amount than that named in the return" to mean that the increase of ten per cent be over and above commissions and other expenses, since the statute itself does not specify such requirement.

This decision was apparently followed until the District Court of Appeal decision in Estate of Cole,⁹ in 1955. There the question was which of two increased bids should have been accepted. The court said that a court is required to accept the bid that nets the estate the greater amount, thus taking into account broker's commissions and other expenses. It held that the sale should have been confirmed to an increased bid which was \$25.00 less than another increased bid but which would have netted more to the estate. The court stated that there is nothing in Section 761.5 which requires a court to accept any bid or confirm any sale unless the amount which the estate will derive

from such bid is actually the highest amount offered. The court said that the Naftzger case was distinguishable because there ". . . [the] bid . . . was not conditioned upon the payment of a specified commission as was the bid in the instant case."

The Cole decision need not be viewed as being in conflict with the earlier Naftzger decision. It would be possible to have one rule for determining whether an increased bid exceeds the returned bid by the required amount and another rule for comparing two or more increased bids. However, the Cole decision suggested that the determining consideration for both purposes is whether the increased bid is conditioned
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on the payment of a specified commission.

Shortly after the Cole case was decided, Section 785 of the Probate Code was amended to provide that the amount of both original bids and increased bids is to be computed without taking into considera-
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tion the agent's commission. This amendment was criticized in the Continuing Education of the Bar comments on 1955 legislation because "the court must now award the sale to the highest bidder even though his bid, because of the inclusion of his commission, may not return the highest net amount to the estate."¹²

FOOTNOTES

1. Cal. Code of Civ. Proc. §§ 752, 763.
2. Cal. Code of Civ. Proc. § 763.
3. Schoonover v. Birnbaum, 150 Cal. 734, 89 Pac. 1108 (1907).
4. 1956 Rep. Calif. Law Rev. Comm'n 22; Cal. Stat. 1956, Res. c. 42, p. 263.
5. Schoonover v. Birnbaum, 150 Cal. 734, 89 Pac. 1108 (1907).
6. These sections read as follows:

Probate Code

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 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 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.

Code of Civil Procedure

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 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.

7. Now Probate Code §§ 760, 761.
8. Estate of Naftzger, 24 Cal.2d 545, 150 P.2d 873 (1944).
9. Estate of Cole, 124 Cal. App.2d 615, 269 P.2d 73 (1954).
10. Judge Condee of the Los Angeles Superior Court in his book on probate practice published shortly after the Cole decision assumed that the Cole rule applied to determining both whether an increased bid is sufficiently larger than the original bid and also which of two increased bids should be accepted. He criticized the Cole case, stating that such a holding would have a detrimental effect on the sale of real property of estates because it would discourage brokers from seeking out bidders and it would impose an additional burden on bidders to ascertain whether or not a commission is to be paid on the original bid and on other increased bids. He also

stated: "Another consideration in favor of the policy of ignoring commissions at the sale is that the sale of real estate carries certain costs which are bound to be paid in one way or another, . . ." pointing out that the administrator or the attorney or both are able to ask for an extraordinary fee for such services. 1 Condee, California Probate Court Practice § 619 (1955).

11. The act which contained this amendment also contained the following statement:

The wording of the sections of the Probate Code amended by this act and a recent district court of appeal decision have resulted in great uncertainty in the minds of real estate agents and brokers as to their right to compensation, and the amount thereof, when producing bids for real property in the estate of a decedent. This uncertainty has resulted in a sharp decrease in the number and amount of bids made for such property. Often such property constitutes the bulk of an estate and a substantially increased bid for the property would mean comfortable rather than substandard living conditions for the widow or widower and children of the decedent. This act, by eliminating the uncertainty referred to, will tend to increase the number and amount of bids, to the benefit of such widows, widowers, children, and other devisees, legatees, or heirs of the decedent.

12. Continuing Educ. of the Bar, Review of Selected 1955 Code Legislation 158, 160, 161.