Meeting File

Date of Meeting: June 19 and 20, 1959
Date of Memo: June 17, 1959

Memorandum No. 1 - A

Subject: Study #21 - Confirmation of Partition Sales

Questions for discussion at June Meeting

1. Code of Civil Procedure Section 759 provides that in partition proceedings the court is not to order the sale of the property until title has been ascertained by proof to the satisfaction of the court. It has been suggested that (a) the evidence presented to the court is often insufficient to enable the court to make such a determination and (b) the plaintiff should be required to submit with his complaint a title report or certificate of title. Is this desirable?

2. Code of Civil Procedure Section 761 provides that if it appears to the court that there are outstanding liens on the property the court must order the holders of such liens to be made parties to the action or appoint a referee to determine whether and to what extent liens have been paid; Section 762 provides that such a referee must serve notice on all lien holders of record, hold hearings and report back to the court. It has been suggested that (a) the appointment of a referee in this situation and the holding of hearings by him is a cumbersome and undesirable procedure and (b) if the filing of a title report or certificate of title were required (see 1 above) this proceedure would be unnecessary and the court itself could consider and determine these matters. Are these suggestions well taken?

3. Section 763 provides that if it appears by the evidence that the property cannot be physically divided without great prejudice to the

parties the court may order the sale thereof. It has been suggested that (a) the court often has insufficient evidence before it on which to base such a determination and (b) to facilitate the determination of this question the court should be required to appoint an appraiser or some other person acquainted with property values to inspect the property and testify as to whether or not it can be divided. Are these suggestions well taken?

4. Section 763 appears to require the appointment of three referees unless all parties consent to the appointment of only one. (It is not clear, however, whether this provision applies to partition sales as well as physical divisions of the property.) Is there any need for the appointment of three referees? If not, would it be preferable to provide that the court must appoint one referee unless it appears under the circumstances that more should be appointed, in which event the court may do so?

5. There are presently no provisions with respect to the bonding of a referee. Would such a provision be desirable? If so, should the amount of the bond be related to the appraised value of the property? Should the referee be required to take an oath?

6. Should the provisions with respect to public partition sales be eliminated?

7. The Commission has already concluded that as a result of the last sentence of Section 775 the provisions of the Probate Code with respect to real estate agents and their commissions are made applicable to partition sales. Mr. Allen has suggested that in his experience such provisions are unnecessary and undesirable. Would this also be true when

the referee is, say, a practicing attorney who has not had extensive experience in conducting partition sales and who may not have either the time or the knowledge necessary to secure the best possible price?

8. Even if the appointment of an appraiser is not required to be made at the time issue is first joined, would it be desirable to require appointment of an appraiser after a sale is ordered to be made so that (a) the referee, who may be totally unfamiliar with property values, may be apprised of the fair value of the property he is required to sell and (b) the court may be informed of the appraised value of the property to assist it in determining whether the sale should be confirmed (whether or not the requirement of Probate Code Section 784 that the sale price be at least 90% of the appraised value is not to be applicable to partition sales)?

9. It has been suggested that before a bid may be accepted any bidder should be required to submit at least 10% of his bid as a deposit to be forfeited if the bidder fails to complete the sale after confirmation. Would this be desirable?

10. The code presently contains no provisions with respect to a standard for fixing the fees of the referee. Should there be such a provision?

11. It has been suggested that the code is vague as to the procedure which should be followed after a sale is confirmed and the referee has received the proceeds of sale and before a final decree of partition is entered. Should new sections be added specifing procedure leading up to a final decree of partition e.g., requiring the referee to file a document in the nature of an accounting?

12. Should provision be made for termination of the proceeding when the parties reconcile their differences?

R. E. ALLEN
Receiver and Commissioner
1557 West Beverly Boulevard
Los Angeles 26, California

June 11, 1959

Glen E. Stephens
Assistant Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Dear Mr. Stephens:

I have yours of June 2 with noted enclosures, the receipt of which I greatly appreciate.

Particularly, I am interested in the copy of a memorandum you received from an attorney in your area. From my first reading of it I can see that it is written by one who has been thinking about the whole subject of partition. I had not supposed there was another person in California who felt so nearly as interested in the subject as I do. I would appreciate it if you will ask him to disclose his identity to me so that I can consult with him. I enclose a copy or so of this letter for your convenience in communicating its contents to him if you wish to.

I agree with everything he says on Page One. I have often served as a referee under Section 761 and 762. The proceedings are cumbersome and unsatisfactory. I think provision for the appointment of such referee should be stricken and that the court be directed to require the bringing in of all parties at interest in outstanding liens, without the alternative of a reference.

So that the court may know if "it appears" that there are such liens, I agree that the production of a title report dated after recordation of lis pendens ought to be mandatory.

And attention should be given to Section 755. Recordation of lis pendens out to be made mandatory. The section sounds mandatory as it is, to me, but it has been held not to be. Some words and phrases should be used that would make plain the legislative intent that without lis pendens there should be no partition or sale. I have seen too many cases in which transfers are made to, or liens created in favor of, innocent purchasers for value, after commencement of the action, to the great embarrassment of all concerned.

The statement that "the result is that the referee appointed to make the sale is also required to determine whether the property is subject to partition

in kind" (in the second paragraph of Page Two) is striking, to me, at least. I have never heard of that being done. The sentence is inconsistent with itself, it seems to me. Am I to understand that it is the practice in your area to leave this issue to the referee appointed to make a sale? If he is appointed to sell, is he authorized to find that the property ought not be sold at all?

So far as I know, only the court can make this determination. Section 763, CCP. If the evidence adduced is scant, I would suppose that it is the fault of counsel, which the court has power to cure by ordering in more evidence.

As a matter of actual practice, the problem does not seem difficult. There is little urban property that can be divided without prejudice to the interest of the parties. And, so far as I can see, there is little farming land that cannot, except the parcels be quite small. The appellate courts have pretty plainly stated that the law favors division rather than sale. In the few close cases that can arise, I would suppose that among them, the court and counsel could arrange for presentation of sufficient evidence to make a decision possible, including appraisal, if thought necessary, without encumbering every case with an appraiser. (The dim view I take of appraisals is set forth sufficiently, I am sure, in another communication with which I have burdened you.) I recall that, on one occasion, the only one in my experience in which there was any real argument about sale or division, I was especially commissioned by the court to investigate and make a report.

Your commentator refers to the "three referees or one" situation. He thinks there would appear to be no reason why three referees would ever be required, and suggests amendment of Section 763.

I agree that when a sale is ordered, three referees are two too many. It renders the proceedings very cumbersome. One is enough, for the function is purely administrative. But where division is to be the result, I favor three. Here the function is the exercise of judgment as to over-all value, and values of portions. There are very few division cases in this county. I think I have served in most of them for the past thirty-five years, and I have always been glad to have two others with whom to consult. I believe that, for this function, three minds are better than one.

There is a lot of misunderstanding of the "three referees or one" situation. A careful reading of the first sentence of Section 763 shows that it requires the court to appoint three (saving a stipulation for one) only when there is to be a division. The section makes no specific provision for appointment of any officer to conduct a sale. The position and effect of the first semi-colon in the sentence must be given attention.

Judge Rufus Schmid, now deceased, of the Los Angeles Superior Court, while presiding over a department to which a large proportion of partitions was assigned, observed that. He felt that if the court is to conduct a sale, it has inherent authority to appoint an officer, and that it was the inherent authority, and not the words following the semi-colon, upon which such appointment was based. Just to make the distinction clear, in his interlocutory decrees he always insisted upon calling the selling officer

a "commissioner" rather than a "referee". In my capacity as an amateur judge of the use of English words, I always felt that he had something.

But more important than Judge Schmid's perspicacity as to this, is the Supreme Court decision in Hughes vs. Devlin, 23 Cal. 501. The point was squarely at issue. The court saw through this sentence and affirmed a judgment in which only one officer was named, and to which there was no stipulation.

That was in 1863, under the old Practice Act. I looked into the whole matter years ago and as I recall it, the words of the Practice Act on the matter were incorporated verbatim in the code section. I would suppose that, by the recognized view of such legislative conduct, the legislature then sufficiently expressed its intent that one officer should be named to conduct a sale, stipulation or no stipulation.

In a case a few years ago, a District Court of Appeal reversed a judgment naming only one referee to conduct a sale, without a stipulation. So far as its own opinion shows, that court never heard of Hughes vs. Devlin. It manifestly erred.

In a later District Court case, a better informed court affirmed a judgment naming but one selling officer, without stipulation.

So the law on this point seems clear enough - one to sell, three to divide. That is to say, it seems clear enough to me. I am sorry to have to report that it does not seem clear enough to one of the Los Angeles County Superior Court judges. For less than a year ago, he insisted on appointing three referees, over the objection of counsel, in a default case. I was one of them, and it certainly was a pain in the neck. I did all the work, naturally, And I got only a piece of the fee. Outside of something by way of legislation that will make lawyers and judges read code sections carefully - I suppose legislation to that end is about impossible - I can think of only one thing that might improve the statement of the law contained in Section 763. That would be the substitution of a period for the first semi-colon in the first sentence of the Section.

The staff of the Commission can do me a big favor, with respect to this Section. It has skills and resources for research that are beyond me. Maybe I can be told just what it was that resulted in the inclusion in this Section of all the provisions for partition of the site of an incorporated city. Surely it must have been some special situation. And is it thinkable that there could be such a situation in California today? If not, should not all this material be eliminated, just to make the book a little lighter, if for no other reason?

As to a bond for the referee. No statute requires one and only rarely does any judgment in which I am named. With any show of modesty at all, I can say nothing to justify this situation, although I never have heard of a referee running off with the proceeds of sale. If a bond is to be required, the law

should provide that it be fixed at the confirmation of sale, when the court knows just what values it is dealing with. Perhaps a sentence or so in Section 784 would suffice.

An oath? Well, I see no objection to it. But so far as operative effect is concerned, it seems to me to be just one more piece of paper for the counties to provide storage for, in perpetuity. When I was admitted to the bar, one of the Los Angeles legal journals reported I had taken the oath some 16,000 times. Receiverships and foreclosure cases were referred to, and not partitions. That would make a chunk of sheets of paper about six inches by nine inches by eighty inches. I dread to compute the cost of that much space in our $24,000,000 courthouse. I do not think all these oaths ever did anyone any good, except the notaries.

I have so far commented upon your commentator's comments on procedure before sale. In a previous communication, I have said, about sale procedure, far too much for anyone to listen to, I suppose. I agree with little that is proposed, or that your commentator suggests.

I have this to submit for consideration, as to a final judgment. A detailed final judgment manifestly is required when there has been a division.

But when there has been a sale, what is there to be determined by a final judgment? So far as I can see, the order confirming sale winds up everything to be covered by a judgment. All remaining to be done is administrative, and of the nature that is ordinarily covered by orders after judgment.

Judge Frank G. Swain, in his Manual of Procedure for the Department of Writs and Receivers in the Los Angeles Superior Court, recognizes that, and states that in such cases the order confirming sale is the final judgment. He presided in that department when part of its business was the default partition cases. He used to require me to head my order confirming sale "Order Confirming Sale and Final Decree".

In almost all cases that would be correct, I think. There are some cases though, in which certain judicial determinations must be reserved until a date later than confirmation of sale. So, if any new law at all is to be written, it would have to be drafted rather carefully. I would be glad to assist in such drafting.

This is another long letter. But I regard it as a mere scratch on the surface of the problem of required revision. I regret that the valuable time of the Commission and of its staff is being used on detail regarding mode of sale, as to which I have never observed any ambiguity that has caused any trouble, instead of upon real basic problems presented in the first paragraph of your commentator's letter. I can, if it is desired, point to several other sections I do not profess to understand very well. That may argue only that I am not very understanding. But I do think some of them could be spared altogether and others clarified for the benefit of not too bright characters such as I may be.

I certainly will appreciate being put in touch with my northern confrere, if he will consent.

Sincerely,

/s/ R. E. Allen

R. E. Allen

REA:eas
Encl.