

#23

4/25/74

First Supplement to Memorandum 74-21

Subject: Study 23 - Partition Procedure

Attached to this memorandum are remarks of the Commission's consultant, Mr. Elmore, directed toward portions of the staff draft of the partition statute.

Respectfully submitted,

Nathaniel Sterling
Staff Counsel

4/26/74

Background

The writer (Consultant) worked with staff on the content of the draft text (partial) circulated 4/18/74. This memorandum presents points and comments not resolved, or not included.

Chapter 1.

§ 875.020 and 875.110- "Co-owner," in the case of personal should be amplified, if only by "such as" wording; if "lien" provisions are to be retained, is there a comparable situation as to personal property where partition would be an effective remedy? Note: See infra as to retention of "lien" wording.

§ 875.110- Subd. (b) is inconsistent with later treatment of "successive estates"; moreover, there is no clarification of what "remainderman" may sue. Note: Views of title companies will have a material bearing.

§ 875.110-Omission of present "lien" wording. The writer continues to believe the present "lien" wording serves a useful purpose and should not be deleted, for the reason that no other procedure will be available that is as expeditious and fair. See CCP 80.1 ff. § 875.120. See note, page 5- Staff Draft, on policy and form.

Chapter 2.

§ 875.510. In subd. (d) and (e), the writer feels it is not accurate to refer to "partition of the interests". One type of action may involve a partition of an "estate" or "interest" and not affect the property itself, e. g., property subject to long term lease, with remainder in A, B. C, tenants in common. The writer would set up this type of partition by wording, and not refer to partition of "interests" in the normal situation. A purchaser in such situation acquires title to the property, not the "interests."

§ 875.510 (cont'd). Subd (e) seems ambiguous, for a pleader. It is not clear the pleader must choose. Subd. (f) should precede the requirement for the prayer; the wording may require evidentiary facts or ultimate facts.

It is believed (though my draft did not so provide) that a pleader should not in all cases be required to state "all right, title and interest of record", etc., if he does not want an "in rem" decree, or alternatively, that guidelines should be stated that permit attachment of a "title report."

In the Comment the reference to one "venue" case is fragmentary. The writer believes this should be left to case law.

The writer does not believe it is desirable to permit the parties to select the mode of partition and be bound thereby, because all the facts are not known at the time of complaint. Substantive provisions should control "division or sale."

§ 875.620. The writer objects to subd. (c). See Note, page 16.

§ 875.730. These provisions are believed vague. See Staff Draft, note, page 5, under § 875.110. "Plead ... facts" is uncertain.

§ 875.810. Agree with principle stated in Staff Draft, note, page 19.

§ 875.850. The writer would prefer to refer to CCP 389 (recently amended by LRC).

ADDENDUM: § 875.620, supra. The writer questions the Comment, in that the writer believes it is uncertain whether CCP 415.50 (Jurisdiction and Process Act) is sufficiently brought to include publication as to defendants sued by general designation such as "Heirs and Devisees," "All Persons Claiming An Interest" (etc.)

Chapter 8

§ 878.510. Should there be reference to "partition by appraisal."

§ 878.520. It is believed that re-wording is required in that (i) it seems important to refer to those having contingent interests, and (ii) if an optional procedure is adopted that permits the parties to elect not to effect all interests, there should be "saving wording" beyond that in subd. (b). It is believed § 878.530, does not adequately cover this point.

§ 878.560. Wording seems over-broad or unclear. I would prefer more particularity, as "a proportionate share" is very general.

§ 878.560 (cont'd). Is it intended that a transfer of a note secured by deed of trust upon the undivided interest of a co-owner be included?

Chapter 9

§ 879.020, 879.030- State- Is it necessary to move these sections from the Government Code? This may be warranted on the ground of more ready access, but it is noted that there are other statutes that incorporated the Partition Act, in part, e. g. probate and CCP 801.1 (improvement assessments).

§ 879.050. Site of City or Town. Whether there is need for continuation of the present sections may depend upon title company experience. The writer would favor more limited provisions than this draft section, if the need continues, e.g., giving the court authority to order such preference rights and the conduct of the division. The objection, in part, is to the intendment of these ancient provisions, and the concern that their retention will give ground for technical attacks and the need for costly litigation.

Chapter 11

§ 879.910 ff. Successive Estates. The views of title company representatives seem important, on my proposed "reform."

Garrett Elmore

THIS MEMORANDUM DOES NOT NECESSARILY REPRESENT THE FINAL VIEWS OF THE WRITER.