

#23

10/18/74

Memorandum 74-60

Subject: Study 23 - Partition Procedure

Attached to this memorandum is a redrafted version of the partition statute in its most recently revised form. We hope at the November 1974 meeting to pick up our review of the redrafted statute commencing with Section 873.730 and continue on to the end of the statute. Then, if time remains, we will review the first part of the statute and, finally, conforming amendments.

Respectfully submitted,

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CODE OF CIVIL PROCEDURE

PART 2. CIVIL ACTIONS

TITLE 10.5. PARTITION OF REAL AND PERSONAL PROPERTY

CHAPTER 1. GENERAL PROVISIONS

Article 1. Preliminary Provisions

§ 872.010. Definitions

§ 872.020. Scope of Title

§ 872.030. Rules of practice in partition actions

Article 2. Powers of Court

§ 872.110. Superior Court

§ 872.120. General authority to hear motions and make orders
and decrees

§ 872.130. Temporary restraining orders and injunctions

§ 872.140. Compensatory adjustment

CHAPTER 2. COMMENCEMENT OF ACTION

Article 1. Complaint and Lis Pendens

§ 872.210. Persons authorized to commence partition action

§ 872.220. Title report

§ 872.230. Contents of complaint

§ 872.240. Joinder of property

§ 872.250. Lis pendens

Article 2. Summons

§ 872.310. Summons

§ 872.320. Requirements where service is by publication

§ 872.330. Publication as to certain defendants

Article 3. Answer

§ 872.410. Contents of answer

§ 872.420. Requirements where defendant is lienholder

§ 872.430. Pleading hardship and oppression

Article 4. Parties

§ 872.510. Mandatory joinder of defendants

§ 872.520. Where defendant is unknown or interest uncertain

§ 872.530. Where defendant is deceased

§ 872.540. Oil and gas interests

§ 872.550. Permissive joinder of "all persons unknown"

CHAPTER 3. TRIAL

Article 1. Determination of Interests of Parties

- § 872.610. Court may determine interests
- § 872.620. Where determination of interests necessary
- § 872.630. Determination of interests of lienholders
- § 872.640. Interests of unknown parties

Article 2. Determination of Right to Partition

- § 872.710. Court determination of right
- § 872.720. Interlocutory judgment of partition
- § 872.730. Partial partition

Article 3. Determination of Manner of Partition

- § 872.810. Division of the property
- § 872.820. Sale of the property
- § 872.830. Partial division and sale
- § 872.840. Disposition of property subject to express trust

CHAPTER 4. REFEREES

Article 1. General Provisions

- § 873.010. Court authority
- § 873.020. Referees for division and sale
- § 873.030. Three referees in place of one
- § 873.040. Appointment of person selected by parties
- § 873.050. Persons disqualified as referee
- § 873.060. Authority of referee
- § 873.070. Petition for instructions
- § 873.080. Disposition in accordance with law
- § 873.090. Designation of public and private ways

Article 2. Contracts of Referee

- § 873.110. Services of third persons
- § 873.120. Employment of attorney
- § 873.130. Employment of surveyor
- § 873.140. Employment of auctioneer
- § 873.150. Contract for third-person services may include interest
- § 873.160. Referee not liable on contracts

CHAPTER 5. DIVISION OF THE PROPERTY

- § 873.210. Division by referee
- § 873.220. Division involving improvements
- § 873.230. Division involving purported conveyance

- § 873.240. Division by distinct lot or parcel
- § 873.250. Ovelty
- § 873.260. Liens
- § 873.270. Unknown owners
- § 873.280. Referee's report of division
- § 873.290. Confirmation of report and entry of judgment

CHAPTER 6. SALE OF THE PROPERTY

Article 1. Manner of Sale

- § 873.510. Sale by referee
- § 873.520. Determination of public or private sale
- § 873.530. Public or private sale of part of property

Article 2. Sales Procedures

- § 873.600. Procedures agreed to by parties
- § 873.610. Court authority in sale
- § 873.620. Sale of property separately or as unit
- § 873.630. Credit sales
- § 873.640. Manner of notice of sale
- § 873.650. Contents of notice of sale
- § 873.660. Sale of perishable property and securities
- § 873.670. Conduct of sale at public auction
- § 873.680. Conduct of sale at private sale
- § 873.690. Persons ineligible to purchase at sale

Article 3. Consummation of Sale

- § 873.710. Referee's report of sale
- § 873.720. Motion to confirm report
- § 873.730. Confirmation hearing
- § 873.740. Determination of amount of in-court offer without
regard to agents' commissions
- § 873.750. Court order for collection of proceeds and transfer
of property
- § 373.760. Refusal of purchaser to deliver proceeds
- § 873.770. Taking setoff from party purchaser
- § 873.780. Court authority at closing
- § 373.790. Conveyance of the property

Article 4. Disposition of Proceeds of Sale

- § 873.810. Court order of disbursement
- § 873.820. Application of proceeds of sale

- § 873.830. Exhaustion of other security of lienholder
- § 873.840. Set-off in lieu of payment of estate for life or years
- § 873.850. Treatment of successive estates

CHAPTER 7. PARTITION BY APPRAISAL

- § 873.910. Agreement of co-owners to partition by appraisal
- § 873.920. Contents of agreement
- § 873.930. Court approval of agreement
- § 873.940. Referee
- § 873.950. Court confirmation of referee's report
- § 873.960. Effect of agreement
- § 873.970. Relation of agreement to other remedies

CHAPTER 8. COSTS OF PARTITION

Article 1. Allowance and apportionment of Costs of Partition

- § 874.010. Costs incurred for common benefit
- § 874.020. Interest on disbursements
- § 874.030. Court apportionment of costs
- § 874.040. Apportionment involving future interests

Article 2. Payment of Costs of Partition

- § 874.110. Payment by parties
- § 874.120. Nonpayment lien
- § 874.130. Enforcement of lien
- § 874.140. Execution to enforce judgment

CHAPTER 9. JUDGMENT

- § 874.210. Persons bound by judgment
- § 874.220. Persons not bound by judgment
- § 874.230. Holder of lien known to plaintiff
- § 874.240. Effect of death or incompetency of party before
judgment
- § 874.250. Effect of conveyance before judgment

OPERATIVE DATE; APPLICATION TO PENDING ACTIONS

405-781

C O D E O F C I V I L P R O C E D U R E

PART 2. CIVIL ACTIONS

TITLE 10.5. PARTITION OF REAL AND PERSONAL PROPERTY

Comment. The Code of Civil Procedure provisions relating to partition were formerly found in Chapter 4 (commencing with Section 752) of Title 10. The partition provisions have been moved to a new Title 10.5 (commencing with Section 872.010).

405-783

CHAPTER 1. GENERAL PROVISIONS

Article 1. Preliminary Provisions

§ 872.010. Definitions

872.010. As used in this title:

- (a) "Action" means an action for partition under this title.
- (b) "Guardian" includes conservator.
- (c) "Lien" means a mortgage, deed of trust, or other security interest in property whether arising from contract, statute, common law, or equity.
- (d) "Property" includes real and personal property and any right, title, estate, lien, or other interest therein.
- (e) "Remainder" includes reversion, reversionary interest, right of entry, and executory interest.

(f) "Title report" means a preliminary report, guarantee, binder, or policy of title insurance.

Comment. Section 872.010 provides definitions for terms used throughout the Partition Act.

The term "lien" is defined broadly in subdivision (c) to apply to any encumbrance on property, including security interests in personal property.

The term "title report" in subdivision (f) is drawn using the terminology employed in the title insurance industry.

405-782

§ 872.020. Scope of title

872.020. This title governs actions for partition of real property and, to the extent applicable, actions for partition of personal property.

Comment. Section 872.020 is derived from the second sentence of former Section 752a. Owners of both real and personal property may maintain a partition action. See Section 872.210. This title does not apply to property divisions under the Family Law Act or in other cases specifically governed by other statutes.

§ 872.030. Rules of practice in partition actions

872.030. The statutes and rules governing practice in civil actions generally apply to actions under this title except where they are inconsistent with the provisions of this title.

Comment. Section 872.030 makes clear that, although partition is nominally a civil action, this title contains some special procedural provisions that apply to partition despite general rules to the contrary. For example, the partition provisions governing referees apply in partition actions notwithstanding any general provisions to the contrary that might be found in Chapter 6 (commencing with Section 638) of Title 8 of Part 2 of the Code of Civil Procedure (references and trials by referees).

405-793

Article 2. Powers of Court§ 872.110. Superior court

872.110. The superior court has jurisdiction of actions under this title.

Comment. Section 872.110 continues a portion of former Section 755.

405-461

§ 872.120. General authority to hear motions and make orders and decrees

872.120. In the conduct of the action, the court may hear and determine all motions, reports, and accounts and may make any decrees

and orders necessary or incidental to carrying out the purposes of this title and to effectuating its decrees and orders.

Comment. Section 872.120 is new. Generally, its purpose is to give the broadest possible statutory authorization to powers that the court, to a large extent, probably already had. The succeeding sections of this article elaborate on, but do not exhaust, the court's power in partition actions. While partition actions in California are a creature of statute (Capuccio v. Caire, 207 Cal. 200, 277 P. 475 (1932)), they are nonetheless equitable in nature (Elbert Ltd. v. Federated Income Properties, 120 Cal. App.2d 194, 261 P.2d 783 (1953)), and the statutory provisions are to be liberally construed in aid of the court's jurisdiction. See Sections 4 and 187.

Note. Mr. Cooper states that this section "should enable the referee to apply for orders where the parties will not cooperate and are hostile to the action." We note that the referee is authorized to petition for instructions by Section 873.070, which should satisfy Mr. Cooper's concern.

Mr. Cooper also suggests that the court be able to set motions and the like for hearing on its own motion. This, we think, is unnecessary.

405-794

§ 872.130. Temporary restraining orders and injunctions

872.130. The court may issue temporary restraining orders and injunctions, with or without bond, for the purpose of:

- (a) Preventing waste.
- (b) Protecting the property or title thereto.
- (c) Restraining unlawful interference with a division or sale of the property ordered by the court.

Comment. Section 872.130 is new. It gives the court authority to take the protective steps described without having to rely either upon its contempt powers or the general provisions as to temporary restraining orders and injunctions.

405-799

§ 872.140. Compensatory adjustment

872.140. The court may, in all cases, order allowance, accounting, contribution, or other compensatory adjustment among the parties according to the ordinary principles of equity.

Comment. Section 872.140 continues the substance of the last sentence of former Section 792. It makes clear the court's authority to order compensatory adjustment for such items as common improvements, unaccounted rents and profits, and other matters for which contribution may be required. For a provision for payment of owelty in cases of unequal division, see Section 873.250.

Note. The staff has not been able to discover any California cases dealing with the statutory authority to make compensatory adjustment. For purposes of clarity, we have added some illustrations of specific types of compensatory adjustments.

CHAPTER 2. COMMENCEMENT OF ACTION

Article 1. Complaint and Lis Pendens§ 872.210. Persons authorized to commence partition action

872.210. A partition action may be commenced and maintained by any of the following persons:

(a) A co-owner of personal property.

(b) An owner of an estate of inheritance, an estate for life, or an estate for years in real property.

Comment. Subdivision (a) of Section 872.210 continues the first portion of former Section 752a relating to personal property.

Subdivision (b) supersedes the first portion of former Section 752 relating to real property. Under subdivision (b), an owner may seek partition whether or not he is a joint tenant or tenant in common. He may, for example, be a sole life tenant seeking partition as against the remaindermen or vice versa. It should be noted, however, that neither a cotenant nor a person seeking partition as between successive estates is entitled to partition as a matter of right. See Section 872.710.

The provision formerly found in Section 752 for partition by a lienholder "on a parity with that on which the owner's title is based" is not continued. The provision was of extremely limited application and was an exception to the rule stated in this section that only a substantial property interest is entitled to demand partition. THE LAW REVISION COMMISSION PARTICULARLY SOLICITS COMMENTS CONCERNING THE DELETION OF THE LIEN PROVISION FROM FORMER SECTION 752.

§ 872.220. Title report

872.220. If it is necessary to have a title report:

(a) The plaintiff may, prior to commencing the action, procure a title report and shall in the complaint indicate he has done so and designate a place where it will be kept for inspection, use, and copying by the parties.

(b) The court may, upon application of a party, authorize him to procure a title report and shall designate a place where it shall be kept for inspection, use, and copying by the parties.

Comment. Section 872.220 is derived from former Section 799. For a definition of "title report," see Section 872.020. Provisions relating to the title report formerly found in Section 800 are omitted. For allowance of cost of procuring the title report, see Section 874.010.

Note. Mr. Swift notes that the matter of "copying" raises the question of the responsibility of the title company to any copier. The staff assumes that there is no responsibility since there is no privity of contract between the title company and the copier. Perhaps a sentence should be added to clarify this point.

405-800

§ 872.230. Contents of complaint

872.230. The complaint shall set forth:

(a) A description of the property that is the subject of the action. In the case of tangible personal property, the description shall include its usual location. In the case of real property, the description shall include both its legal description and its street address or common designation.

(b) All interests the plaintiff has or claims in the property.

(c) All interests of record or actually known to the plaintiff that persons other than the plaintiff have or claim in the property and that the plaintiff reasonably believes will be materially affected by the action, whether the names of such persons are known or unknown to the plaintiff.

(d) The interests as to which partition is sought and a prayer for partition of the interests.

(e) Where the plaintiff at the time of filing the complaint seeks a sale of the property, an allegation of the facts justifying such relief.

Comment. Section 872.230 is new. In addition to the information required by this section, other information may be necessary. See, e.g., Section 872.220 (information relating to title report).

Subdivision (a) requires a description of the property that is the subject of the action. It should be noted that several properties may be joined in one complaint even though located in different counties. See, e.g., Murphy v. Superior Court, 138 Cal. 69, 70 P. 1070 (1902). And, real and personal property may be joined in one action. Section 872.240. As to joinder of property under varying ownership, see Middlecoff v. Cronise, 155 Cal. 185, 100 P. 232 (1909).

Subdivision (b) requires an allegation of all the plaintiff's interest in the property, including such interests as liens. For interests sufficient to maintain the action, see Section 872.210.

Subdivision (c) supersedes the first portion of former Section 753. Unlike the former provision that required all interests to be set out regardless whether the interests would be affected, subdivision (c) limits the requirement to only those interests the plaintiff reasonably believes will be materially affected. Incorporation of a title report should be sufficient to satisfy this requirement as to recorded interests but not as to unrecorded interests known to the plaintiff.

Partition of some or all of the interests in the property may be obtained. Subdivision (d) requires the plaintiff to make an election and to indicate which interests are intended to be affected by the action. For provisions relating to parties defendant, see Article 4 (commencing with Section 872.510).

Subdivision (e) requires an allegation of facts justifying a sale of the property only where the plaintiff seeks sale in the complaint. There is no requirement that the plaintiff elect division or sale at the time of filing the complaint.

405-802

§ 872.240. Joinder of property

872.240. Real and personal property may be partitioned in one action.

Comment. Section 872.240 continues the last sentence of former Section 752a.

Note. Mr. Cooper writes: "Joinder should be permissible of all persons claiming interest in both the real and personal property involved. It could be considerable hardship on a person claiming an interest in personal property only to sit through a long procedure where the main issue is the real property."

405-803

§ 872.250. Lis pendens

872.250. (a) Immediately upon filing the complaint, the plaintiff shall record a notice of the pendency of the action in the office of the

county recorder of each county in which any real property described in the complaint is located.

(b) If, thereafter, partition of other real property is sought in the same action, the plaintiff or other person seeking such relief shall immediately record a supplemental notice.

(c) If the notice is not recorded, the court, upon its own motion or upon the motion of any party at any time, shall order the plaintiff or person seeking partition of the property, or another party on behalf of the plaintiff or other person, to record the notice and shall stay the action until the notice is recorded. The recordation shall be at the expense of the plaintiff or other person seeking partition of the property.

(d) From the time of filing the notice for record, all persons shall be deemed to have notice of the pendency of the action as to the property described in the notice.

Comment. Subdivisions (a) and (d) of Section 872.250 continue provisions formerly found in Section 755. The detailed listing of the contents of the lis pendens formerly found in Section 755 is omitted since Section 409 covers this matter.

Subdivision (b) is new. The duty under subdivision (b) is upon the person joining the property to record the lis pendens; this might be either the plaintiff or a cross-complainant.

Subdivision (c) is new. The recording of the lis pendens is an essential step in the partition action. Prompt recording enables the court to deal with the title with certainty. The person required to record might be either the plaintiff or a cross-complainant.

Note. Mr. Cooper comments: "Is lis pendens jurisdictional as in quiet title or is it merely a convenience for binding subsequent vestees? I think that lis pendens should be mandatory and be filed within 10 days after filing the complaint."

Article 2. Summons§ 872.310. Summons

872.310. (a) The form, content, and manner of service of summons shall be as in civil actions generally.

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

Comment. Section 872.310 supersedes former Section 756.

The provision of former Section 756 that the summons must contain a description of the property is not continued since the property will already be described in the complaint that accompanies the summons. See Section 873.230(a).

The provision of former Section 756 that the summons be directed to all persons "named" as defendants is continued in subdivision (a) which incorporates the general provisions governing the contents of summons in civil actions. See Section 412.20(2)(requiring the summons to contain the names of the parties to the action).

Subdivision (b) makes clear that, where unknown parties or heirs are involved, service must be by publication. For additional provisions relating to service by publication, see Sections 872.320 and 872.330.

§ 872.320. Requirements where service is by publication

872.320. Where the court orders service by publication, it shall further order that:

(a) The plaintiff post, not later than 10 days after the date the order is made, a copy of the summons and complaint on the property that is the subject of the action.

(b) The plaintiff record, if not already recorded, a notice of the pendency of the action.

(c) The publication describe the property that is the subject of the proceeding in a manner reasonably calculated to give persons having an interest in the property actual notice of the action.

Comment. Section 872.320 supersedes former Section 757. While publication will be pursuant to Section 415.50, subdivisions (a) and (b) are new requirements that supplement the publication provisions of Section 415.50 in order to increase the likelihood that persons interested in the property will receive notice of the proceeding. Subdivision (c) continues a comparable provision in the last sentence of former Section 757.

Note. The requirement in subdivision (c) of publication "in a manner reasonably calculated . . ." is included to satisfy due process requirements. An open-ended provision such as this, however, may create title problems. Perhaps subdivision (c) should make express provision for publication of street address or other common designation.

Mr. Swift suggests insertion of language from Civil Code Section 2924f (relating to notice of sale under the power of sale contained in a deed of trust or mortgage): "In addition to any other description of the property, the notice shall describe the property by giving its street address, if any, or other common designation, if any." The Civil Code provision also excuses error or noncompliance if a legal description of the property is given.

405-807

§ 872.330. Publication as to certain defendants

872.330. (a) Where the court orders service by publication, the publication may:

(1) Name only the defendants to be served thereby.

(2) Describe only the property in which the defendants to be served thereby have or claim interests.

(b) Judgment based on failure to appear and answer following service under this section shall be conclusive against the defendants named in respect only to property described in the publication.

Comment. Section 872.330 is new. It is derived from Section 1245.2 (eminent domain).

Note. Mr. Cooper states simply that this section "should be eliminated."

405-808

Article 3. Answer

§ 872.410. Contents of answer

872.410. The answer shall set forth:

- (a) Any interest the defendant has or claims in the property.
- (b) Any facts tending to controvert such material allegations of the complaint as the defendant does not wish to be taken as true.

Comment. Section 872.410 continues portions of former Section 758. The provision of former Section 758 that the defendant's failure to answer within the time allowed by law would result in the allegations of the complaint being taken as true is continued in Section 431.20. It should be noted that the requirement in subdivision (a) that the defendant list his interest in the property includes liens as well as other interests claimed by the defendant.

§ 872.420. Requirements where defendant is lienholder

872.420. (a) Where the defendant has or claims a lien on the property, his answer shall set forth:

(1) The date and character of the lien.

(2) The amount remaining due thereon.

(3) If there is any additional security therefor, its nature and extent.

(b) If the defendant fails to disclose any additional security, he shall be deemed to have waived his lien on the property.

Comment. Section 872.420 continues a portion of former Section 758.

Note. Mr. Swift indicates one situation where the lien waiver provision may be unduly harsh: "Where the defendant's lien arises from a recorded abstract of judgment, he would have to obtain a title report to determine what other property it might be a lien on."

§ 872.430. Pleading hardship and oppression

872.430. If the defendant opposes the partition on the ground it would be inequitable under the circumstances of the case, he shall so state in his answer and shall set forth the facts upon which he relies to establish the inequity.

Comment. Section 872.430 is new. It implements the general exception to the right to partition in cases of inequity. The defendant has the burden of proof on this issue. See Section 872.710.

Article 4. Parties

§ 872.510. Mandatory joinder of defendants

872.510. The plaintiff shall join as defendants in the action:

(a) All persons having or claiming a lien, of record or actually known to the plaintiff, upon the property or part thereof.

(b) All persons having or claiming interests as to which partition is sought.

Comment. Subdivision (a) of Section 872.510 supersedes former Section 754. Subdivision (a) converts the rule of Section 754 (no person having a lien or "conveyance" need be made a party unless of record) to an affirmative joinder requirement while limiting it to liens and extending it to persons not of record but known to the plaintiff. For the effect of failure to join a recorded lien, see Section 874.220; for the effect of failure to join liens actually known to the plaintiff, see Section 874.230. For the definition of "lien," see Section 872.020.

Subdivision (b) is new. This provision is elaborated in the succeeding sections of this article.

It should be noted that joinder of other parties may be necessary under Section 389 (mandatory joinder).

Note. The required joinder of all liens in subdivision (a) is derived from existing law. It should be noted, however, that the policy of mandatory joinder of such interests is rather inflexible and appears to oppose the policy of the Commission expressed in subdivision (b) permitting the plaintiff to choose the interests he wishes to affect and to determine whether he wants the property sold free of or subject to a lien.

§ 872.520. Where defendant is unknown or interest uncertain

872.520. (a) If the name of a person described in Section 872.510 is not known to the plaintiff, or if the ownership or the share or quantity of the person's interest is unknown, uncertain, or contingent, the plaintiff shall so state in the complaint and shall name as parties all persons unknown in the manner provided in Section 872.550.

(b) If the lack of knowledge, uncertainty, or contingency is caused by a transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, the plaintiff shall also state in the complaint, so far as is known to him, the name, age, and legal disability (if any) of the person in being who would be entitled to ownership of the interest had the contingency upon which his right depends occurred prior to the commencement of the action.

(c) The court shall upon its own motion or upon motion of any party make such orders for joinder of additional parties and for appointment of guardians ad litem pursuant to Sections 372, 373, and 373.5 as is necessary or proper.

Comment. Section 872.520 is derived from the last portion of former Section 753. Subdivision (a) incorporates the requirement, formerly found in Section 756, that "all persons unknown" be joined. Subdivision (b) adds the requirement of an indication of possible additional parties, and subdivision (c) provides for joinder of such parties and protection of their interests.

Note. Mr. Elmore believes that the portion of subdivision (a) permitting the plaintiff to state that the name of a party is not known to him should be deleted. If it is kept, he feels it should be expanded to prevent abuse:

The problem is the thorny one of what efforts a plaintiff must make to ascertain names of owners. The fact that the plaintiff does not know the name of B, a remainderman with an absolute estate, should not be sufficient to use the publication method. At the minimum, such allegation should be permitted only after affidavit of due diligence, and the Doe procedure should be used. On the other hand, if the name is not known because the interest is contingent, new (b) is intended to take care of this situation.

405-813

§ 872.530. Where defendant is deceased

872.530. (a) If a person described in Section 872.510 is dead and the plaintiff knows of a personal representative, the plaintiff shall join such personal representative as a defendant.

(b) If a person described in Section 872.510 is dead, or is believed by the plaintiff to be dead, and the plaintiff knows of no personal representative:

(1) The plaintiff shall state these facts in an affidavit filed with the complaint.

(2) The plaintiff may join as defendants "the testate and intestate successors of _____ (naming such deceased person), deceased, and all persons claiming by, through, or under said decedent," naming them in that manner.

(3) Where it is stated in the affidavit that such person is believed to be dead, the plaintiff may join such person as a defendant, and he may also join "the testate and intestate successors of _____ (naming such person) believed to be deceased, and all persons claiming by, through, or under such person," naming them in that manner.

Comment. Section 872.530 is new. It is derived from Section 1245.3 (eminent domain).

§ 872.540. Oil and gas interests

872.540. Where property is subject to a lease, community lease, unit agreement, or other pooling arrangement with respect to oil or gas or both, the plaintiff need not join as defendants persons whose only interest in the property is that of a lessee, royalty-owner, lessor-owner of other real property in the community, unit, or pooled area, or working interest owner, or persons claiming under them, and the judgment shall not affect the interests of such persons not joined as defendants.

Comment. Section 872.540 continues the substance of former Section 753.1.

Note. Mr. Cooper states that this section "is bad. There is no assurance that the holder of a master lease will inform the sub-lessees, royalty claimants, etc. of a pending action. These persons should receive some kind of notice of the proceeding."

§ 872.550. Permissive joinder of "all persons unknown"

872.550. The plaintiff may, in cases where partition is sought as to all interests in the property, join as defendants "all persons unknown claiming any interest in the property," naming them in that manner.

Comment. Section 872.550 is new. It is derived from Section 1245.3 (eminent domain) and provides a means whereby the plaintiff may give the partition action an in rem effect. For provisions relating to service by publication, see Section 872.320. For the effect of the judgment, see Section 874.210.

CHAPTER 3. TRIAL

Article 1. Determination of Interests of Parties§ 872.610. Court may determine interests

872.610. The interests of the parties, plaintiff as well as defendant, may be put in issue, tried, and determined in the action.

Comment. Section 872.610 continues the substance of the first portion of former Section 759. The section makes clear that the court may resolve any title disputes in the course of the proceeding where placed in issue by answer of a defendant or cross-defendant. Cf. Section 872.410 (answer).

405-819

§ 872.620. Where determination of interests necessary

872.620. To the extent necessary to grant the relief sought or other appropriate relief, the court shall upon adequate proof ascertain the state of the title to the property.

Comment. Section 872.620 supersedes the portion of former Section 759 that required that "the title must be ascertained by proof to the satisfaction of the court" where a sale of the premises was necessary. Section 872.620 expands this requirement to any case, sale or division, where ascertainment of title appears to be necessary. In contrast with Section 872.610, in cases where it is necessary to know the state of the title, Section 872.620 applies regardless whether a defendant raises the issue in his pleadings.

For special provisions relating to ascertainment of the status of liens, see Section 872.630.

§ 872.630. Determination of interests of lienholders

872.630. (a) To the extent necessary to grant the relief sought or other appropriate relief, the court shall determine the status and priority of all liens upon the property and for each lien the extent to which the amount remaining due thereon has been secured in any other manner.

(b) The court may appoint a referee to ascertain the facts necessary for the determinations required by this section. Upon application of the referee or a lienholder, the court shall direct the issuance of process to compel attendance of witnesses, the production of books, documents, or things, and the filing of verified claims. The report of the referee thereon shall be made in writing to the court and shall be confirmed, modified, or set aside and a new reference ordered, as the justice of the case may require.

Comment. Section 872.630 supersedes the provisions of former Sections 761 and 762, which applied only to determination of the status of liens of record held by persons not made parties to the action. Section 872.630 extends this requirement to all liens and simplifies the provisions relating to ascertainment of the status of liens by a referee.

Note. Existing law provides that, where the matter is referred to a referee, the plaintiff is required to serve notice to appear on the lienholders in the same manner as service of process. The notice contains the time and place of the hearing and instructs the lienholder to appear and make proof by his own affidavit or otherwise. Subdivision (b) in effect gives greater discretion to the referee as to how proof is to be made and the like.

§ 872.640. Interests of unknown parties

872.640. Where two or more parties are unknown, the court may consider their interests together in the action and not as between each other.

Comment. Section 872.640 continues the last portion of former Section 759.

405-823

Article 2. Determination of Right to Partition§ 872.710. Court determination of right

872.710. (a) At the trial, the court shall determine whether the plaintiff has the right to partition.

(b) Partition as to concurrent interests in the property shall be as of right, unless the partition would be inequitable under the circumstances of the case, taking into consideration the interests of all persons in the property. The defendant has the burden of proof as to any such inequity.

(c) Partition as to successive interests in the property shall be allowed if it is in the best interest of all the parties. The court shall consider whether the possessory interest has become unduly burdensome by reason of taxes or other annual charges, expense of ordinary or extraordinary repairs, change in the character of the property since

creation of the interests, the circumstances under which the interests were created, and all other factors that would be considered by a court of equity in the case of trust property.

Comment. Subdivision (a) of Section 872.710 continues in substance the portion of former Section 763 for partition "upon the requisite proofs being made." It applies to both contested and uncontested trials. In order to make the determination that the plaintiff has the right to partition, the court must find that the plaintiff has an interest in the property sufficient to maintain the action. (See Section 872.210.) In addition, the court must find the existence of any special conditions prerequisite to partition of interests in particular types of property. See, e.g., Civil Code Section 1354 (limitations on partition of interests in condominium property).

Subdivision (b) is new. Instances where partition might be "inequitable" include cases where there has been a valid waiver of the right to partition, where the market for property is temporarily depressed, and the like. The court, in an appropriate case, may deny the partition, postpone the partition, or grant the partition on such terms and conditions as will be equitable.

Subdivision (c) is new. It is designed to give the court fairly broad discretion over partition as to successive interests.

405-824

§ 872.720. Interlocutory judgment of partition

872.720. If the court finds that the plaintiff is entitled to partition, it shall make an interlocutory judgment that determines the interests of the parties in the property and orders the partition of the property.

Comment. Section 872.720 continues the portion of former Section 763 that required a court order of "partition according to the respective rights of the parties as ascertained by the court." An interlocutory judgment of partition is appealable. See Section 904.1(i).

405-825

§ 872.730. Partial partition

872.730. (a) If the court determines that it is impracticable or highly inconvenient in the first instance to make a single interlocutory judgment of partition, the court may first ascertain the interests of the original concurrent or successive owners and thereupon make an interlocutory judgment of partition as if such persons were the sole parties in interest and the only parties to the action.

(b) Thereafter the court may proceed in like manner as between the original concurrent or successive owners and the parties claiming under them or may allow the interests to remain without further partition if the parties so desire.

Comment. Section 872.730 continues the substance of former Section 760. The interlocutory judgment of partition is appealable. See Section 904.1(i); contrast Emeric v. Alvarado, 64 Cal. 529 (1884).

Article 3. Determination of Manner of Partition

§ 872.810. Division of the property

872.810. The court shall order that the property be divided among the parties in accordance with their interests in the property as determined in the interlocutory judgment.

Comment. Section 872.810 continues the preference of prior law for partition by division in kind. Cf. former Sections 763, 752 (real property), 752a (personal property).

It should be noted that the provision formerly found in Section 763 for division where the site of an incorporated town or city is included within the exterior boundaries of property has not been continued because it is obsolete.

405-828

§ 872.820. Sale of the property

872.820. Notwithstanding Section 872.810, the court shall order that the property be sold and the proceeds be divided among the parties in accordance with their interests in the property as determined in the interlocutory judgment in the following situations:

(a) The parties agree to such relief, by their pleadings or otherwise.

(b) The court determines that, under the circumstances, sale and division of the proceeds would be more equitable than division of the property. For the purpose of making the determination, the court may appoint a referee and take into account his report.

Comment. Section 872.820 represents an exception to the rule of partition by division stated in Section 872.810. The court may order a sale under the terms of this section whether or not requested by the pleadings.

Subdivision (b) changes the standard for allowing a sale of the property from "great prejudice" to "more equitable," thereby enabling sale in cases in which it previously was precluded. Cf. former Sections 763, 752 (real property), 752a (personal property). The portion of former Section 763 requiring sale in the case of a life estate with contingent remainder is not continued.

It should be noted that the provision formerly found in Section 763 for sale where the site of an incorporated town or city is included within the exterior boundaries of the property has not been continued because it is obsolete.

405-329

§ 872.830. Partial division and sale

872.830. If, in making a determination whether sale would be more equitable than division of the property, the court finds that sale and division of proceeds for part of the property would be more equitable than division of the whole property, the court may order that such part be sold and the remainder divided.

Comment. Section 872.830 makes explicit the authority of the court to order a partial division of the property and a sale and division of proceeds as to the remainder. Provisions of prior law in which such authority was implicit include Sections 763 and 770.

§ 872.840. Disposition of property subject to express trust

872.840. (a) Where the property or an interest therein is subject to an express trust, the court may, but is not required to, order that the property be sold.

(b) Upon division or sale of such property, the property or proceeds of sale allotted to the trustee of the express trust shall be held by him upon the trust therein stated, and no further action by the court pursuant to Section 873.850 is required.

Comment. Section 872.840 continues the substance of the second paragraph of former Section 763.

CHAPTER 4. REFEREES

Article 1. General Provisions§ 873.010. Court authority

873.010. (a) The court shall appoint a referee to divide or sell the property as ordered by the court.

(b) The court may:

(1) Determine whether a referee's bond is necessary and fix the amount of the bond.

(2) Instruct the referee.

(3) Fix the reasonable compensation for the services of the referee and his reasonable expenses.

(4) Provide for the date of commencement of the lien of the referee allowed by law.

(5) Require the filing of interim or final accounts of the referee, settle the accounts of the referee, and discharge the referee.

(6) Remove the referee.

Comment. Section 873.010 sets out some, but not all, of the court's powers with respect to the referee.

Subdivision (a), providing for court appointment of a single referee, supersedes provisions of former Section 763 that required the consent of the parties for the appointment of a single referee. On interpretation of **former** statutory provisions, see Hughes v. Devlin, 23 Cal. 501 (1863)(upholding power of court to appoint one sale referee); Ahr v. Ahr, 153 Cal. App.2d 1, 314 P. 95 (1957)(refusing on appeal to consider question because no objection to one referee was made at the trial); compare Parmelee v. Brainard, 62 Cal. App.2d 182, 144 P.2d 381 (1944)

(alternative ground of reversal, on appeal, that one referee was appointed for sale, without citation of Hughes decision).

Subdivision (b)(1) is new. Whether a bond is required depends on the circumstances of the case.

Subdivision (b)(2) is new; it gives express recognition to the instructions procedure. It is a valuable tool for resolving ambiguities and matters not otherwise covered and, if properly used, serves to expedite the action. See also Section 873.070 (petition for instructions).

Subdivision (b)(3) states the substance of former Section 768 in providing for court allowance of fees and expenses of referees. Cf. Section 874.010 and Comment thereto (costs incurred for the common benefit).

Subdivision (b)(4), providing for the court to fix the date of commencement of the lien, is new. It avoids the possibility of later settlement and dismissal of the action. For authority of the court to fix the date of commencement of liens of third persons furnishing services, see Section 873.110.

Subdivision (b)(5) is new. It recognizes the need for and practice of receiving and passing upon the account and final report of the referee, particularly in, but not limited to, sales transactions, and of discharging the referee when he has made a final report and accounting.

Subdivision (b)(6) is intended to state the substance of the introductory portion of former Section 766. It broadens this provision to apply to the referee for sale as well as for division.

Note. Mr. Cooper advocates for referees "a fee schedule as in probate subject to extra compensation for extraordinary services."

404-380

§ 873.020. Referees for division and sale

873.020. The court in its discretion may appoint a referee for sale and a referee for division, or may appoint a single referee for both.

Comment. Section 873.020 is new. It makes clear the court's discretion to appoint referees with different functions where property in an action is to be both divided and sold.

404-656

§ 873.030. Three referees in place of one

873.030. (a) The court may, with the consent of the parties, appoint three referees to divide or sell the property as ordered by the court.

(b) The three referees so appointed shall have all the powers and may perform all the duties required of one referee.

Comment. Section 873.030, providing for court appointment of three referees only with the consent of the parties, replaces provisions of former Section 763 that provided for appointment of three referees.

404-657

§ 873.040. Appointment of person selected by parties

873.040. (a) The court shall appoint as referee under this title any person or persons to whose appointment the parties have consented.

(b) In the case of an incompetent or minor party, the guardian of the party may so consent.

Comment. Section 873.040 continues without substantive change a portion of former Section 763. See Section 872.010 (defining guardian).

It should be noted that the parties may nominate persons to serve as referee but, absent agreement among the parties, the choice of a referee is in the discretion of the court.

Note. Mr. Swift queries whether the court must appoint a person it would not otherwise approve. The statutory language, and the policy it embodies, the staff believes require appointment of the person selected by the parties.

404-658

§ 873.050. Persons disqualified as referee

873.050. None of the following persons shall be appointed a referee under this title:

- (a) A clerk or deputy clerk of the court.
- (b) A partner or employee of the judge.
- (c) A relative of the judge or his spouse within the third degree or a spouse of a relative of the judge within the third degree.
- (d) An owner of any interest in the property that is the subject of the action.

Comment. Section 873.050 continues provisions formerly found in Section 763.

§ 873.060. Authority of referee

873.060. The referee may perform any and all acts necessary to exercise the authority conferred upon him by this title or by order of the court.

Comment. Section 873.060 is new. It makes explicit the referee's general authority to effectuate the partition.

405-844

§ 873.070. Petition for instructions

873.070. The referee may petition the court for instructions concerning any of his duties under this title.

Comment. Section 873.070 is new; it is intended to enable the referee expeditiously to resolve any administrative problems that may arise in the execution of his duties.

404-665

§ 873.080. Disposition in accordance with law

873.080. The division or sale of the property by the referee shall comply with all laws, regulations, and ordinances governing such transactions including where applicable, but not limited to, the following:

- (a) Zoning requirements.
- (b) Environmental impact reports.

- (c) Subdivision map provisions.
- (d) Land dedication requirements.
- (e) Street opening and closing provisions.

Comment. Section 873.080 is new. It makes clear that the actions of the referee in disposing of the property and of the court in confirming the referee's actions must conform to any applicable laws.

Note. The listing in subdivisions (a)-(e) is subject to further staff research into the applicability of the items listed, particularly items (b)-(d). Mr. Swift suggests for inclusion among the items to be researched: "parcel map laws and ordinances, due on sale clauses in deeds of trust."

404-666

§ 873.090. Designation of public and private ways

873.090. (a) In selling or dividing the property, the referee may, if it will be for the advantage of those interested, designate a portion of the property as a public or private way, road, or street. In connection therewith, the referee may also recommend the closure of any or all other roads on the property and allocation of the portion of the property occupied by such roads to the parties.

(b) Upon making such a designation and recommendation that is adequate to accommodate public and private needs, the referee shall report that fact to the court.

(c) The court shall not confirm the referee's report for the opening or closing of a public way, road, or street unless all necessary action has been taken by the appropriate public entities.

(d) Upon confirmation of the referee's report by the court:

(1) The portion of the property designated as a public way, road, or street shall not be allocated to any of the parties or sold but shall be an open and public way, road, or street.

(2) The property designated as a private way, road, or street shall be a private way for the use of the parties interested.

(3) The roads recommended to be closed shall be deemed abandoned upon the terms stated in the order of confirmation.

Comment. Section 873.090 continues the substance of a portion of the second sentence of former Section 764. Under Section 873.090, property set apart as a public way need not be accepted by a local public entity in order to be open to the public. The provision in former Section 764 for abandonment of public highways upon confirmation of the referee's report is not continued since such abandonment can be accomplished only by the public entity concerned.

It should be noted that the provision formerly found in Section 763 for sale where the site of an incorporated town or city is included within the exterior boundaries of the property has not been continued because it is obsolete.

Note. Mr. Swift questions whether a local governmental entity would be inclined to accept or abandon a right of way prior to court approval, order, or other finality.

405-796

Article 2. Contracts of Referee

§ 873.110. Services of third persons

873.110. Subject to the limitations of this article, the court may:

(a) Authorize or approve contracts of the referee for the services and expenses of surveyors, engineers, appraisers, attorneys, real estate brokers, auctioneers, and others.

(b) Allow and direct payment of or reject claims under such contracts.

(c) Provide for the date of commencement of any lien provided by law or contract for such claims.

Comment. Section 873.110 is new. It recognizes that the court is the supervising entity in carrying out the partition. It removes from the referee, acting alone, the authority to engage the services of third persons for his assistance. It contemplates that the court will authorize or approve contracts of the referees for third-party services and expenses, allow or reject claims thereunder, and in proper cases specify the priority of any lien therefor. Cf. Section 874.120 (nonpayment lien).

Former Sections 766 and 768 provided only for employment by the referee of surveyors and necessary assistants and allowance of their fees and expenses. For particular provisions relating to employment of third persons, see Sections 873.120-873.140.

Section 873.110 is intended to vest the court with broad discretion and with corresponding duties. Surveying services may involve substantial sums. Ability to obtain such services may depend upon assurance of, or security for, payment despite any later settlement by the parties and dismissal of the action.

So also, in a particular case, employment of a real estate broker by the referee may be desirable. Under Section 873.110, such employment may be authorized or approved and the terms of the contract prescribed or approved by the court.

§ 873.120. Employment of attorney

873.120. (a) The referee may employ an attorney only with the approval of the court pursuant to Section 873.110.

(b) The application for approval shall be in writing and shall include the name of the attorney whom the referee wishes to employ and the necessity for the employment.

(c) The attorney so employed may not be attorney for, or associated with or employed by an attorney for, any party to the action except with the written consent of all the parties to the action.

(d) Any claim for compensation for the attorney shall detail the services performed by the attorney.

Comment. Section 873.120 is new. It is derived from Rule 528 of the California Rules of Court (employment of an attorney by a receiver).

§ 873.130. Employment of surveyor

873.130. The referee may, with the approval of the court pursuant to Section 873.110, employ a surveyor with the necessary assistants to aid him in making a sale or division of property.

Comment. Section 873.130 continues a portion of former Section 764 with the added requirement for court approval. Court approval is required since the amounts involved may be substantial and means of payment may present a problem.

§ 873.140. Employment of auctioneer

873.140. The referee may, with the approval of the court pursuant to Section 873.110, employ an auctioneer, authorized to act as such in the locality, to conduct a public auction and to secure purchasers by such method for any property to be sold at public auction.

Comment. Section 873.140 is new. It is derived from Probate Code Section 760.5 (sale of tangible personal property of estate).

Note. The Commission had previously suggested that a section such as this be added. In this connection, it should be noted that the section on court powers authorizes employment of appraisers to assist the referee in procuring valuations of property under partition. Mr. Cooper states: "I would suggest that he be authorized to employ State Inheritance Tax Referees for this purpose." Should the choice of appraisers be limited to inheritance tax referees?

404-663

§ 873.150. Contract for third-person services may include interest

873.150. A contract for the services of an attorney, surveyor, auctioneer, or other third person in the action may provide for the accrual of interest at a rate not in excess of the legal rate for amounts due under the contract that are not paid within three months after the time they become due and payable.

Comment. Section 873.150 is new. It is designed to better enable the referee to obtain competent services where the person rendering the service will not be paid until the conclusion of the action.

Note. This provision for payment of interest is only a mild attempt to alleviate the problem of obtaining adequate services. Mr. Cooper states:

I ran into a very serious problem where very extensive title work had to be done and where a perimeter survey was absolutely necessary. The litigants would not advance the fees so the title

company would not work on the report and no survey could be obtained. The judge could not compel the litigants to advance these costs and neither the title company nor the surveyor would do their work on the basis that the court would impress a lien on the property for the cost thereof. Your committee should work on this problem since it may often arise.

One solution that comes readily to the staff's mind is to require that the plaintiff advance costs as necessary as a condition to maintaining the action and receiving a credit for them in the final disposition. This could work a substantial hardship on the plaintiff, however, particularly in a case where the plaintiff is bringing the action because he is in desperate need of money.

Mr. Elmore believes that it would be unfair to require a party to advance expenses as a condition to maintain the action where substantial amounts are involved. He favors a "lien" solution--see Section 874.120.

404-664

§ 873.160. Referee not liable on contracts

873.160. The referee is not personally liable on contracts made, or for expenses incurred, by him except as he expressly assumes such liability in writing.

Comment. Section 873.160 is new. The contract itself may provide a means of payment, e.g., the commission of an auctioneer or a real estate broker from the proceeds of sale. In other cases, particularly where the property is divided, the third person will have lien rights. See Section 874.120 (nonpayment lien).

CHAPTER 5. DIVISION OF THE PROPERTY

§ 873.210. Division by referee

873.210. The referee appointed by the court to make a division of the property shall divide the property and allot the several portions to the parties, quality and quantity relatively considered, according to their interests in the property as determined in the interlocutory judgment of partition.

Comment. Section 873.210 continues a portion of former Section 764 with respect to physical division of the property. For provisions relating to sale of the property by the referee, see Chapter 6 (commencing with Section 873.510).

404-667

§ 873.220. Division involving improvements

873.220. As far as practical, and to the extent it can be done without material injury to the rights of the other parties, the property shall be so divided as to allot to a party any portion that embraces any improvements he has made. In such division and allotment, the value of such improvements shall be excluded.

Comment. Section 873.220 continues the substance of the last sentence of former Section 764.

Note. The staff has not yet researched thoroughly the law relating to improvements made by one cotenant. The results of this research will be incorporated in the Comment.

§ 873.230. Division involving purported conveyance

873.230. Where a party has executed a deed purporting to convey to a purchaser a portion of the property to be divided, to the extent it can be done without material injury to the rights of the other parties, the property shall be so divided as to allot that portion to the purchaser, his heirs, or assigns, or such other action taken as to make the deed effectual as a conveyance of that portion of the property.

Comment. Section 873.230 continues the substance of the fourth sentence of former Section 764.

404-669

§ 873.240. Division by distinct lot or parcel

873.240. Where real property consists of more than one distinct lot or parcel, the property shall be divided by such lots or parcels without other internal division to the extent that it can be done without material injury to the rights of the parties.

Comment. Section 873.240 is new. Cf. former Section 782 (requiring separate sale of "distinct farms or lots"). In order to facilitate division by individual lots, the parties may join additional property whether by complaint or by cross-complaint.

§ 873.250. Ovelty

873.250. (a) Where division cannot be made equally among the parties according to their interests without prejudice to the rights of some, compensation may be required to be made by one party to another on account of the inequality.

(b) No compensation shall be required to be made to others by unknown owners or by minors unless it appears that a minor has personal property sufficient for that purpose and his interest will be promoted thereby.

Comment. Section 873.250 continues the substance of the first sentence of former Section 792. The provision in this section for ovelty of partition should be distinguished from compensatory adjustments made under the ordinary principles of equity, as for accountings, allowances, and the like, pursuant to Section 872.140.

§ 873.260. Liens

873.260. Where a lien is on an undivided interest of a party, the lien shall, upon division of the property, become a charge only on the share allotted to that party.

Comment. Section 873.260 continues the substance of the first portion of former Section 769. As under the former section, the lien that is continued will be subordinate to charges on the property for its just proportion of the costs of partition. See Section 874.120.

It should be noted that, in case of a sale of the property, liens of parties are paid in preference to the shares of the former owners. See Section 873.820.

§ 873.270. Unknown owners

873.270. Where the court has determined the combined interests of two or more unknown parties, the entire portion of the property allocated to such parties shall remain undivided.

Comment. Section 873.270 continues the portion of former Section 763 that required the court to designate an undivided portion for owners whose interests remain "unknown, or are not ascertained." Cf. Section 872.640 (court authority to consider rights of unknown owners together). If during the action an unknown party becomes known, his interest may be determined and his portion of the undivided property may be allocated to him.

405-761

§ 873.280. Referee's report of division

873.280. (a) The referee shall file with the court a report of his proceedings and give written notice of filing to each party who has appeared in the action.

(b) The report shall include all of the following:

(1) A specification of the manner in which he has executed his trust.

(2) A description of the property divided and of the share allotted to each party, along with any recommendation as to owelty.

(3) Any recommendation as to ways, roads, streets, and easements.

Comment. Section 873.280 continues the substance of the first sentence of former Section 765 with the added requirement of any recommendations as to owelty (Section 373.250) and public and private ways (Section 873.090). The description required by subdivision (b)(2) must be by metes and bounds, or lots and blocks, or such other method as will enable the precise location of each portion.

§ 873.290. Confirmation of report and entry of judgment

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 the report as filed or as the court may modify and enter judgment accordingly or 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.

Comment. Subdivision (a) of Section 873.420 continues the substance of the last sentence of former Section 765. Cf. Sections 1005 (time for service of notice) and 1010 (notice must be in writing).

Subdivision (b) supersedes the first sentence of former Section 766.

Subdivision (c) supersedes the introductory portion of former Section 766. It makes clear that it is the judgment that gives effect to the referee's report. For persons affected by the judgment, see Chapter 9 (commencing with Section 874.210).

CHAPTER 6. SALE OF THE PROPERTY

Article 1. Manner of Sale§ 873.510. Sale by referee

873.510. The referee appointed by the court to make a sale of the property shall sell the property in the manner and following the procedures provided in this chapter.

Comment. Section 873.510 is new.

§ 873.520. Determination of public or private sale

873.520. The property shall be sold at public auction or private sale as the court determines will be more beneficial to the parties. For the purpose of making this determination, the court may refer the matter to the referee and take into account his report.

Comment. Section 873.520 supersedes a portion of the first sentence of former Section 775, making clear that there is no preference for either public or private sale.

§ 873.530. Public or private sale of part of property

873.530. Part of the property may be sold at public auction and part at private sale if it appears that to do so will be more beneficial to the parties.

Comment. Section 873.530 continues the substance of a portion of the first sentence of former Section 775.

Article 2. Sales Procedures§ 873.600. Procedures agreed to by parties

873.600. Notwithstanding any other provision of this title, the court shall order sale by such methods and upon such terms as are expressly agreed to in writing by all the parties to the action.

Comment. Section 873.600 is new. It permits the parties to agree to sales procedures that may vary from the procedures prescribed in this chapter. In order for Section 873.600 to be operative, the consent of all parties is necessary whether or not they have appeared. As a consequence, this section cannot be used where there are unknown owners. On the other hand, the consent of persons named as parties who are not served or who have not appeared is not necessary since their interests will not be affected by the judgment in the action.

It should be noted that the court also has authority to prescribe additional sales procedures. See Section 873.610.

§ 873.610. Court authority in sale

873.610. (a) The court may, at the time of trial or thereafter, prescribe such manner, terms, and conditions of sale not inconsistent with the provisions of this chapter as it deems proper for the particular property or sale.

(b) The court may refer the manner, terms, and conditions of sale to the referee for recommendation but shall not approve the referee's report except following a hearing upon noticed motion.

Comment. Section 873.610 is new; it makes clear the court's authority to control the manner, terms, and conditions of sale. These include, but are not limited to, the following:

(a) Form, manner, and contents of notice of sale. Cf. Sections 873.640-873.650.

(b) Minimum bid and right to reject all bids. For example, if the property is a manufacturing plant which has been shut down and there are few potential buyers, it may be desirable to impose one or more of these conditions. Minimum bids, right to reject all bids, display, or national advertising are tools that are often used in noncourt sales. The use of conditions such as minimum bids in partition sales does not appear to have been ruled upon by California appellate courts. Divided views have been expressed in other jurisdictions. See Kemp v. Waters, 165 Md. 521, 170 A. 178 (1934); Schmitt v. Weber, 60 Misc. 361, 113 N.Y.S. 449 (1908); compare Ill. Stats., Ch. 106, § 60 (Smith-Hurd 1952)(requiring sale at two-thirds the property valuation with provision for new valuation if the property cannot be sold at the original "upset" figure).

(c) Terms of credit. Cf. Section 873.630.

(d) Any prior estate, charge, or lien to which the property will be subject.

(e) Escrow and title insurance expenses.

(f) Agents' commissions and determination of amount of in-court offer without regard to agents' commissions. Cf. Section 873.740 (permitting the court to make applicable to the sale the so-called "gross overbidding" procedure and to fix, divide, and limit agents' commissions).

(g) Procedure as to increased offers at court confirmation. Cf. Section 873.730.

(h) Sale of personal property. Whether items of personal property are to be sold individually, in a single lot, or in several lots. Cf. Section 873.620.

405-768

§ 873.620. Sale of property separately or as unit

873.620. (a) Unless the interests and rights of the parties will be materially prejudiced thereby, the court shall order that distinct lots or parcels of real property be sold separately.

(b) The court may order that the real and personal property or any portion thereof be sold as a unit.

Comment. Subdivision (a) of Section 873.620 supersedes the last portion of former Section 782.

Subdivision (b) is new. Under subdivision (b) where any real and personal property is sold as a unit, they will be subject to a combined offer or "one bid." Cf. Prob. Code § 754.5.

§ 873.630. Credit sales

873.630. The court may:

(a) Direct a sale on credit for the property or any part thereof.

(b) Prescribe such terms of credit as may be appropriate.

(c) Approve or prescribe the terms of security to be taken upon the sale, including the manner in which title to the security is to be taken, whether in a single instrument or several instruments, according to the interests of the parties.

Comment. Section 873.630 states the court's authority over purchase money security in general terms. The subject was covered in former Sections 773 and 776, which appeared to divide the authority between the court and referee. The portion of former Section 776 that referred to "unknown owners, infants, or parties out of the state" is deleted as obsolete. Where there are minors or unknown owners, the court may direct that a trustee or other fiduciary hold the security for them and act on their behalf.

Under Section 873.630, if the court fails to prescribe the terms of credit, the referee may accept offers with varying terms proposed.

§ 873.640. Manner of notice of sale

873.640. (a) Notice of the sale of real or personal property shall be given in the manner required for notice of sale of like property upon execution. Such notice shall also be given to every party who has appeared in the action and to such other interested persons as may have requested the referee for special notice.

(b) Where real and personal property are to be sold as a unit, notice of the sale may be in the manner required for notice of sale of real property alone.

(c) The court may order such additional notice as it deems proper.

Comment. Subdivision (a) of Section 873.640 continues the requirement of former Section 775 that real property be sold at public auction "upon notice given in the manner required for the sale of real property on execution." Subdivision (a) extends this provision to personal property and to both public and private sales. Subdivision (a) substitutes for the requirement found in the execution provisions (Section 692) that notice be given to the debtor, a requirement that notice be given to parties who have appeared and to other interested persons who have requested notice. This preserves the right of interested persons to receive notice without imposing the burden of widespread notice to persons who may have no interest. It should be noted that inadequate notice of sale to the parties or persons who have requested notice may be a ground for setting aside the sale. See Section 873.730.

Subdivision (b) is new.

Subdivision (c) gives the court discretion to require additional notice. In some types of sales, the court may deem it desirable to order such other types of notice as display or classified advertisement.

405-771

§ 873.650. Contents of notice of sale

873.650. (a) The court shall prescribe the contents of the notice of sale, which shall include a description of the property, the time and place of sale, and a statement of the principal terms of sale. In addition to the principal terms of sale, the notice may refer to an

order of the court or to a written statement containing such information which may be inspected at the place of business of the referee or his attorney.

(b) A notice of private sale shall state a place where bids or offers will be received and a day on or after which the sale will be made.

Comment. Section 873.650 continues and expands the requirements of former Sections 775 and 782 that the notice of sale contain the principal terms of sale.

Subdivision (a) requires a reference to the "time and place of sale." In the case of a private sale (subdivision (b)), the place of sale will normally be the place of business of the referee. Cf. Prob. Code § 782.

It should be noted that the court may permit variation from the published terms of sale if to do so will benefit the parties. See Section 873.730.

405-772

§ 873.660. Sale of perishable property and securities

873.660. (a) The court may order securities listed on an established stock or bond exchange, and personal property that is perishable, that will depreciate in value if not promptly disposed of, or that will incur loss or expense by being kept to be sold upon such notice and conditions as may be appropriate.

(b) Unless otherwise ordered by the court, title to property sold pursuant to this section passes without court confirmation. The referee

shall be responsible for the actual value of the property until, after return and proper showing, the court approves the sale.

Comment. Section 873.660 is new; it is derived from Probate Code Sections 770 and 771. The provisions of Section 873.660 apply notwithstanding the other provisions of this chapter governing sales.

405-773

§ 873.670. Conduct of sale at public auction

873.670. (a) A sale at public auction to the highest bidder shall be held in the county in which the action is pending or such other place as may be specified by the court.

(b) Unless otherwise ordered by the court, personal property shall be present at the sale.

(c) The sale may be postponed by the referee by public declaration as provided for sales upon execution.

Comment. Section 873.670, providing procedural detail for sales at public auction, is new. It generally follows execution procedure. Cf. Section 694.

§ 873.680. Conduct of sale at private sale

873.680. (a) A sale at private sale shall not be made before the day specified in the notice of sale but shall be made within one year thereafter.

(b) The bids or offers shall be in writing and left at the place designated in the notice at any time after the first publication or, if none, the posting of the notice.

Comment. Section 873.680 continues the substance of the last sentence of former Section 775, which provided for sales at private sale in the manner required in private sales of real property of estates of decedents. Section 873.680 incorporates the comparable provisions from Probate Code Sections 782 and 783.

§ 873.690. Persons ineligible to purchase at sale

873.690. (a) The following persons shall not purchase property sold in the action directly or indirectly.

- (1) The referee.
- (2) The attorney of a party.
- (3) The guardian of a party, unless for the benefit of his ward.

(b) All sales contrary to this section are void except that a sale to a bona fide purchaser following a sale contrary to this section shall not be disturbed.

Comment. Section 873.690 supersedes former Section 783. Because the parties listed in this section may not purchase the property "directly or indirectly," neither they nor persons for their behalf may purchase the property.

Subdivision (a)(3) expands the coverage of former Section 783, which barred the guardian of an infant in the sale of real property, to bar any guardian in the sale of any property.

It should be noted that Section 873.690 precludes the listed parties only in partition sales. Sales made to enforce the lien of a referee, attorney, or guardian ad litem imposed under this title are sales in which those persons may be interested.

405-776

Article 3. Consummation of Sale

§ 873.710. Referee's report of sale

873.710. (a) Upon making a sale of property, the referee shall report the sale to the court.

(b) The referee's report shall contain all of the following information:

- (1) A description of the property sold to each purchaser.
- (2) The name of the purchaser.
- (3) The sale price.
- (4) The terms and conditions of the sale and the security, if any, taken.
- (5) Any amounts payable to lienholders.
- (6) A statement as to contractual or other arrangements or conditions as to agents' commissions.

(7) Any determination and recommendation as to ways, roads, streets, and easements.

(8) Other material facts relevant to the sale and the confirmation proceeding.

Comment. Section 873.710 continues the substance of the first sentence of former Section 784 with the added requirements of paragraphs (5)-(8) of subdivision (b).

405-777

§ 873.720. Motion to confirm report

873.720. (a) A purchaser, the referee, or any party may move the court to confirm or set aside the sale.

(b) The moving party shall give 10 days' notice of motion to the other parties who have appeared and to the purchaser if he is not the moving party.

Comment. Section 873.720 continues the substance of the third sentence of former Section 784.

§ 873.730. Confirmation hearing

873.730. (a) At the hearing, the court shall examine the report and witnesses in relation to the report. The court may permit the terms of the sale sought to be confirmed to vary from the terms prescribed under Article 2 (commencing with Section 873.600) if to do so will be beneficial to the parties.

(b) The court may vacate the sale and direct a new sale to be made if it determines any of the following:

(1) The proceedings were unfair or notice of sale was not properly given. If there is no finding at the confirmation hearing of unfairness or improper notice, the sale may thereafter not be attacked on such grounds.

(2) The sale price is disproportionate to the value of the property.

(3) It appears that a new sale will yield a sum that exceeds the sale price by at least 10 percent on the first ten thousand dollars (\$10,000) and five percent on the amount in excess of ten thousand dollars (\$10,000), determined after a reasonable allowance for the expenses of a new sale.

(c) If, at the hearing, a written offer is made to the court by a responsible bidder that exceeds the sale price named in the report by at least 10 percent on the first ten thousand dollars (\$10,000) and five percent on the amount in excess of ten thousand dollars (\$10,000), the court in its discretion may do either of the following:

(1) Vacate the sale and direct a new sale to be made.

(2) Vacate the sale, accept the offer, and confirm the sale to the offeror.

(d) Where the court orders a new sale, notice of sale shall be given as provided in this chapter.

Comment. Section 873.730 supersedes the fourth and fifth sentences of former Section 784. Unlike the former section, subdivision (a) expressly authorizes confirmation of a sale that varies from the published terms. Subdivision (b) makes the grounds for vacating a sale independently sufficient. The increased offer criterion of subdivision (b)(3) and subdivision (c) is changed from a straight 10-percent increase to a 10-5 formula derived from Probate Code Section 785.

Note. The Commission deferred decision on this section pending receipt of further staff research concerning the character of public and private sales. The research will be supplied either in a separate memorandum or orally at the meeting.

405-780

§ 873.740. Determination of amount of in-court offer without regard to agents' commissions

873.740. (a) This section applies when, in advance of sale, the court has so ordered, or the parties have so agreed.

(b) In a sale governed by this section, the amount of an increased offer in court shall be determined without regard to agents' commissions, if any, and the commissions payable on account of the sale shall be fixed by the court, and shall be divided or limited, as provided in any such instance, for private sales of real property in decedents' estates, except that, if an original offer or an increased offer is made to the

court by a co-owner or lienholder not represented by an agent, the amount of an increased offer in court made by one who is not such co-owner or lienholder shall be determined with regard to agents' commissions, if any, payable on account of the sale.

Comment. Section 873.740 is new. It provides a flexible procedure whereby the court may order, or the parties in advance of the sale may agree, that the procedure in private sales of real property in decedents' estates shall apply to the sale, with one modification. That modification, stated in the last clause of subdivision (b), makes inapplicable the "gross overbidding" rule when the original or an increased offer to the court is a "direct" offer of a co-owner or lienholder.

The rule takes cognizance of two important factors: first, the legitimate interests of co-owners and lienholders in preserving their property or contract rights by bidding in the property at what essentially is a forced sale and in not being forced to take proceeds or a share of proceeds lesser in amount than they are willing to pay; second, certain types of property to be sold at partition sale and certain indicated situations lend themselves to adoption of the probate sale method, modified as above.

This approach better serves the ends of justice than a fixed adoption of the probate sale procedure. The latter, even with limitations on commissions, can result in less "net" than a direct offer or increased offer.

Though there is no reported California case, it is believed that presently the court, sitting as a court of equity, has authority to accept increased offers on a "net overbid" basis (see, generally, Estate of Cole, 124 Cal. App.2d 615, 269 P.2d 739 (1954)) and to fix and, where necessary, limit and divide agents' commissions.

Statutory provisions, however, are desirable so that, when the procedure is availed of under subdivision (a), there will be established rules as to agents' commissions ordered in advance of sale. For various statutory provisions as to agents' commissions in private sales of real property in probate, see Sections 760, 761, 761.5, and 785 of the Probate Code.

§ 873.750. Court order for collection of proceeds and transfer of property

873.750. (a) Upon confirmation of a sale, the court shall order the referee to execute a conveyance or other instrument of transfer, to collect the proceeds, take security, and perform other acts required to consummate the sale.

(b) The order may direct the referee concerning the distribution, deposit, or securing of sale deposits and sale proceeds.

Comment. Section 873.750 continues the substance of the first two sentences of former Sections 785 and 773. Section 873.750 states the court's authority in broader terms than the former sections, which referred only to "proceeds of sale." These are to be distributed to the person entitled when the court directs or are to be paid into court or deposited therein. However, substantial sums may be held by the referee or others pending a sale. These funds, as well as technical "proceeds of sale," should be subject to the court's order. For provisions concerning the disposition of the proceeds of sale, see Article 4 (commencing with Section 873.810).

§ 873.760. Refusal of purchaser to deliver proceeds

873.760. If the purchaser, after the confirmation of the sale, refuses to pay the amount of his bid, the referee may do either of the following:

(a) The referee may again sell the property at any time to the highest bidder. If any loss is occasioned thereby, the referee may

recover the amount of such loss and costs and expenses incurred, including a reasonable attorney's fee, from the bidder so refusing.

(b) The referee may, without making a resale, maintain an action against the purchaser for the amount of his bid and, if he recovers judgment, shall be awarded a reasonable attorney's fee.

Comment. Section 873.760 continues the substance of the last sentence of former Section 785 with the addition of express provisions for recovery of a reasonable attorney's fee.

404-117

§ 873.770. Taking setoff from party purchaser

873.770. Where the purchaser is a party entitled to a share of the property or a lienholder entitled to have his lien paid out of the proceeds of sale, the referee may:

(a) Take his receipt for so much of the proceeds of sale as belongs to him.

(b) Take his security, or other arrangement satisfactory to the referee, for payment of amounts which are or may become due from him on account of the expenses of sale, general costs of the action, and costs of the reference.

Comment. Section 873.770 continues the substance of former Section 786 with the addition of subdivision (b), which provides for assurances of payment of a share of the costs which may not be determined at the time of sale.

§ 873.780. Court authority at closing

873.780. The court may make orders relating to the closing of a sale after confirmation, including escrow and closing provisions and adjustments based on objections to title or after-discovered defects.

Comment. Section 873.780 is new. It recognizes that modern transactions often involve, at closing, minor deviations or adjustments. The court is expressly authorized to pass upon them.

§ 873.790. Conveyance of the property

873.790. (a) Upon fulfillment of the terms of sale, the referee shall execute a conveyance or other instrument of transfer to the purchaser.

(b) The conveyance or transfer of real property and the order authorizing such conveyance or transfer shall be recorded in each county in which the property is located.

Comment. Subdivision (a) of Section 873.790 is new. Subdivision (b) continues the substance of the first portion of former Section 787.

Article 4. Disposition of Proceeds of Sale

Comment. This article, and to a limited extent the preceding article, relating to collection and distribution of the proceeds of sale, omit many of the detailed provisions formerly found in the partition statute. These provisions were enacted over 100 years ago. Many of them are obsolete, outmoded, or inappropriate under modern conditions. Others are unnecessary or their function is served by other statutes of more general application in the Code of Civil Procedure. Listed below are the principal omitted provisions.

- § 771(3) (amount due on lien verified by affidavit)
- § 773 (proceeds paid into court if no direction given)
- § 774 (continuance for determination of claims to proceeds)
- § 777 (security taken in name of county clerk)
- § 788 (proceeds invested in United States or state bonds)
- § 789 (security taken in name of county clerk)
- § 790 (agreement of parties to portions, and receipt)
- § 791 (duties of county clerk making investments)
- § 793 (share of infant paid to guardian)
- § 794 (share of insane person paid to guardian)

404-122

§ 873.810. Court order of disbursement

873.810. The court shall order the proceeds of sale and any security therefor to be paid, transferred, deposited in court, placed in trust, or invested in State of California or United States government obligations or interest-bearing accounts insured by an agency of the

federal government, to or for the benefit of the persons in interest entitled thereto, as may be appropriate or as specifically provided in this article.

Comment. Section 873.810 supersedes former Section 773. The portion of former Section 773 providing for deposit of proceeds in court if no other direction is given is not continued. Under Section 873.810, the court must affirmatively specify the disposition of the proceeds, including proceeds for the shares of unknown owners. Cf. former Section 780.

404-123

§ 873.820. Application of proceeds of sale

873.820. The proceeds of sale for any property sold shall be applied in the following order:

- (a) To pay the expenses of sale.
- (b) To pay the other costs of partition in whole or in part or to secure any cost of partition later allowed.
- (c) To pay any liens on the property in their order of priority except liens which under the terms of sale are to remain on the property.
- (d) The residue among the parties in proportion to their shares as determined by the court.

Comment. Section 873.820 continues the substance of former Section 771 and extends it to the sale of unencumbered as well as encumbered property. The provision formerly found in Section 771, requiring payment

of liens prior to the lien upon which the owner's title is based, is not continued since the provision formerly found in Section 752 for partition by a lienholder is not continued. See Comment to Section 872.210.

The preference for payment of the expenses of sale in subdivision (a) is new. For the costs of partition (subdivision (b)), see Chapter 8 (commencing with Section 874.010).

Note. Subdivision (c) does not refer to liens of "parties." Whether it should be so limited may depend upon the Commission action with respect to mandatory joinder of lienholders.

404-396

§ 873.830. Exhaustion of other security of lienholder

873.830. Notwithstanding Section 873.820, when a lienholder has other security for the payment of the amount of his lien, the court may, in its discretion, order such security to be exhausted before a distribution of the proceeds of sale to the lienholder, or may order a just deduction to be made from the amount of the lien on the property, on account of the security.

Comment. Section 873.830 continues the substance of former Section 772.

§ 873.840. Set-off in lieu of payment of estate for life or years

873.840. Where a part only of the property is sold, a tenant for life or years in an undivided share of the whole property may have his estate set off in any part of the property not sold by way of complete or partial satisfaction of his share of the proceeds.

Comment. Section 873.840 continues the substance of former Section 770.

§ 873.850. Treatment of successive estates

873.850. (a) The court shall ascertain the proportion of the proceeds of sale that will be a just and reasonable sum for the satisfaction of the estate of a tenant for life or years and shall order such amount distributed to him or held for his benefit.

(b) The court shall ascertain the proportional value of any vested or contingent future right or estate in the property and shall direct such proportion of the proceeds of sale to be distributed, secured, or held in such a manner as to protect the rights and interests of the parties.

(c) Notwithstanding any other provision of this section, in the case of an estate for life with remainder over, the court may direct that the entire proceeds of sale of such interests be placed in trust as provided in this section upon a showing that the establishment of such a trust is economically feasible and will serve the best interests of the

parties. The court shall appoint a trustee, upon security satisfactory to the court, who shall invest and reinvest the proceeds, pay the income of the investments to the life tenant, and upon termination of the life estate, deliver or pay to the remainderman as determined by the court the corpus of the trust estate. The court shall retain jurisdiction over the settlement of the accounts of the trustee and in all matters necessary for the proper administration of the trust and the final distribution of the trust fund.

Comment. Subdivision (a) of Section 873.850 supersedes former Sections 778-780. Particular aspects of the former sections are preserved in other provisions. See Sections 872.520 (protection of interests of unknown owners), 872.640 (interests of unknown owners considered together), 873.820 (proportionate allocation after costs and expenses). The provision in former Section 778 for presale estimate of the value of a tenancy for life or years is not continued.

Subdivision (b) continues the substance of the first portion of former Section 781 and the last portion of former Section 766(2).

Subdivision (c) supersedes the last portion of former Section 781. It makes clear that imposition of a trust under its terms is not mandatory in all cases but is discretionary with the court, and then only if the establishment of a trust is both practical and desirable. Contrast Estate of Giacomelos, 192 Cal. App.2d 244, 13 Cal. Rptr. 245 (1961) (imposition of trust mandatory).

Note. With respect to subdivision (c), the Commission developed a scheme for disposition of the proceeds that belong to life tenant and remainderman that is comparable to this subdivision. For eminent domain, the proceeds may be distributed to the parties outright or placed in trust, as in partition. In addition, the proceeds may be invested in comparable property to be held subject to the life tenancy or other equitable arrangements may be made. Unlike eminent domain, however, there may be tax problems with reinvestment after partition sale.

Commissioner Williams has suggested that subdivision (c) not be limited to life estates but be expanded to apply to any defeasible estate with remainder over.

CHAPTER 7. PARTITION BY APPRAISAL

§ 873.910. Agreement of co-owners to partition by appraisal

873.910. When the undivided interests of all co-owners are undisputed or have been adjudicated, and all such interests are owned in absolute ownership, the co-owners may agree upon a partition by appraisal pursuant to this chapter.

Comment. Section 873.910 and other sections in this chapter are new. The purpose of this chapter is to provide an alternative method of partition for co-owners who are willing to agree to the method and whose interests permit them to avail themselves of this method. A statutory procedure based upon appraisal by a referee, with court supervision, will serve the interests of co-owners who find themselves in disagreement, in some situations. An acquisition method does not appear to involve the same tax consequences as a partition sale. See 3 J. Rabkin & M. Johnson, Federal Income, Gift and Estate Taxation, § 43.01.

Though the same result can be accomplished by an agreement to arbitrate, the authority of the court under this chapter is much broader than in case of arbitration. Moreover, arbitration does not establish or clear title.

§ 873.920. Contents of agreement

873.920. The agreement shall be in writing filed with the clerk of court and shall include:

(a) A description of the property.

(b) The names of the parties who have requested the partition and their respective interests;

(c) The names of the parties who have not requested the partition but who are willing to acquire the interests described in subdivision (b) above, and the undivided interests of the acquiring parties;

(d) Whether one or three referees shall be appointed, and the name or names of a person or persons to whose appointment the interested parties consent;

(e) The date or dates as of which the interests to be acquired shall be appraised;

(f) Other terms mutually agreed upon which may include, but not by limitation, provisions as to abandonment of the action if the appraised value of the interests to be acquired exceeds a stated amount; required deposits on account of purchase price; terms of any credit; title and objections to title; and payment of the expenses of the proceeding authorized by this chapter and of costs of the action.

Comment. Section 873.920 is new. It establishes the framework for the agreement of the parties without, however, providing a fixed form of agreement.

405-985

§ 873.930. Court approval of agreement

873.930. If the court determines that the agreement complies with Section 873.920, that the terms and conditions are equitable, and that there are no objections to the proposed procedure, it shall approve the agreement and stay any pending division or sale of the property.

Comment. Section 873.930 is new. The court, as a court of equity, may exercise a sound discretion in approving or refusing to approve a particular agreement.

405-986

§ 873.940. Referee

873.940. The court shall appoint one referee or, upon request of the parties, three referees to appraise the property and the interests involved. The referee shall report his findings and valuations to the court by report in writing filed with the clerk. Any party to the agreement or the referee, upon 10 days' notice to the other parties to the agreement and to the referee, if he is not the moving party, may move the court to confirm, modify, or set aside the report.

Comment. Section 873.940 is new. It follows other partition procedures in respect of the referee's report and the authority of the court to act upon the report.

405-987

§ 873.950. Court confirmation of referee's report

873.950. The court shall examine the report and witnesses in regard to the same. If the court finds that the proceedings have been regularly conducted, that transfer of title to the interests of the parties requesting partition may regularly be made, and that no facts appear which would make such transfer inequitable, it shall confirm the

report and order the interests being acquired transferred to the acquiring parties in proportion to their respective interests, or in such other proportion as is set out in the agreement, 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 interested parties of the expenses of the procedure authorized by this chapter and of the general costs of the action or an appropriate share thereof.

Comment. Section 873.950 is new. It may be argued that the words "that no facts appear which would make such transfer inequitable" vest too great discretion in the court. On balance, it seems preferable to vest the court with equitable powers to refuse to permit consummation of the transaction where it would be inequitable. The parties contract in the light of such power of the court. Presumably, the power would seldom be exercised.

405-988

§ 873.960. Effect of agreement

873.960. The agreement shall bind the respective heirs, executors, administrators, successors, and assigns of the parties and, in the event of default, may be specifically enforced by further proceedings in the action, or the aggrieved parties may pursue any other remedy, at law or in equity, which they may have.

Comment. Section 873.960 is new. The agreement, subject to the provisions of this chapter, is a binding agreement. Even though the subject is personal property, the agreement should be specifically enforceable if the innocent party chooses this remedy.

§ 873.970. Relation of agreement to other remedies

873.970. The provisions of this chapter are cumulative and if, for default or other cause, interests are not transferred and acquired pursuant to this chapter, the parties may pursue their other rights of partition, subject to Section 873.960.

Comment. Section 873.970 is new. If the proceeding aborts or is not carried out, the parties should not be prejudiced as to their normal rights of partition except as an innocent party may elect to proceed under the agreement pursuant to Section 873.960.

CHAPTER 8. COSTS OF PARTITION

Article 1. Allowance and Apportionment of
Costs of Partition

§ 874.010. Costs incurred for common benefit

874.010. The costs of partition shall include all disbursements or expenses found by the court to have been incurred or paid for the common benefit, including but not limited to the following:

- (a) Reasonable attorney's fees.
- (b) The fee and expenses of the referee.
- (c) The compensation provided by contract for services of a surveyor or other person employed by the referee in the action.
- (d) The reasonable costs of a title report procured pursuant to Section 872.220 with interest thereon from the time of payment or, if paid before commencement of the action, from the time of commencement of the action.
- (e) Reasonable expenses, exclusive of attorney's fees, necessarily incurred by a party for the common benefit in prosecuting or defending other actions or proceedings for the protection, confirmation, or perfection of title, setting the boundaries, or making a survey of the property, with interest thereon from the time of making the expenditures.

Comment. Section 874.010 is a statement of the "common benefit" rule applicable in partition actions. The listing in this section is illustrative only, and the costs of partition include other expenses or disbursements, of a like or different kind, found by the court to have been incurred or paid for the common benefit.

Subdivision (a) continues the substance of a portion of former Section 796.

Subdivision (b) continues a portion of former Section 768. The reference in the former section to the fee allowed by the court "in its discretion" is not continued since the fee must be a "reasonable sum" pursuant to Section 1023.

Subdivision (c) continues a portion of former Section 768.

Subdivision (d) continues the substance of a portion of former Section 799.

Subdivision (e) continues the substance of a portion of former Section 798. The requirement of the former section that the expenses be pleaded is eliminated; the expenses are presented and allowed just as other costs in the action.

Note. Mr. Cooper believes that the fees of the referee should be set out "to avoid uncertainty. Some judges allow the referee a statutory fee on the value of the property based on the probate fee sections."

404-361

§ 874.020. Interest on disbursements

874.020. Where disbursements have been made by a party under the direction of the court, interest shall be allowed thereon from the time of making such disbursements.

Comment. Section 874.020 continues the substance of former Section 801.

§ 874.030. Court apportionment of costs

874.030. Except as otherwise provided in this article, the court shall apportion the costs of partition among the parties in proportion to their interests or make such other apportionment as may be equitable.

Comment. Section 874.030 supersedes the first portion of former Section 796. It applies the principle stated in the former section to cases where the property is sold as well as to those where it is divided. The general rule stated in Section 874.030 is qualified by Section 874.040.

Although normally the costs of partition are apportioned in proportion to the interests of the parties, there may be cases in which some other arrangement will be equitable. Where litigation for the common benefit arises among only some of the parties, or where the interests of the parties in all items, lots, or parcels of property are not identical, the court may segregate the costs of partition to the extent practicable and apportion a part among particular parties only. Cf. former Section 796 (last sentence).

404-364

§ 874.040. Apportionment involving future interests

874.040. (a) The court may order that the share of the costs apportioned to a future interest be paid by other parties to the action or by the persons who are then the presumptive owners of the future interest.

(b) Where the court orders payment pursuant to this section, such payment is subject to a right of reimbursement, with interest, secured by a charge upon the future interest.

Comment. Section 874.040 is new.

Article 2. Payment of Costs of Partition

§ 874.110. Payment by parties

874.110. (a) The costs of partition as apportioned by the court may be ordered paid in whole or part prior to judgment.

(b) Any costs that remain unpaid shall be included and specified in the judgment.

Comment. Section 874.110 supersedes portions of former Section 796. While subdivision (a) requires payment by the parties, it should be noted that, in the case of sale of the property, the proceeds are to be applied first to discharge the costs of partition before disbursement to the parties. Section 873.820.

Subdivision (b) requires the judgment to list only amounts remaining unpaid rather than all amounts apportioned to the parties under the former provision. See also former Section 798.

§ 874.120. Nonpayment lien

874.120. (a) The costs shall be a lien on the share of the party specified.

(b) The lien provided by this section shall be prior to any other lien on the share.

Comment. Subdivision (a) of Section 874.120 continues a portion of former Sections 796 and 798. Subdivision (b) is derived from former Section 769.

§ 874.130. Enforcement of lien

874.130. Upon application of a person entitled to a lien imposed under this article and upon a showing of good cause, the court may order a sale of the property before or after judgment for the benefit of all lien claimants without priority among themselves.

Comment. Section 874.130 is new. The remedies provided in this section and in Section 874.140 are cumulative.

§ 874.140. Execution to enforce judgment

874.140. A judgment for unpaid costs of partition may be enforced by the person entitled to the costs by execution against the share of the party specified in the judgment or against other property of the party.

Comment. Section 874.140 continues the substance of a portion of former Section 796. The remedies provided in this section and in Section 874.130 are cumulative.

CHAPTER 9. JUDGMENT

§ 874.210. Persons bound by judgment

374.210. The judgment in the action is binding and conclusive on all of the following:

(a) All persons known and unknown who were joined as parties in the action and who have or claim any interest in the property, whether present or future, vested or contingent, legal or beneficial, several or undivided.

(b) All persons not in being or not ascertainable at the time judgment is entered who have any remainder interest in the property, or any part thereof, after the determination of a particular estate therein and who by any contingency may be entitled to a beneficial interest in the property provided the judge shall make appropriate provision for the protection of such interests.

(c) All persons who were not joined as parties in the action and who have or claim any interest in the property which was not of record at the time the lis pendens was filed.

(d) All persons claiming under any of the foregoing persons.

Comment. Section 874.210 supersedes portions of former Sections 766 and 787.

Subdivision (a) makes clear that all parties to the action are bound by the judgment, including the heirs of a decedent joined pursuant to Section 872.530 and unknown persons joined pursuant to Section 872.550. Subdivision (a) supersedes former Section 766(1), (3) and the first portion of former Section 787.

Subdivision (b) continues the substance of former Section 766(2).

Subdivision (c) supersedes the last portion of former Section 787. Subdivision (d) supersedes former Section 766(4) and the middle portion of former Section 787.

§ 374.220. Persons not bound by judgment

874.220. The judgment does not affect the interest of any person who is not joined as a party in the action and who had an interest of record in the property or part thereof at the time the lis pendens was filed.

Comment. Section 874.220 is new.

Note. Mr. Cooper states this section "is bad. The court should compel joinder of all necessary parties and make an in rem judgment. The title companies could not insure under the present proposed section."

Mr. Swift concurs.

§ 874.230. Holder of lien known to plaintiff

874.230. Notwithstanding Section 874.220, where a person having or claiming an unrecorded lien upon the property or part thereof is not joined as a party in the action but the existence or claim of the lien is actually known to the plaintiff at any time before entry of the interlocutory judgment of partition, the judgment shall not affect the interest of such person in the portion of the property or proceeds of sale thereof allocated to the plaintiff.

Comment. Section 874.230 is new. It is intended to implement the requirement of Section 872.510, making mandatory on the plaintiff the joinder of all persons "actually known" to the plaintiff having or claiming a conveyance of or lien upon the property or part thereof.

Section 874.230 is an exception to the rule stated in Section 874.210(c) that the judgment binds all persons having unrecorded interests in the property. It should be noted that Section 874.230 makes the judgment not conclusive only with respect to the share of the plaintiff. The portions of the property allocated to other parties in case of a division, or the entire property in case of a sale to a bona fide purchaser, are free of the unrecorded interests.

Note. Mr. Cooper makes the same comment with respect to this section as he did to the previous section.

Mr. Swift concurs.

404-373

§ 874.240. Effect of death or incompetency of party before judgment

874.240. (a) If during the pendency of the action any party dies or becomes incompetent, the action shall not for that cause be delayed or suspended, but the attorney who has appeared for the party may continue to represent his interest, or the court may appoint an attorney to represent his interest, until his heirs, legal representative, or successor in interest have appeared in the action.

(b) No judgment is invalidated by reason of the death or incompetency of any party before entry of judgment. The judgment is as conclusive against the heirs, legal representative, or successor in interest of a decedent as if it had been entered before his death.

(c) An attorney appointed pursuant to this section shall be allowed by the court a reasonable compensation for his services. Such compensation may be taxed as costs against the share or interest represented by such attorney and may be adjudged a lien thereon in the discretion of the court.

Comment. Section 874.240 continues the last paragraph of former Section 763 and the fifth paragraph of former Section 766, extending some of its provisions to incompetents as well as decedents.

Note. The staff believes this section may be unnecessary in view of general provisions relating to this subject. This is a matter to which the staff is giving further study.

Mr. Swift notes that the reference to "heirs" in subdivision (a) is too vague; there is no indication of how many or how determined.

404-374

§ 874.250. Effect of conveyance before judgment

874.250. If, during the pendency of the action and before entry of judgment, any co-owner conveys or transfers to another person his interest or any part thereof, the transfer or conveyance shall be deemed to have passed to the grantee the property or proceeds of sale of the property allocated to the grantor or such proportion thereof as the interest in the property so conveyed or transferred bears to the whole interest of the co-owner.

Comment. Section 874.250 supersedes the last paragraph of former Section 766. The principle stated in the former section is expanded to apply to the interest of any co-owner, not simply cotenants; to any property rather than simply to land; and to sale as well as division of the property.

Note. Mr. Cooper believes this section should be restated. "The transferred interest vests in the transferee subject to the effect of the pending action."

Mr. Swift agrees, suggesting: "said interest as transferred or conveyed is subject to the pending action."

OPERATIVE DATE: APPLICATION TO PENDING ACTIONS

(a) This act becomes operative July 1, 1976.

(b) Subject to subdivisions (c), (d), and (e), in the case of an action commenced prior to the operative date, this act upon the operative date applies to the action unless in the opinion of the trial court application of a particular provision would be materially inconsistent with the proceedings theretofore had or would substantially interfere with the effective conduct of the action or the rights of the parties or other interested persons, in which case the particular provision does not apply and the law in effect immediately prior to the operative date applies.

(c) Code of Civil Procedure Sections 872.210, 872.430, and 872.710 do not apply to an action commenced prior to the operative date.

(d) If, on the operative date, summons was issued but not served in an action, service and proof of service may be made pursuant to the law in effect immediately prior to the operative date.

(e) If, on the operative date, securities have been taken, investments made, or funds deposited pursuant to former Code of Civil Procedure Section 777, 788, 793, or 794, or a trust has been established pursuant to former Code of Civil Procedure Section 784, the trial court retains jurisdiction as provided under the law in effect immediately prior to the operative date. The trial court, upon reasonable notice and opportunity to be heard and if it appears in the best interests of the parties and other interested persons, may order that securities, investments, or funds held by the county clerk be assigned, delivered, or paid over to a trustee or agent, or otherwise transferred from the name or custody of the county clerk.

Civil Code § 1354 (amended)

1354. (a) Except as provided in Section 752b of the Code of Civil Procedure this section, the common areas shall remain undivided, and there shall be no judicial partition thereof. Nothing herein shall be deemed to prevent partition of a cotenancy in a condominium.

(b) The owner of a condominium in a condominium project may maintain a partition action as to the entire project as if the owners of all of the condominiums in the project were tenants in common in the entire project in the same proportion as their interests in the common areas. The court shall order partition under this subdivision only by sale of the entire condominium project and only upon a showing of one of the following:

(1) More than three years before the filing of the action, the project was damaged or destroyed so that a material part was rendered unfit for its prior use, and the project has not been rebuilt or repaired substantially to its state prior to the damage or destruction.

(2) Three-fourths or more of the project is destroyed or substantially damaged and condominium owners holding in aggregate more than a 50-percent interest in the common areas oppose repair or restoration of the project.

(3) The project has been in existence more than 50 years, is obsolete and uneconomic, and condominium owners holding in aggregate more than a 50-percent interest in the common areas oppose repair or restoration of the project.

(4) The conditions for such a sale, set forth in restrictions entered into with respect to the project pursuant to Section 1355, have been met.

Comment. Section 1354 is amended to incorporate the substance of former Code of Civil Procedure Section 752b, which is repealed.

Civil Code § 1355 (technical amendment)

1355. The owner of a project shall, prior to the conveyance of any condominium therein, record a declaration of restrictions relating to such project, which restrictions shall be enforceable equitable servitudes where reasonable, and shall inure to and bind all owners of condominiums in the project. Such servitudes, unless otherwise provided, may be enforced by any owner of a condominium in the project, and may provide, among other things:

(a) For the management of the project by one or more of the following management bodies: the condominium owners, a board of governors elected by the owners, or a management agent elected by the owners or the board or named in the declarations; for voting majorities, quorums, notices, meeting dates, and other rules governing such body or bodies; and for recordation from time to time, as provided for in the declaration, of certificates of identity of the persons then composing such management body or bodies, which certificates shall be conclusive evidence thereof in favor of any person relying thereon in good faith.

(b) As to any such management body:

(1) For the powers thereof, including power to enforce the provisions of the declaration of restrictions;

(2) For maintenance by it of fire, casualty, liability, workmen's compensation and other insurance insuring condominium owners, and for bonding of the members of any management body;

(3) For provision by it of and payment by it for maintenance, utility, gardening and other services benefiting the common areas; for employment of personnel necessary for operation of the building, and legal and accounting services;

(4) For purchase by it of materials, supplies and the like and for maintenance and repair of the common areas;

(5) For payment by it of taxes and special assessments which would be a lien upon the entire project or common areas, and for discharge by it of any lien or encumbrance levied against the entire project or common areas;

(6) For payment by it for reconstruction of any portion or portions of the project damaged or destroyed;

(7) For delegation by it of its powers;

(8) For entry by it or its agents into any unit when necessary in connection with maintenance or construction for which such body is responsible;

(9) For an irrevocable power of attorney to the management body to sell the entire project for the benefit of all of the owners thereof when partition of the project may be had under Section ~~752b-of-the-Code-of-Civil~~ Procedure 1354, which said power shall: (i) be binding upon all of the owners, whether they assume the obligations of the restrictions or not; (ii) if so provided in the declaration, be exercisable by less than all (but not less than a majority) of the management body; (iii) be exercisable only after recordation of a certificate by those who have power to exercise it that said power is properly exercisable hereunder, which certificate shall be conclusive evidence thereof in favor of any person relying thereon in good faith.

(c) For amendments of such restrictions which amendments, if reasonable and made upon vote or consent of not less than a majority in interest of the owners in the project given after reasonable notice, shall be binding upon every owner and every condominium subject thereto whether the burdens thereon are increased or decreased thereby, and whether the owner of each and every condominium consents thereto or not.

(d) For independent audit of the accounts of any management body.

(e)(1) For reasonable assessments to meet authorized expenditures of any management body, and for a reasonable method for notice and levy thereof, each condominium to be assessed separately for its share of such expenses in proportion (unless otherwise provided) to its owner's fractional interest in any common areas;

(2) For the subordination of the liens securing such assessments to other liens either generally or specifically described.

(f) For the conditions upon which partition may be had of the project pursuant to ~~Section 752b of the Code of Civil Procedure~~ 1354 . Such right to partition may be conditioned upon failure of the condominium owners to elect to rebuild within a certain period, specified inadequacy of insurance proceeds, specified damage to the building, a decision of an arbitrator, or upon any other reasonable condition.

(g) For restrictions upon the severability of the component interests in real property which comprise a condominium as defined in Section 783 of the Civil Code. Such restrictions shall not be deemed conditions repugnant to the interest created within the meaning of Section 711 of the Civil Code; provided, however, that no such restrictions shall extend beyond the period in which the right to partition a project is suspended under ~~Section 752b of the Code of Civil Procedure~~ 1354 .

Code of Civil Procedure §§ 752-801 (repealed)

Chapter 4 (commencing with Section 752) of Title 10 of Part 2 of the Code of Civil Procedure is repealed.

Comment. Sections 752-801 are replaced by Title 10.5 (commencing with Section 872.010) of Part 2. The text of the repealed sections and their present disposition is set out in the Appendix.

Code of Civil Procedure § 801.13 (amended)

801.13. If the court orders a sale of the property or a partition thereof, the same shall be made in accordance with the provisions of ~~Chapter-4,~~ Title 19, 10.5 (commencing with Section 872.010) of Part 2 ~~of the~~ Code-of-Civil-Procedure , except that ~~+-{a}--The-court-may-appoint-one referee-instead-of-three,-and-(b)}~~ proceeds of sale belonging to unknown defendants or defendants whose identities or whereabouts are unascertained shall be paid to the public officer who is the custodian of the funds collected on such public improvement assessments, bonds or certificates of sale, to be held by him as in like instances of collection.

Comment. Former subdivision (a) of Section 801.13 is deleted since the general partition law provides for appointment of a single referee. See Section 873.010.

Revenue & Taxation Code § 3965 (amended)

3965. If the court orders a sale of the property or a partition thereof, the same shall be made in accordance with the provisions of ~~Chapter-4,~~ Title 19, 10.5 (commencing with Section 872.010) of Part 2 of the Code of Civil Procedure, except that +

~~{a}--The-court-may-appoint-one-referee-instead-of-three,-and~~

(b)-~~Prceeds~~ proceeds of sale belonging to unknown special assessment owners, or persons claiming an interest in said special assessments, shall be paid to the treasurer, to be held by him as in like instances of collections by said treasurer of special assessments.

Comment. Former subdivision (a) of Section 3965 is deleted since the general partition law provides for appointment of a single referee. See Code Civ. Proc. § 873.010.

Code of Civil Procedure § 752 (repealed)

<p>752. <u>When several</u> cotenants own real property as joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, or when real property is subject to a life estate with remainder over, an action may be brought by one or more of such persons; or, where property is subject to a life estate with remainder over, by the life tenant, or where real property is subject to a lien on a parity with that on which the owner's title is based, by the owner or by the holder of such lien, for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appears that a partition can not be made without great prejudice to the parties</p>	<p>ALL IN STRIKEOUT</p>
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Comment. The portion of former Section 752 that specified the interests in real property entitled to maintain a partition action is continued in Section 872.210. However, the provision enabling partition by the owner of a lien on a parity with that on which the owner's title is based is not continued. It had extremely limited application and represented a departure from the general rule that only substantial interests in property may compel partition.

The portion of former Section 752 that provided a standard for sale or division of property in a partition action is superseded by Sections 872.810-872.830.

Code of Civil Procedure § 752a (repealed)

~~752a. Where several persons are co-owners of any personal property, an action may be brought by any one or more such co-owners for a partition thereof; or in case partition cannot be had without great prejudice to the owners, for the sale thereof, and partition of the proceeds according to the respective interests of the parties. In all such actions the provisions of this chapter shall govern whenever applicable. Real and personal property may be partitioned in the same action.~~

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Comment. The portion of former Section 752a that specified that the co-owner of personal property is entitled to maintain a partition action is continued in Section 872.210. The portion that provided a standard for sale or division of the property is superseded by Sections 872.810-872.830.

The second sentence of former Section 752a is continued in Section 872.020.

The third sentence of former Section 752a is continued in Section 872.240.

Code of Civil Procedure § 752b (repealed)

~~752b. Where several persons own condominiums, as defined in Section 783 of the Civil Code, in a condominium project, as defined in Section 1350 of the Civil Code, an action may be brought by one or more of such persons for partition thereof by sale of the entire project, as if the owners of all of the condominiums in such project were tenants-in-common in the entire project in the same proportion as their interests in the common areas, provided, however, that a partition shall be made only upon the showing that (1) three years after damage or destruction to the project which renders a material part thereof unfit for its use prior thereto, the project has not been rebuilt or repaired substantially to its state prior to its damage or destruction, or (2) that three-fourths or more of the project has been destroyed or substantially damaged, and that condominium owners holding in aggregate more than a 50 percent interest in the common areas are opposed to repair or restoration of the project, or (3) that the project has been in existence in excess of 50 years, that it is obsolete and uneconomic, and that condominium owners holding in aggregate more than a 50 percent interest in the common areas are opposed to repair or restoration of the project, or (4) that conditions for such a partition by sale set forth in restrictions entered into with respect to such project, pursuant to the provisions of Chapter 4 (commencing with Section 1350), Title 6, Part 4, Division Second of the Civil Code have been met.~~

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Comment. Former Section 752b is continued in Civil Code Section 1354.

Code of Civil Procedure § 753 (repealed)

753.

~~Except as provided in Section 753.1 and 754, the interests of all persons in the property, whether such persons are known or unknown, must be set forth in the complaint, as far as known to the plaintiff; and if one or more of the parties, or the share or quantity of interest of any of the parties, is unknown to the plaintiff, or is uncertain or contingent, or the ownership of the inheritance depends upon an executory devise, or the remainder is a contingent remainder, so that such parties cannot be named, that fact must be set forth in the complaint.~~

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Comment. The first portion of former Section 753, requiring that the interests of all persons in the property be set forth in the complaint, is superseded by subdivision (c) of Section 872.230. The last portion of former Section 753, requiring that the complaint set forth additional information as to parties who are unknown or whose interests are uncertain, is continued and broadened in Section 872.520.

Code of Civil Procedure § 753.1 (repealed)

753.1.

~~When the property is subject to a lease, community lease, unit agreement or other pooling arrangement with respect to oil or gas or both, it shall not be necessary to name as parties defendant persons whose only interest in the property is that of a lessee, royalty-owner, lessor-owner of other real property in the community, unit or pooled area, or working interest owner, or persons claiming under any of them, and no sale or judgment shall affect the interest of such persons not made parties defendant.~~

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Comment. Former Section 753.1, making it unnecessary to name as defendants certain persons owning oil and gas interests, is continued in Section 872.540.

Code of Civil Procedure § 754 (repealed)

~~754. No person having a conveyance of or claiming a lien on the property, or some part of it, need be made a party to the action, unless such conveyance or lien appear of record.~~

Comment. Former Section 754 is superseded by Section 872.510.

Code of Civil Procedure § 755 (repealed)

~~755. Immediately after filing the complaint in the superior court, the plaintiff must record in the office of the recorder of the county, or of the several counties in which the property is situated, a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of filing such notice for record all persons shall be deemed to have notice of the pendency of the action.~~

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Comment. The portion of former Section 755, placing jurisdiction over partition actions in the superior court, is continued in Section 872.110. The portion of former Section 755 relating to the lis pendens is continued in Section 872.250.

Code of Civil Procedure § 756 (repealed)

~~756. The summons must contain a description of the property sought to be partitioned, and must be directed to all of the persons named as defendants in the complaint, and when it shows that some person has or claims an interest in or lien upon the property whose name is unknown to the plaintiff, the summons must also be directed to all persons unknown who have or claim any interest in or lien upon the property.~~

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Comment. Former Section 756 is superseded by Section 872.310.

Code of Civil Procedure § 757 (repealed)

~~757. If a party having a share or interest or lien is unknown and such fact is made to appear by affidavit, the summons may be served on such unknown party by publication. When publication is made pursuant to this section or as to a known party, pursuant to Section 415.50, the summons, as published, shall contain the description of the property which is the subject of the action.~~

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Comment. The first sentence of former Section 757 is superseded by Section 872.310. The second sentence of former Section 757 is superseded by Section 872.320.

Code of Civil Procedure § 758 (repealed)

~~758. If the defendant fails to answer within the time allowed by law, he is deemed to admit and adopt the allegations of the complaint. Otherwise, he must controvert such of the allegations of the complaint as he does not wish to be taken as admitted, and must set forth his estate or interest in the property, and if he claims a lien thereon must state the date and character of the lien and the amount remaining due, and whether he has any additional security therefor, and if so, its nature and extent, and if he fails to disclose such additional security, he must be deemed to have waived his lien on the property to be partitioned.~~

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Comment. The first sentence of former Section 758 is not continued; the consequence of the failure of a defendant to answer is covered generally in Section 431.20.

The portion of the second sentence of former Section 758, requiring the defendant to controvert material allegations of the complaint and to allege his interest in the property, is continued in Section 872.410. The portion of the second sentence, requiring the defendant to state information relating to any lien he may have, is continued in Section 872.420.

Code of Civil Procedure § 759 (repealed)

~~759.~~

~~The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried, and determined in such action; and when a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the court before the sale can be ordered; except that where there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not as between themselves.~~

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Comment. The portion of former Section 759 that provided for the determination of the rights of the parties is continued in Section 872.610. The portion that required ascertainment of title in case of a sale of the property is superseded by Section 872.620, requiring ascertainment of title generally to the extent necessary to grant appropriate relief. The portion that permitted consideration of the rights of unknown persons together is continued in Section 872.640.

Code of Civil Procedure § 760 (repealed)

~~760.~~

~~Whenever from any cause it is, in the opinion of the Court, impracticable or highly inconvenient to make a complete partition, in the first instance, among all the parties in interest, the Court may first ascertain and determine the shares or interest respectively held by the original co-tenants, and thereupon adjudge and cause a partition to be made, as if such original co-tenants were the parties, and sole parties, in interest, and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof, as they may desire.~~

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Comment. The substance of former Section 760 is continued in Section 872.730.

Code of Civil Procedure § 761 (repealed)

~~761.~~

~~If it appears to the court that there are outstanding liens or incumbrances of record upon such real property, or any part thereof, which existed and were of record at the time of the commencement of the action, and the persons holding such liens are not made parties to the action, the court must either order such persons to be made parties to the action, by an amended or supplemental complaint, or appoint a referee to ascertain whether or not such liens or incumbrances have been paid, and if not paid, what amount remains due thereon, and their order among the liens or incumbrances severally held by such persons and the parties to the action, and whether the amount remaining due thereon has been secured in any manner, and if secured, the nature and extent of the security.~~

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Comment. Former Section 761 is superseded by Section 872.630, providing for the determination of the status of outstanding liens to the extent necessary to grant appropriate relief.

Code of Civil Procedure § 762 (repealed)

~~762. The plaintiff shall cause a notice to be served, a reasonable time previous to the day for appearance before the referee appointed as provided in Section 761, on each person having outstanding liens of record, who is not a party to the action, to appear before the referee at a specified time and place, to make proof, by his own affidavit or otherwise, of the amount due, or to become due, contingently or absolutely thereon. The notice shall be served in the manner provided by law for the service of a summons in a civil action, but, if service cannot otherwise be made with the exercise of reasonable diligence, service may be made by publication or notice to his agents, under the direction of the court, in such manner as may be proper. The report of the referee thereon must be made to the court, and must be confirmed, modified, or set aside, and a new reference ordered, as the justice of the case may require.~~

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Comment. Former Section 762 is superseded by Section 872.630, providing generally for the referee's procedure and authorizing issuance of process in support thereof.

Code of Civil Procedure § 763 (repealed)

~~763. If it appears by the evidence, whether alleged in the complaint or not, that the property or any part of it is so situated that partition cannot be made without great prejudice to the owners, or where property is subject to a life estate and the remainder is a contingent remainder, the court may and in the latter case must order the sale thereof; otherwise, upon the requisite proofs being made it must order a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees therefor, and must designate the portion to remain undivided for the owners whose interests remain unknown, or are not ascertained; or the court may with the consent of the parties appoint one referee instead of three, and he, when appointed, has all the powers and may perform all the duties required of three referees; and the court must appoint as referee any person or persons to whose appointment all the parties have consented, provided that in the case of an incompetent or minor party the duly appointed guardian or conservator or guardian ad litem of said defendant may so consent, and provided further that no person shall be appointed as referee who is a clerk of the court or deputy clerk, or partner or employee of the judge, or person related to the judge or to his wife within the third degree, or who is married to a relative of the judge within the third degree, or who owns any interest or estate in the property.~~

Where the property or an interest therein is subject to an express trust the court, notwithstanding the foregoing provisions of this section respecting property subject to a life estate and contingent remainder, may but shall not be required to order a sale thereof; and in the event of either a partition or sale, the property or proceeds of sale allotted to the trustee of such express trust shall be held by him upon the trust therein stated, and no further action by the court pursuant to Section 781 of this code shall be required.

When the site of an incorporated city or town is included within the exterior boundaries of the property to be partitioned, the court must direct the referees to survey and appraise the entire property to be partitioned by actual lots and subdivisions then existing in the actual possession of the several tenants in common, exclusive of the value of improvements thereon, first setting apart necessary portions of the property for ways, roads and streets, as in Section 764 provided, and to report such survey and separate appraisement on each lot and subdivision to the court.

The court may confirm, change, modify, or set aside the report in whole or in part, and, if necessary, appoint new referees.

When, after the final confirmation of the report of such survey and appraisement, it appears by evidence to the satisfaction of the court that an equitable partition of the whole property is impracticable, and a sale of the site of such city or town, or any portion thereof, will be for the best interests of the owners of the whole property, it must order a sale thereof; provided, that within 60 days thereafter any tenant in common or tenants in common, having improvements erected on any town or city lot or subdivision included in such order of sale, shall have the prior right to purchase the same at such appraised valuation, and may pay into court the amount so appraised as the value thereof, and upon such payment the ~~title shall vest in such purchaser or purchasers, and the court~~

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~~shall cause to be executed by such referees a deed for such lot or subdivision in fee and in severality to such purchaser or purchasers; such further proceeding shall then be had as to the remainder of the property, and the money so paid to the court, as by this chapter provided.~~

If, during the pendency of the action, any of the parties die, or become insane, or otherwise incompetent, the proceedings shall not for that cause be delayed or suspended, but the attorney who has appeared for such party may continue to represent such interest; and in case any such party has not appeared by an attorney, the court must appoint an attorney to represent the interest which was held by such party, until his heirs or legal representatives, or successors in interest, shall have appeared in the action; and an attorney so appointed must be allowed by the court a reasonable compensation for his services, which may be taxed as costs against the share or interest represented by such attorney, and may be adjudged a lien thereon in the discretion of the court.

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Comment. The portion of former Section 763 providing for division of property in partition as a general rule is continued in Section 872.810. The portion that provided for sale of the property if division could not be made without great prejudice is superseded by Section 872.820, providing for sale where sale would be more equitable than division. The portion of former Section 763 that required sale of the property in case of a life estate with contingent remainder is not continued; the general provisions governing manner of partition control. See Article 3 (commencing with Section 872.810) of Chapter 3.

The portion of former Section 763 providing for appointment of three referees as a matter of course is superseded by Section 873.010, providing for appointment of one referee as a matter of course. The portion that provided for appointment of one referee with the consent of the parties is superseded by Section 873.030, providing for appointment of three referees with the consent of the parties. The portion requiring appointment of any person all parties have agreed to and authorizing the guardian of an incompetent or minor to so agree is continued in Section 873.040. The portion of former Section 763 disqualifying certain persons from acting as referee is continued in Section 873.050.

The portion of Section 763 requiring designation of a portion of the property to remain undivided for owners whose interests remain unknown is continued in Section 873.270

The second paragraph of former Section 763 is continued in Section 872.840.

The substance of the third, fourth, and fifth paragraphs of former Section 763, relating to partition of property which includes the site of an incorporated city or town, is not continued because it is obsolete.

The sixth paragraph of former Section 763 is continued in Section 874.240.

Code of Civil Procedure § 764 (repealed)

764.

~~In making partition, the referees must divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistants to aid them. Before making partition or sale, the referees may, whenever it will be for the advantage of those interested, set apart a portion of the property for a way, road, or street, and the portion so set apart must not be assigned to any of the parties or sold, but must remain an open and public way, road, or street, unless the referees shall set the same apart as a private way for the use of the parties interested, or some of them, their heirs and assigns, in which case it shall remain such private way. Whenever the referees have laid out on any tract of land roads sufficient in the judgment of said referees to accommodate the public and private wants, they must report that fact to the court, and upon the confirmation of their report all other roads on said tract cease to be public highways. Whenever it appears, in an action for partition of lands, that one or more of the tenants in common, being the owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds out of the common land, and executed to the purchaser a deed of conveyance, purporting to convey the whole title to such specific tract to the purchaser in fee and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs or assigns, or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts of land can be so allotted or set apart without material injury of the rights and interests of the other co-tenants who may not have joined in such conveyance. In all cases it is the duty of the referees, in making partition of land, to allot the share of each of the parties owning an interest in the whole~~

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STRIKEOUT

~~or in any part of the premises sought to be partitioned, and to locate the share of each co-tenant, so as to embrace as far as practicable the improvements made by such co-tenant upon the property, and the value of the improvements made by the tenants in common must be excluded from the valuation in making the allotments, and the land must be valued without regard to such improvements, in case the same can be done without material injury to the rights and interests of the other tenants in common owning such land.~~

ALL IN
STRIKEOUT

Comment. The portion of former Section 764 that provided for division of the property by the referee in accordance with the rights of the parties is continued in Section 873.210. The portion relating to employment of a surveyor is continued in Section 873.130. The portion relating to designation of the divided portions by landmarks is not continued because it is obsolete. The portion of former Section 764 that provided for designation of public and private ways is superseded by Section 873.090, making comparable provision.

The portion of former Section 764 that provided for division in such a manner as to effectuate prior purported conveyances is continued in Section 873.230.

The portion of former Section 764 that provided for division in such a manner as to allocate improvements to the parties making the improvements is continued in Section 873.220.

Code of Civil Procedure § 765 (repealed)

~~765.~~

~~The referees must make a report of their proceedings, specifying therein the manner in which they executed their trust, and describing the property divided, and the shares allotted to each party, with a particular description of each share. Any party to the action, after giving at least ten days' notice in writing to the other parties who have appeared therein of his intention to do so, may move the court to confirm, change, modify, or set aside such report.~~

ALL IN
STRIKEOUT

Comment. The first sentence of former Section 765 is continued in Section 873.410. The second sentence is continued in Section 873.420 (a).

Code of Civil Procedure § 766 (repealed)

~~766.~~

~~The court may confirm, change, modify, or set aside the report, and if necessary, appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive.~~

1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee or as tenants for life or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants, for years or for life;

2. On all persons not in being at the time said judgment is entered, who have any interest in the property divided, or any part thereof, as entitled to the reversion, remainder or the inheritance of such property, or any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property; provided, that in case sale has been made under the provisions of this chapter the judgment shall provide for keeping intact the share of the proceeds of said sale, to which said party or parties not in being at the time are or may be entitled until such time as such party or parties may take possession thereof;

3. On all persons interested in the property, who may be unknown, to whom notice has been given of the action for partition by publication;

4. On all other persons claiming from such parties or persons, or either of them.

And no judgment is invalidated by reason of the death of any party before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representatives, or assigns of such decedent, as if it had been entered before his death.

If during the pendency of the action, and before final judgment therein, any of the cotenants has conveyed to another person his interest, or any part of his interest, such conveyance, whatever its form, shall be deemed to have passed to the grantee any lands which, after its execution, may have been set aside to the grantor in severalty, or such proportionate interest in such lands as the interest so conveyed bears to the whole interest of the grantor.

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STRIKED OUT

Comment. The first sentence of former Section 766 is superseded by Section 873.420(b). The introductory portion is superseded by Section 873.420(c). Subdivisions (1)-(4) are continued in Section 874.210 with the exception of the last portion of subdivision (2) relating to preservation of the share of parties not in being, which is superseded by Section 873.850(b).

The paragraph of former Section 766, relating to the effect of a judgment on persons who die or become incompetent, is continued in Section 874.240. The last paragraph, relating to the effect of the judgment in case of a conveyance, is continued in Section 874.250.

Code of Civil Procedure § 767 (repealed)

~~767.~~

~~The judgment does not affect tenants for years less than ten to the whole of the property which is the subject of the partition.~~

Comment. The substance of former Section 767 is continued in Section 873.320.

Code of Civil Procedure § 768 (repealed)

~~768.~~

~~The expenses of the referees, including those of a surveyor and his assistants, when employed, must be ascertained and allowed by the Court, and the amount thereof, together with the fees allowed by the Court, in its discretion, to the referees, must be apportioned among the different parties to the action, equitably.~~

ALL IN
STRIKED OUT

Comment. Former Section 768 is continued in substance by Sections 874.010 (costs incurred for the common benefit) and 874.030 (court apportionment of costs), providing for equitable apportionment of the fee and expenses of the referee and surveyor.

Code of Civil Procedure § 769 (repealed)

~~769.~~

~~When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such party, but such share must first be charged with its just proportion of the costs of the partition, in preference to such lien.~~

ALL IN
STRIKED OUT

Comment. Former Section 769 is continued in substance by Sections 873.260 (liens) and 874.120 (nonpayment lien), providing for continuation of a lien on the share of a party but making the lien subordinate to other liens for costs of partition.

Code of Civil Procedure § 770 (repealed)

770.

~~When a part of the property only is ordered to be sold, if there be an estate for life or years, in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold.~~

Comment. The substance of former Section 770 is continued in Section 873.840.

Code of Civil Procedure § 771 (repealed)

771.

~~The proceeds of the sale of encumbered property must be applied under the direction of the court, as follows:~~

1. To pay its just proportion of the general costs of the action;
2. To pay the costs of the reference;
3. To satisfy and cancel of record the several liens in their order of priority, if entitled to priority over the lien under which the owner's title was obtained, by payment of the sums due and to become due; the amount due to be verified by affidavit at the time of payment;

~~4. The residue among the parties, according to their respective shares therein, as found by the court.~~

ALL IN
STRIKEOUT

Comment. The substance of former Section 771 is continued in Section 873.820 with the exception of the portion of subdivision (3) which provided for determination of the amount due by verified affidavit, which is not continued.

Code of Civil Procedure § 772 (repealed)

772.

~~Whenever any party to an action, who holds a lien upon the property, or any part thereof, has other securities for the payment of the amount of such lien, the Court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property, on account thereof.~~

ALL IN
STRIKEOUT

Comment. The substance of former Section 772 is continued in Section 873.830.

Code of Civil Procedure § 773 (repealed)

~~773.~~

~~The proceeds of sale and the securities taken by the referees, or any part thereof, must be distributed by them to the persons entitled thereto, whenever the Court so directs. But in case no direction be given, all of such proceeds and securities must be paid into Court, or deposited therein, or as directed by the Court.~~

ALL IN
STRIKEOUT

Comment. The first sentence of former Section 773 is superseded by Section 873.810. The second sentence, providing for deposit of proceeds in court if no direction is given, is not continued; a direction will be given in every case under Section 873.810.

Code of Civil Procedure § 774 (repealed)

~~774.~~

~~When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action, whether known or unknown, are paid into courts, the action may be continued as between such parties, for the determination of their respective claims thereto, which must be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee, at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy, by pleadings, as in an original action.~~

ALL IN
STRIKEOUT

Comment. Former Section 774, providing for a continuance for determination of claims to proceeds, is not continued because it is unnecessary.

Code of Civil Procedure § 775 (repealed)

~~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 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.~~

ALL
IN
STRIKEOUT

Comment. The portion of former Section 775 providing for sale at public or private sale as will be more beneficial to the parties is continued in Section 873.520. The portion of former Section 775 that provided for partial public and partial private sale is continued in Section 873.530.

The portion of former Section 775 providing for notice of public sale in the manner required for sale on execution is continued in Section 873.640. The portion prescribing the contents of the notice is superseded by Section 873.650.

The portion of former Section 775 requiring the conduct of sales at private sale to be in the manner of private sales of estates of decedents is continued in substance in Section 873.680, which adopts relevant portions of the Probate Code.

Code of Civil Procedure § 776 (repealed)

~~776.~~

~~The Court must, in the order for sale, direct the terms of credit which may be allowed for the purchase money of any portion of the premises of which it may direct a sale on credit, and for that portion of which the purchase money is required, by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants, or parties out of the State.~~

ALL IN
STRIKEOUT

Comment. The portion of former Section 776 authorizing the court to direct the terms of credit for a sale is continued in Section 873.630. The portion providing for investment for the benefit of unknown owners, infants, and the like is superseded by Section 873.810, granting the court full authority over the disposition of the proceeds of sale.

Code of Civil Procedure § 777 (repealed)

777.

~~The referees may take separate mortgages and other securities for the whole, or convenient portions of the purchase money, of such parts of the property as are directed by the Court to be sold on credit, for the shares of any known owner of full age, in the name of such owner; and for the shares of an infant, in the name of the guardian of such infant; and for other shares, in the name of the Clerk of the County and his successors in office.~~

ALL IN
STRIKEOUT

Comment. The portion of former Section 777 providing for collection of the security by the referee is continued in Section 373.750. The portion that specified in whose name the security is to be taken is not continued because it is unnecessary. The portion providing for taking security in the name of the county clerk is not continued because it is inappropriate under modern conditions.

Code of Civil Procedure § 778 (repealed)

778.

~~The person entitled to a tenancy for life, or years, whose estate has been sold, is entitled to receive such sum as may be deemed a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing, filed with the Clerk of the Court. Upon the filing of such consent, the Clerk must enter the same in the minutes of the Court.~~

ALL IN
STRIKEOUT

Comment. Former Section 778 is not continued. The provision for a presale estimate of the value of a tenancy is inappropriate under modern conditions.

Code of Civil Procedure § 779 (repealed)

779.

~~If such account be not given, filed, and entered as provided in the last section, at or before a judgment of sale is rendered, the Court must ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate, and must order the same to be paid to such party, or deposited in Court for him, as the case may require.~~

ALL IN
STRIKEOUT

Comment. The substance of former Section 779 is continued in Section 873.850(a).

Code of Civil Procedure § 780 (repealed)

780.

~~If the persons entitled to such estate for life or years be unknown, the Court must provide for the protection of their rights in the same manner, as far as may be, as if they were known and had appeared.~~

Comment. The substance of former Section 780 is continued in Section 873.810, providing for court order for the disposition of proceeds for the benefit of the persons entitled to them.

Code of Civil Procedure § 781 (repealed)

781.

~~In all cases of sales, when it appears that any person has a vested or contingent future right or estate in any of the property sold, the court must ascertain and settle the proportional value of such contingent or vested right or estate, and must direct such proportion of the proceeds of the sale to be invested, secured, or paid over, in such manner as to protect the rights and interests of the parties; or where property is subject to a life estate with remainder over, the court may direct the entire proceeds of the sale of such interests to be paid to a trustee to be appointed by the court, upon security satisfactory to the court, to be invested and reinvested, the income thereof to be paid to the life tenant and the corpus of the trust estate, upon the termination of the life estate, to be delivered or paid to the remaindermen as in the decree determined; and the court shall retain jurisdiction for the settlement of the accounts of such trustee and in all matters necessary for the proper administration of such trust and final distribution of the trust fund.~~

ALL IN
STRIKEOUT

Comment. The first portion of former Section 731, relating to protection of the rights of persons having vested or contingent future interests, is continued in Section 873.850(b). The last portion of former Section 781, relating to treatment of a life estate, is superseded by Section 873.850(c).

Code of Civil Procedure § 782 (repealed)

782.

~~In all cases of sales of property the terms must be made known at the time; and if the premises consist of distinct farms or lots, they must be sold separately.~~

Comment. The first portion of former Section 782, requiring that the terms of sale be known at the time of sale, is continued in substance in Section 873.650, providing that the notice of sale contain the principal terms of sale. The last portion, requiring that separate farms or lots be sold separately, is superseded by Section 873.620, which provides for separate sale of known lots or parcels unless the interests or rights of the parties will be materially prejudiced thereby.

Code of Civil Procedure § 783 (repealed)

783.

~~Neither of the referees, nor any person for the benefit of either of them, can be interested in any purchase; nor can a guardian of an infant party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section are void.~~

ALL IN
STRIKED OUT

Comment. Former Section 783 is superseded by Section 873.690.

Code of Civil Procedure § 784 (repealed)

~~784.~~

~~After conducting a sale and after the referee has made a report, the referee 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 the expenses 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.~~

ALL IN
STRIKEOUT

Comment. The portion of former Section 784 relating to the referee's report of sale and its contents is continued in Section 873.710. The portion relating to the motion to confirm the report is continued in Section 873.720. The portion relating to the confirmation hearing is superseded by Section 873.730.

Code of Civil Procedure § 785 (repealed)

~~785.~~

~~If the sale is confirmed by the court, an order must be entered, directing the referees to execute conveyances and take securities pursuant to such sale, which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of the sale. If the purchaser, after the confirmation of the sale, refuses to pay the amount of his bid, the referees may again sell the property at any time to the highest bidder, and if any loss is occasioned thereby the referees may recover the amount of such loss and the cost from the bidder so refusing, or the referees, without making a resale, may maintain an action against the purchaser for the amount of his bid.~~

ALL IN
STRIKEOUT

Comment. The portion of former Section 785 providing for the court-ordered consummation of sale is continued in Section 873.750(a). The portion authorizing the order to give directions concerning the disposition of proceeds is continued in Section 873.750(b). The portion of former Section 785 relating to refusal of the purchaser to deliver the proceeds is continued in Section 873.760.

Code of Civil Procedure § 786 (repealed)

~~786.~~

~~When a party entitled to a share of the property, or an incumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.~~

Comment. The substance of former Section 786 is continued in Section 873.770.

Code of Civil Procedure § 787 (repealed)

~~787. The conveyances must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way who shall have been named as parties in the action, and against all such parties and persons as were unknown, if the summons was served by publication, and against all persons claiming under them, or either of them, and against all persons having unrecorded deeds or liens at the commencement of the action.~~

ALL IN
STRIKEOUT

Comment. The portion of former Section 787 that provided for recordation of conveyances is continued in Section 873.790. The portion of former Section 787 that specified the effect of the recorded conveyances is continued in Section 874.210, which is phrased in terms of the effect of the judgment.

Code of Civil Procedure § 788 (repealed)

~~788.~~

~~When there are proceeds of a sale belonging to an unknown owner, or to a person without the State, who has no legal representative within it, the same must be invested in bonds of this State or of the United States, for the benefit of the persons entitled thereto.~~

ALL IN
STRIKEOUT

Comment. Former Section 788 is superseded by Section 873.810.

Code of Civil Procedure § 789 (repealed)

789.

~~When the security of the proceeds of sale is taken, or when an investment of any such proceeds is made, it must be done, except as herein otherwise provided, in the name of the Clerk of the county where the papers are filed, and his successors in office, who must hold the same for the use and benefit of the parties interested, subject to the order of the Court.~~

ALL IN
STRIKEOUT

Comment. Former Section 789, providing for security in the name of the county clerk, is not continued because it is outmoded and inappropriate under modern conditions.

Code of Civil Procedure § 790 (repealed)

790.

~~When security is taken by the referees on a sale, and the parties interested in such security, by an instrument in writing, under their hands, delivered to the referees, agree upon the shares and proportions to which they are respectively entitled, or when shares and proportions have been previously adjudged by the Court; such securities must be taken in the names of and payable to the parties respectively entitled thereto, and must be delivered to such parties upon their receipt therefor. Such agreement and receipt must be returned and filed with the Clerk.~~

ALL
IN
STRIKEOUT

Comment. Former Section 790, providing for agreement of parties as to their shares, is not continued because it is unnecessary.

Code of Civil Procedure § 791 (repealed)

791.

~~The Clerk in whose name a security is taken, or by whom an investment is made, and his successors in office, must receive the interest and principal as it becomes due, and apply and invest the same as the Court may direct; and must deposit with the County Treasurer all securities taken, and keep an account in a book provided and kept for that purpose, in the Clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof.~~

ALL IN
STRIKEOUT

Comment. Former Section 791, relating to the duties of the county clerk in making investments, is not continued because it is outmoded and inappropriate under modern conditions.

Code of Civil Procedure § 792 (repealed)

792.

~~When it appears that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights and interests of some of them, and a partition be ordered, the Court may adjudge compensation to be made by one party to another, on account of the inequality; but such compensation shall not be required to be made to others by owners unknown, nor by an infant, unless it appears that such infant has personal property sufficient for that purpose, and that his interest will be promoted thereby. And in all cases the Court has power to make compensatory adjustment between the respective parties, according to the ordinary principles of equity.~~

ALL IN
STRIKEOUT

Comment. The substance of the first sentence of former Section 792, relating to owelty, is continued in Section 873.250. The substance of the second sentence, relating to other compensatory adjustment, is continued in Section 872.140.

Code of Civil Procedure § 793 (repealed)

793.

~~When the share of an infant is sold, the proceeds of the sale may be paid by the referee making the sale to his general guardian, or the special guardian appointed for him in the action, upon giving the security required by law or directed by order of the Court.~~

ALL IN
STRIKEOUT

Comment. Former Section 793, relating to the proceeds of sale for the share of an infant, is not continued because it is covered by other more general provisions.

Code of Civil Procedure § 794 (repealed)

794.

~~The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property has been sold, may receive in behalf of such person his share of the proceeds of such real property from the referees, on executing with sufficient sureties an undertaking approved by a Judge of the Court, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled or to his legal representative.~~

ALL IN
STRIKEOUT

Comment. Former Section 794, relating to the proceeds of sale for the share of an incompetent, is not continued because it is covered by other more general provisions.

Code of Civil Procedure § 796 (repealed)

796.

~~The costs of partition, including reasonable counsel fees, expended by the plaintiff or either of the defendants, for the common benefit, fees or [of] referees, and other disbursements, must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. When, however, litigation arises between some of the parties only, the Court may require the expense of such litigation to be paid by the parties thereto, or any of them.~~

ALL IN
STRIKEOUT

Comment. The portion of former Section 796 relating to the costs of partition expended for the common benefit is continued in Section 874.010. The portion requiring payment by the parties in proportion to their interests is continued in Section 874.030. The portion requiring inclusion of costs in the judgment is superseded by Section 874.110, requiring inclusion only of unpaid costs.

The portion of former Section 796 providing for a lien for costs is continued in Section 874.120. The portion providing for execution to enforce the costs is continued in Section 874.140.

The portion of former Section 796 that provided for appropriate allocation of expenses of litigation between only some of the parties is continued in the general provision for equitable apportionment of Section 874.030.

Code of Civil Procedure § 798 (repealed)

~~798.~~

~~If it appear that other actions or proceedings have been necessarily prosecuted or defended by any one of the tenants in common, for the protection, confirmation, or perfecting of the title, or settling the boundaries, or making a survey or surveys of the estate partitioned, the Court shall allow to the parties to the action, who have paid the expense of such litigation or other proceedings, all the expenses necessarily incurred therein, except counsel fees, which shall have accrued to the common benefit of the other tenants in common, with interest thereon from the date of making the said expenditures, and in the same kind of money expended or paid, and the same must be pleaded and allowed by the Court, and included in the final judgment, and shall be a lien upon the share of each tenant respectively, in proportion to his interest, and shall be enforced in the same manner as taxable costs of partition are taxed and collected.~~

ALL IN
STRIKEOUT

Comment. The first portion of former Section 798 relating to the expenses for the common benefit of prosecuting or defending other actions is continued in Section 874.010(e). The provision relating to reimbursement "in the same kind of money" is not continued because it is obsolete. The provision relating to pleading the expenses is not continued because the general procedure for allowance of costs is adequate.

The last portion of former Section 798 relating to enforcement of the costs allowed is continued in Sections 874.110 (unpaid costs included in judgment), 874.120 (nonpayment lien), 874.130 (enforcement of lien), and 874.140 (execution to enforce judgment)..

Code of Civil Procedure § 799 (repealed)

~~799.~~

~~If it is necessary to have an abstract of title, policy of title insurance or certificate of title of the property to be partitioned, or a litigation report or guarantee as to the necessary parties to the action, the plaintiff may procure one before commencing the action, and may, in his complaint, state that he has done so, and that the abstract, policy, certificate, report or guarantee is subject to the inspection and use of all the parties to the action, designating a place where it will be kept for such inspection. Otherwise the court may, upon application of any one of the parties, authorize him to procure an abstract, policy, certificate, report or guarantee, which, when made, shall be kept at some place designated by the court for the inspection and use of all parties, any of whom is entitled to make a copy thereof. The expense reasonably incurred in procuring such abstract, policy, certificate, report or guarantee must be allowed to the party incurring it, with interest thereon from the commencement of the action, if it had been procured before that time, otherwise from the time of payment.~~

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STRIKEOUT

Comment. The portion of former Section 799 permitting the parties to obtain a title report is superseded by Section 872.220. The portion allowing the expense of the title report as part of the costs of partition is continued in Section 874.010(d).

Code of Civil Procedure § 800 (repealed)

~~800.~~

~~The abstract mentioned in the last preceding section may be made by any competent searcher of records, and need not be certified by the Recorder or other officer, but instead thereof it must be verified by the affidavit of the person making it, to the effect that he believes it to be correct, but the same may be corrected from time to time if found incorrect, under the direction of the Court.~~

ALL IN
STRIKEOUT

Comment. Former Section 800, relating to the searcher of records and correction of a title report, is not continued because it is outmoded and inappropriate under modern conditions.

Code of Civil Procedure § 801 (repealed)

801.

~~Whenever, during the progress of the action for partition, any disbursements shall have been made, under the direction of the Court or the Judge thereof, by a party thereto, interest must be allowed thereon from the time of making such disbursements.~~

} ALL IN
STRIKEOUT

Comment. The substance of former Section 801 is continued in Section 874.020.