

## Memorandum 75-43

Subject: Study 23 - Partition of Real and Personal Property

This memorandum presents for Commission review problems that have been raised concerning the Commission's proposed partition statute (AB 1671). It includes matters presented but not considered at the last Commission meeting.

§ 872.010(d). "Property" defined

Mr. Elmore recommends that the words "right, title, estate, lien, or other interest" be deleted from the definition of "property." While the staff believes that these words are helpful in determining the meaning of the word "property" as used in the partition statute, the staff also believes that they could be deleted without undue violence to the statute since the statute is so drafted that, whenever it is critical that "interests" be referred to, a reference to interests is made. See, e.g., Sections 872.210 (persons authorized to commence partition action), 872.230 (contents of complaint), 872.510 (joinder of defendants).

§ 872.110. Superior court

Mr. Elmore has indicated that existing venue provisions for partition actions are inadequate because they do not deal with personal property at all. The staff suggests that Section 872.110 be amended to read:

§ 872.110. Superior court Jurisdiction and venue

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

(b) The proper county for the trial of actions under this title is:

(1) Where the subject of the action is real property or real property and personal property, the county in which the real property, or some part, is situated.

(2) Where the subject of the action is personal property, the county in which the personal property is principally located or in which the defendants, or some of them, reside at the commencement of the action.

(c) Upon motion, the court may change the place of trial to another county which is a proper county for trial, for the convenience of witnesses or to aid in the expeditious determination of the action.

Comment. Subdivision (a) of Section 872.110 continues a portion of former Section 755. Subdivision (b)(1) continues language formerly found in Section 392 as to real property and broadens it to apply to cases involving real and personal property. Subdivision (b)(2) is new. Compare Section 395 (venue). Subdivision (c) limits the grounds for venue change as well as the counties to which venue may be changed. Compare Section 392 et seq. (transfer of actions).

Note that, in this draft, besides providing venue rules, subdivision (c) limits change of venue.

Adoption of this provision will necessitate the following conforming amendment:

Code of Civil Procedure § 392

392. (1) Subject to the power of the court to transfer actions and proceedings as provided in this title, the county in which the real property, which is the subject of the action, or some part thereof, is situated, is the proper county for the trial of the following actions:

(a) For the recovery of real property, or an estate or interest therein, or for the determination in any form, of such right or interest, and injuries to real property;

~~(b) For partition of real property;~~

~~(c)~~ (b) For the foreclosure of all liens and mortgages on real property.

(2) The proper court for the trial of any such action, in the county hereinabove designated as the proper county, shall be determined as follows:

If there is a municipal or justice court, having jurisdiction of the subject matter of the action, established in the city and county or judicial district in which the real property which is the subject of the action, or some part thereof, is situated, such court is the proper court for the trial of such action; otherwise any court in such county having jurisdiction of the subject matter of the action, is a proper court for the trial thereof.

Comment. The provision formerly found in subdivision (1)(b) of Section 392 is continued in Section 872.110(b)(1)(partition).

§ 872.210. Persons authorized to commence partition action

The Commission at the last meeting determined that the Comment to this section should indicate that the section authorizes partition by owners of community property. The staff believes the Comment should also indicate that the section overrules the recent case of Akagi v. Ishioka (Ct. of Appeal 1975), holding that a remainderman may not obtain partition as against a life tenant. A copy of this case is attached as Exhibit I (blue).

The second paragraph of the Comment would be revised to read:

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. Contrast Akagi v. Ishioka, Cal. App.3d , Cal. Rptr. (1975) (remainderman may not obtain partition against life tenant). Or he may be a spouse seeking partition of community property. Contrast Jacquemart v. Jacquemart, 142 Cal. App.2d 794, 299 P.2d 281 (1956); see also Civil Code Section 5127 ("either spouse has the management and control" of community property). 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 partition as to concurrent interests is subject to the doctrine of waiver and that partition as to successive interests is subject to equitable considerations~~. See Section 872.710.

The Commission also requested the staff to research the extent to which property on which a homestead is declared may be partitioned. Basically, homesteaded property is subject to partition with two exceptions: (1) community property on which a homestead has been declared may not be partitioned because community property generally may not be partitioned; (2) joint tenancy property on which a homestead has been declared by the wife may not be partitioned by the husband because the homestead statute permits the wife to create a homestead on her husband's as well as her own undivided interest in the property. For a detailed discussion of the existing law, see the study attached as Exhibit III (white).

The Commission's recommended Section 872.210, by extending the right to partition to community property, could arguably change the law as to partition of homesteaded community property. However, this would be a case of first impression and whether the court would permit partition is speculative. The Commission's recommendation would appear to make no change in the case law precluding a husband from partitioning joint tenancy property homesteaded by the wife since that case law came under the existing statute that appears to authorize partition by a joint tenant and the Commission's recommendation would continue to appear to authorize partition by a joint tenant. The staff has concluded that there is no need to change the section or Comment on this point.

§ 872.430 (new). Claim for affirmative relief

Mr. Elmore has pointed out that, where a defendant in a partition action has a claim for contribution, and the like, he must raise his claim by cross-complaint. Mr. Elmore believes that provision should be made for accomplishing this in the answer. The staff suggests that the following provision be added:

§ 872.430. Claim for affirmative relief

872.430. The answer may set forth any claim the defendant has for contribution or other compensatory adjustment.

Comment. Section 872.430 is new. It avoids the need of the defendant to file a cross-complaint for affirmative relief. Compare Section 431.30(c)(affirmative relief may not be claimed in the answer).

§ 872.720. Interlocutory judgment of partition

Mr. Elmore has pointed out that the partition statute does not make clear that the interlocutory judgment may determine the manner of partition

in appropriate cases. The staff suggests that subdivision (a) of Section 872.720 be amended to read:

§ 872.720. Interlocutory judgment

872.720. (a) 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 and, unless it is to be later determined, the manner of partition .

§ 873.010. Court authority concerning referee

Mr. Elmore has noted that the section dealing with the court's authority over referees lacks a provision permitting appointment of a new referee. The staff agrees that this would be a useful addition to the listing of the section:

§ 873.010. Court authority concerning referee

873.010.

\* \* \* \* \*

(b) The court may:

\* \* \* \* \*

(7) Appoint a new referee.

§ 873.820. Application of proceeds of sale

This section provides that, if property is sold in partition, the proceeds are applied first to the costs of partition, then to pay liens of the parties (except liens which under the terms of sale are to remain encumbrances on the property), and, finally, the residue to the parties in proportion to their interests in the property. Mr. Elmore points out that the lien provision is incomplete; the residue should be used to pay all liens (not merely liens of parties), except those that are to remain on the property.

Section 873.820 as amended would read:

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

\* \* \* \* \*

(c) Payment of any liens ~~of parties~~ on the property in their order of priority except liens which under the terms of sale are to remain on the property.

\* \* \* \* \*

The following language would be added to the Comment:

Subdivision (c) provides for payment of liens on the property (including liens on undivided interests in the property) regardless whether the lienholder is a party unless the property has been sold subject to the lien. In case of a dispute concerning payment of a lien, the proceeds may be deposited in court pursuant to Section 873.810 pending resolution of the dispute.

The result of these changes would be that a lienholder need not be made a party to the partition action in order to have his lien discharged in the action.

§ 874.230. Unrecorded interests known to plaintiff

This section provides that a judgment of partition does not affect the interest of an occupant or an unrecorded interest in the plaintiff's share of the partitioned property or proceeds where the plaintiff knew of the unrecorded interest, or should reasonably have known of the occupancy, but failed to join the occupant or interest holder in the partition action.

Mr. Swift, counsel for Western Title Insurance Company, has several concerns with this section. See Exhibit II (yellow). His first concern is that, because this section is an exception to the rule stated in Section 874.210 (persons bound by judgment), Section 874.210 should mention the exception. The staff notes that the Comment to Section 874.210 mentions the exception and that Section 874.230 is prefaced by a "notwithstanding" clause. The staff believes no change is necessary on this point.

Mr. Swift's next concern is that the term "occupant" is not defined-- does it mean oil lessee, easement holder, tenant farmer, and the like? The staff believes that this is a good point. The Commission probably intended to include only persons in actual, as opposed to constructive, possession of the property, and only persons in lawful possession. However, rather than amend the section to include "actual and lawful possession" language, the staff recommends that we simply delete the "occupant" concept. Since the plaintiff is the owner of a substantial interest in the property which he is seeking to partition, he will presumably in the ordinary case have actual knowledge of any person in actual and lawful possession of the property, albeit that person's interest is unrecorded. For this reason, the staff believes that we can keep only the "actual knowledge" of an unrecorded interest provision of Section 874.230 and still pick up nearly all the cases the Commission intended to cover by the "occupant" provision.

Mr. Swift's final point is that the standard for joining parties in Section 872.510 (interests actually known to the plaintiff) and the standard in Section 874.230 should be the same. The staff agrees, and elimination of the occupant provision as recommended in the preceding paragraph would accomplish this. The staff recommends that Section 874.230 be amended to read:

874.230. Notwithstanding Section 874.210, where ~~an occupant or~~ either a person having or claiming an unrecrded interest in the property or part thereof was not a party to the action but ~~the occupancy reasonably should have been known or~~ the existence or claim of the interest was actually known to the plaintiff at any time before entry of the interlocutory judgment, the judgment does not affect the interest of such ~~occupant or other~~ person in the portion of the property or proceeds of sale thereof allocated to the plaintiff.

§ 874.240 (new). Judgment defined

Mr. Elmore has discovered a technical gap in the statute which would be filled by the addition of the following provision:

§ 874.240. Judgment defined

874.240. As used in this chapter, "judgment" includes a conveyance or transfer of the property pursuant to Section 873.790 or Section 873.960.

Comment. Section 874.240 continues the substance of former Section 787 which provided the effect of a conveyance of property in the partition action.

Absent this provision, it could be argued that the sections relating to the effect of the judgment apply only to division and not to sale of the property.

§ 872.850 (new). Sale of whole property or interests

The Commission at the last meeting expressed concern over the problem of partition as to particular interests where sale of the interests would not bring an adequate price. Below is a draft of a section designed to permit sale of the whole property where the defendant shows that sale of the interest would be unfair. It is arguable that the burden should be reversed and that sale should be of the whole property unless the plaintiff shows that sale of the individual interests would be equitable. However, the staff believes that this procedure would in effect negate the Commission's decision to permit partition of individual interests.

§ 872.850. Sale of whole property or interests

872.850. Where partition is sought as to less than all the interests in property and the court has ordered that the property be sold, the sale shall be of the interests as to which partition is sought unless the court finds that sale of the whole property would be more equitable to the defendants.

Comment. Section 872.850 is new. Partition by division will be appropriate in many cases where partition is sought as to less than all interests in property pursuant to Sections 872.230 and 872.510.



However, where division is inappropriate and the court orders sale pursuant to Section 872.820, Section 872.850 requires that the interests be sold unless sale of the whole property would be more equitable to the defendants. This section is designed to protect defendants owning interests in property that would bring substantially less than their true value if they were marketed as individual interests.

§ 873.080. Disposition in accordance with law

At the last meeting, the Commission determined to remove the statutory duty from the referee to comply with applicable zoning, subdivision, and similar regulations, and to give the court continuing jurisdiction in case the judgment is not in accordance with such laws. Section 872.860 below removes the duty from the referee, and the Comment makes clear that the section does not indicate when any particular law may nor may not be applicable:

§ 872.860. Division or sale in accordance with law

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

- (a) Zoning requirements.
- (b) Environmental impact report and similar requirements.
- (c) Subdivision and parcel map requirements.
- (d) Land dedication requirements.
- (e) Street opening and closing provisions.

Comment. Section 872.860 is new. It makes clear that the sale or division must conform to any laws that may be applicable. Section 872.860 does not determine whether a particular law will be applicable in a particular situation. For authority of the court to modify a judgment of division or sale that does not comply with applicable laws, see Section 872.150.

Section 872.150 below gives the court continuing jurisdiction over subsequent proceedings:

§ 872.150. Continuing jurisdiction

872.150. After entry of judgment, the court has continuing jurisdiction over any further proceeding to cure any failure of the judgment to comply with any applicable laws, regulations, or ordinances governing division or sale of property.

Comment. Section 872.150 is new. See also Section 872.860 (division or sale in accordance with law).

Operative date

Mr. Elmore has discovered two defects in the operative date provisions. Subdivision (c) inadvertently fails to contain an indication of what law controls in cases mentioned in the subdivision; the operative date provisions contain no statute of limitations cutting off the partition right of a lienholder. These defects would be cured by the following amendment:

(a) This act shall become operative on January 1, 1977.

\* \* \* \* \*

(c) Sections 872.210 and 872.710 of the Code of Civil Procedure do not apply to an action commenced prior to the operative date and the law applicable thereto prior to the operative date applies .

\* \* \* \* \*

(f) An action for partition by the owner or holder of a lien on a parity with that on which the owner's title is based shall be commenced prior to the operative date.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

CERTIFIED FOR PUBLICATION

IN

APR 25 9 19 AM '75

EDIT. DEPT.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GEORGE YUKIO AKAGI,

Plaintiff and Appellant,

v.

RIICHI ISHIOKA,

Defendant and Respondent.

2d Civil No. 44879

(Super.Ct. No. C 60477)

COURT OF APPEAL-SECOND DIST.

FILED

APR 23 1975

CLAY ROBBINS, JR. *Clk.*

*Deputy Clerk*

APPEAL from a judgment of the Superior Court of  
Los Angeles County. Harry L. Hupp, Judge. Affirmed.

Lyle C. Ellis for Plaintiff and Appellant.

Alef and Schnitzer and Martin J. Schnitzer for  
Defendant and Respondent.

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THE CASE

The plaintiff (appellant herein) filed a first amended complaint containing two counts. The defendant (respondent herein) attacked each count separately by general demurrer for failure to state a cause of action. The court below sustained the demurrer to the first count with leave to amend and overruled the demurrer to the second count. The plaintiff voluntarily dismissed his second count<sup>1/</sup> and refused to amend his first count. The trial court, on defendant's motion, ordered dismissal of the plaintiff's action as to the defendant. The plaintiff has appealed from the judgment (order) of dismissal.

THE ISSUE

The sole issue on appeal is whether, under section 752 of the Code of Civil Procedure, the plaintiff (remainderman owning a vested interest) may have partition as against defendant (owning a life estate) in real property.

The trial court held that, under the circumstances, no partition was provided for by section 752.

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While this is stated in appellant's brief, it did not appear in the clerk's transcript on appeal. On our own motion, we have augmented the record by having the superior court file brought before us for consideration. That file supports the stated fact.

THE FACTS

The plaintiff's pleading describes three parcels of real property all situated in Los Angeles, California. It is alleged that "Plaintiff owns a fee title to the subject property and defendant RIICHI ISHIOKA holds a life estate to same." It alleged that "Plaintiff desires a partition of the subject property according to the respective rights of plaintiff and defendant." It further alleged that "An equitable partition of the whole property is impracticable and a sale of the property and a subsequent division of the proceeds of said sale in proportion to the respective interests of both Plaintiff and Defendant will be in the best interest of both Plaintiff and Defendant."

There is no claim made that the defendant violated any duty owed by a life estate owner (see Civ. Code, §§ 818 and 840) or that plaintiff had any rights based on other than that above summarized and quoted from plaintiff's pleading. In short, plaintiff seeks only partition of the real properties by sale and division of proceeds. He bases his claim solely upon the fact that he is owner of the remainder and defendant is owner of the life estate in the subject real property.

THE LAW

Exhibit 66  
1-1-66  
(1) 2  
→ "In this state partition of real property is a special statutory proceeding available only under circumstances authorized by Code of Civil Procedure section 752.

[En. omitted.] The action may be maintained only by a person having the interest described by statute. (Ryer v. Fletcher Ryer Co., 126 Cal. 482, 483 [58 P. 908]; Jacquemart v. Jacquemart, 142 Cal.App.2d 794, 796 [229 P.2d 281]; Bacon v. Wahrhaftig, 97 Cal.App.2d 599, 603 [218 P.2d 144].)" (Powers v. Powers, 221 Cal.App.2d 746, 748 [1] [34 Cal. Rptr. 835].)

Section 752 delineates those persons and only those persons who may maintain an action for partition of real property.

The section was based on the Practice Act, section 264 (Stats. 1851, ch. 5, p. 93), and after intervening amendments, was enacted in 1872 as section 752 of the Code of Civil Procedure. As so enacted, it provided:

"When several cotenants hold and are in possession of real property as parceners, 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, an action may be brought by one or more of such persons 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 cannot be made without great prejudice to the owners."

This language was considered in Jameson v. Hayward, 106 Cal. 682, 686-687 [39 P. 1078]. The court pointed out that at least two things were required, (1) hold and possess; and (2) cotenancy interest. As to the

second of these, it was held "it is only the cotenants mentioned . . . who can bring the action for partition, and it is only that real property which is thus held by them that can be partitioned. . . . It is the cotenancy which gives the right to a partition. Several persons together may own a thing without being cotenants thereof, and in such a case, under a statute like our own, no partition can be had." (P. 686.) This was further explained by the court (p. 687): ". . . It [Martin v. Walker 58 Cal. 590] does not, however, go to the extent of holding that any person having an estate in land, but not holding as a coparcener, joint tenant, or tenant in common, can maintain an action for partition. It has often been said by the courts that the first inquiry in an action for partition is, Is there such a cotenancy established as warrants the action?"

In 1919, section 752 was amended by substituting "When several cotenants own real property as joint tenants, or tenants in common" for "When several cotenants hold and are in possession of real property as parceners, joint tenants, or tenants in common" at the beginning of the section. Under the amendment, while the requirement of "hold," i.e., own, was retained and "possession" was eliminated, there was no change in the requirement of cotenancy interest as the latter was discussed in Jameson v. Hayward, supra, 106 Cal. at pages 686-687. The statute, as amended in 1919, was presented for consideration in Geary v.

De Espinosa, 51 Cal.App. 52, 54 [196 P. 90]. (See also Skulich v. Skulich, 213 Cal. 652, 654 [3 P.2d 12].) In Geary, plaintiff and 15 defendants were remaindermen tenants in common of real property in which Josefa Boronda de Espinosa was owner of a life estate. The trial court held that since plaintiff was not entitled to possession he could not maintain the action for partition. In reversing, the appellate court held (51 Cal.App. at pp. 55-56):

"We are of the opinion that it is now the rule in this state that actual possession, or a right of actual or immediate possession, is no longer necessary in order to enable a cotenant to maintain an action in partition, if he otherwise falls within the provisions of section 752 of the Code of Civil Procedure, as it now reads. [Citations.] Clearly, under the decisions above noted the plaintiff is entitled to maintain this action against all the other holders of remainder interests in the real property. It is unnecessary for us to further consider the question whether or not the action will lie against the defendant Josefa Boronda de Espinosa, owner of the life estate, which is raised by some of the authorities [citation], for she joined in the prayer of the plaintiff and certain of the other defendants that the property be partitioned in conformity with the interests of the respective parties. It is certain, of course, that the decree in the partition suit can in nowise affect her rights. Furthermore, there is no necessity for disturbing the interest of Mrs. Espinosa, for



there can be an actual partition, as between the reversioners, by each taking his share in severalty, subject to her life estate, or the whole may be sold subject to her interest. [Citation.]"

Section 752 next was amended in 1927 and then lastly in 1943. So far as here concerned, the 1943 amendment made no change in language applicable to this case. We quote the section in its present language:<sup>2/</sup>

"When several 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."

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The 1943 amendment (1) added "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 holder of such lien"; and (2) substituted "parties" for "owners" at the end of the section.

(2) → As presently worded, section 752 creates three general classes of persons who are permitted to bring an action for partition of real property:

1. "When several cotenants own real property as joint tenants, or tenants in common, . . . an action [for partition thereof] may be brought by one or more of such persons" where there is in existence the intervening matters prescribed in the omitted portion. This first part of the section requires cotenancy to exist. This portion of the section remains governed by Jameson v. Hayward, supra, from which we repeat (106 Cal. at p. 686): "[I]t is only the cotenants mentioned . . . who can bring the action for partition, and it is only that real property which is thus held by them that can be partitioned. . . . It is the cotenancy which gives the right to a partition. Several persons together may own a thing without being cotenants thereof, and in such a case, under [provisions of the statute relating to the class of plaintiff's being considered], no partition can be had."

2. A second class permitted to bring an action for partition is stated to be, "where property is subject to a life estate with remainder over, by the life tenant," and in the absence of meeting this requirement no such action may be brought based upon this portion of the statute.

3. The remaining class permitted to bring an action for partition is stated to be, "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," upon the basis of which no such action may be brought in the absence of meeting this stated requirement.

In the case at bench, plaintiff nowhere claims to be a cotenant or a life tenant or to come within the lien provisions of the statute. He fails to meet any one of the three classes.

Plaintiff argues that under *Cunningham v. Frymire*, 160 Cal.App.2d 726, 730 [325 P.2d 555], he is entitled to partition. In that case, plaintiff Ruby owned an undivided one-third interest in the real property and was a cotenant. Clearly, she was entitled to have partition, being a member of the first class provided for by the statute. Neither her undivided one-third interest nor Benjamin's undivided one-third interest was subject to any other interest. It is true that the remaining undivided one-third interest was subject to a life interest in Goldsmith. However, this would not remove plaintiff Ruby from the class of a cotenant entitled to partition. That is not the situation in the case at bench.

Estate of Giacomelos, 192 Cal.App.2d 244 [13 Cal. Rptr. 245, 91 A.L.R.2d 956], involved proceeds from condemnation under eminent domain proceedings by the state regarding real property which had been distributed pursuant to probate of a will to Ann for life with remainder to a bank as trustee for decedent's surviving children. The bank petitioned the probate court which directed that a certain

amount be given Ann as the value of her life interest and the balance be held as testamentary trustee. The appellate court held (p. 248): ". . . The investment by a trustee of the entire proceeds of the sale and the payment of the income therefrom to appellant [Ann] for life would be carrying out the desire of the testator more nearly than giving her merely the present value of her life estate in cash." (This is stated to be the view of the majority of courts which have considered that question. See, e.g., United States v. 403.15 Acres of Land, etc., State of Tenn. (U.S.D.C.M.D. Tenn. 1970) 316 F.Supp. 655, 658.) That is not the problem presented in this appeal but the holding there made tends to support the trial court's determination here under consideration.

By dicta in Estate of Giacomelos, supra, 192 Cal. App.2d at p. 247, it was said: ". . . We see no reason why, in such a [probate] court, the life tenant in a compulsory sale should not be entitled to the same rights as in a partition sale. In fact, she should be entitled to greater consideration, for a partition of property in which there is a life estate cannot be had without the consent of the life tenant, thus giving the life tenant the control of whether there can be a partition sale, whereas in a compulsory sale she has no control whatever."

CONCLUSION

(2) We hold that in the absence of special statutory authorization, a remainderman has no right of action for partition against a life tenant. (68 C.J.S., Partition, § 58, p. 90.) As heretofore discussed, section 752 of the Code of Civil Procedure carefully prescribes the situations under which partition may be had and the precise class of persons permitted to bring the action. The plaintiff is not among those persons.

A life estate with remainder over in real property frequently is created by will or deed and the obvious intent or desire of the creator is to provide haven and, in some instances, income to the life tenant for life without interference. That intent or desire would be destroyed were the remainderman allowed to force partition against the life tenant. We do not believe that section 752 was intended to permit this to be done. Of course, a different situation is presented where the life tenant seeks partition or acquiesces or joins in the partition. But no such situation here is presented.

The judgment (order) is affirmed.

CERTIFIED FOR PUBLICATION

HANSON, J.

We concur:

LILLIE, Acting P.J. *de*

THOMPSON, J.

Memorandum 75-43

EXHIBIT II

CALIFORNIA LAND TITLE ASSOCIATION

P. O. BOX 128 • SACRAMENTO, CALIFORNIA 95801 • (916) 444-2617

SEAN E. MCCARTHY  
VICE PRESIDENT-LEGISLATIVE COUNSEL

April 22, 1975

Mr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
Stanford Law School  
Stanford, California

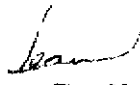
RE: Proposed New Partition Procedures

Dear John:

Enclosed for your review and comment is a recent communication I received with respect to your efforts in the partition area.

If you have further questions please let me know.

Sincerely yours,

  
Sean E. McCarthy  
Vice President -  
Legislative Counsel

SEM/kh

Encs.

WESTERN TITLE INSURANCE COMPANY



MAIN OFFICE: (415) 381-6767 • 350 GUSH STREET • SAN FRANCISCO, CALIFORNIA 94104

April 9, 1975

Sean E. McCarthy  
Vice President - Legislative Counsel  
California Land Title Association  
P. O. Box 13968  
Sacramento, California 95813

Re: CLTA Legislative Subcommittee to Study  
Proposed New Partition Procedures

Dear Sean:

It is possible that my complete approval of the proposed legislation regarding partition actions derives from one or more of the following grounds: my confidence in the committee, my insufficient review of the material, or my ignorance. Nevertheless, the only concrete objection I have arises from the comment in the Second Paragraph of page 10, referring to matters covered by 874.230, p. 75, and the comment following on p. 76.

874.210 covers the binding effect of the judgment on persons not a party to the action having or claiming an interest not of record at the time the lis pendens is recorded, or if none, at the time the judgment is recorded. It does not except the effect of 874.230, though this section makes exception to the effect of 874.210. 874.210 and 872.510 cover interests, whereas 874.230 covers interests of "occupant or other person having or claiming an unrecorded interest. Note the distinction in 874.230 between "the occupancy reasonably should have been known" and the claim of interest "actually known."

ROUTE TO

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SEC. \_\_\_\_\_  
DESK \_\_\_\_\_

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PRES. \_\_\_\_\_

FILE # \_\_\_\_\_

My concern naturally would arise where we are asked to insure the physical portion going to the plaintiff. We would not be concerned with proceeds ordinarily. If we are asked to issue a CLTA policy, we assume the policy would exclude any unrecorded interest and specifically does exclude the interest of an occupant. We would be on shakier ground where we issue an ALTA, since we do not have the specific exclusion of the interest of the occupant and would probably have to defend against the claim of the unrecorded claimant. It further bothers me that "occupant" is not defined. Does it mean, for example, oil lessee, easement holder, tenant farmer, etc.

APR 10 1975

Sean E. McCarthy

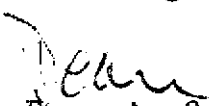
- 2 -

April 9, 1975

We may of course simply not worry about such unknown interests as a calculated risk, relying upon our subrogation rights under implied warranties, when we insure a buyer from the plaintiff. In any case though, I feel that an exception should be made to 874.210, "occupant" should be defined, and the differences between actual and constructive knowledge and the differences between interests and interests of occupants and other persons should be eliminated or made consistent in the three sections, 872.510, 874.210 and 874.230.

I hope the foregoing makes some sense and may be of some use.

Best regards,

  
Dean A. Swift  
Vice President and Counsel

DAS:bo



EXHIBIT III

MEMORANDUM

TO: Nat Sterling  
FROM: Bob Murphy  
SUBJECT: Partition of land subject to homestead

It is the general rule in California that a statutory homestead interest does not deprive a cotenant of the right to have the property partitioned. Squibb v. Squibb, 190 Cal. App. 2d 766, 770, 12 Cal. Rptr. 346 (1961); Young v. Hessler, 72 Cal. App. 2d 67, 69, 164 P.2d 65 (1945); Priddel v. Shankie, 69 Cal. App. 2d 319, 325, 159 P.2d 438 (1945). See Estate of Kachigian, 20 Cal. 2d 787, 792, 128 P.2d 865 (1942). This is because a cotenant may declare a homestead on "his undivided interest," Squibb v. Squibb, 190 Cal. App. 2d at 770; Young v. Hessler, 72 Cal. App. 2d at 69; and "the other cotenant's interest is in no way affected;" Estate of Kachigian, 20 Cal. 2d at 792.

There is an exception to this rule which protects against partition homestead rights perfected by a wife on property owned jointly with her husband, at least so long as the parties remain married. Walton v. Walton, 59 Cal. App. 2d 26, 31-37, 138 P.2d 54 (1943). Accord, Johnson v. Brauner, 131 Cal. App. 2d 713, 722, 281 P.2d 50 (1955) (dictum); Kaupe v. Kaupe, 131 Cal. App. 2d 511, 514, 280 P.2d 856 (1955) (wife,

who had created homestead, denied partition).

The law to be applied if the husband or wife seeks a division or sale of homesteaded property depends upon whether the purported cotenancy is a true cotenancy, or whether the property is actually community notwithstanding its description in the deed as a cotenancy.<sup>1</sup> If the homesteaded property is actually community property, the court appears to have discretion under Civil Code 4800, in an action for dissolution of marriage or for legal separation, either to order a sale of the property or to make a conditional award to the wife if she has custody of the children. Supplementary Report on the Family Law Act, Assembly Daily Journal, February 26, 1970. See Civil Code section 4800(d).<sup>2</sup>

If the property is a true cotenancy, however, with each party owning his or her undivided one-half interest as separate property, the family court lacks jurisdiction to divide the property. E.g., Maher v. Maher, 216 Cal. App. 2d 30, 31, 30 Cal. Rptr. 516 (1963); Barba v. Barba, 103 Cal. App. 2d 395, 396, 229 P.2d 465 (1951). The question thus

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<sup>1</sup>The form of deed is not conclusive, and either party may show that their intention was that the property be held as community. 7 Witkin, Summary of California Law, Community Property, section 49, at 5140 (1974).

<sup>2</sup>Former Civil Code section 4808 specifically authorized "partition or sale" of community property subject to homestead. Section 4808 was repealed and section 4800 was amended in 1970 to ensure inclusion of the homestead value in the equal-division provisions of section 4800. In re Marriage of Paddock, 18 Cal. App. 3d 355, 360, 95 Cal. Rptr. 652 (1971).

posed is: when can a cotenant obtain partition of a true cotenancy subject to a marital homestead? The answer to this question turns principally on how much vitality the Walton decision retains today.

Walton v. Walton, 59 Cal. App. 2d 26, 138 P.2d 54 (1943), held that the husband could not obtain partition of joint tenancy property where the homestead declaration had been filed by the wife, at least where the parties were still married at the time of the partition suit. The rationale of the Walton case was two-fold. First, the court erroneously observed that a homestead generally "may not be made the subject of an action for partition," 59 Cal. App. 2d at 31, although the court acknowledged the case of Estate of Kachigian, 20 Cal. 2d 787, 128 P.2d 865 (1942), which concluded the opposite, 59 Cal. App. 2d at 37. The central basis for the Walton decision appears to have been the correct observation that Civil Code section 1238 allows the wife to declare a homestead in the separate property of the husband. 59 Cal. App. 2d at 33.<sup>3</sup> Her homestead thus attaches to the whole of the property and not merely to her undivided one-half interest.

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<sup>3</sup>The constitutionality of this statute may be in doubt, since the husband cannot declare a homestead in the separate property of the wife without her consent. Civil Code sections 1238(d), 1239.

Walton v. Walton, 59 Cal. App. 2d at 33-34. Accord, Squibb v. Squibb, 190 Cal. App. 2d at 768; Priddel v. Shankie, 69 Cal. App. 2d at 326.<sup>4</sup>

If this is literally the basis for the Walton decision, one might suppose that the bar to partition of property held in cotenancy and subject to a marital homestead would continue after the parties' divorce.<sup>5</sup> But this appears not to be the rule. In the Walton case the parties were still married at the time the partition suit was carried on, there having been entered merely a decree of legal separation. 59 Cal. App. 2d at 28-29. The case implies that the result would have been different had the parties been divorced. 59 Cal. App. 2d at 29, 34, 36. Similarly, in the cases of

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<sup>4</sup>After a decree of legal separation, the wife may declare a homestead only as to her undivided one-half interest, and the husband is not barred from obtaining partition of the homesteaded property. Wiltrakis v. Wiltrakis, 244 Cal. App. 2d 257, 259, 53 Cal. Rptr. 97 (1966).

<sup>5</sup>Although the cases are in "apparent conflict" as to whether a homestead is an estate in land or merely an exemption not otherwise affecting title, the prevailing view is that a homestead creates no new or additional title, but merely affords certain immunities to the existing title. 25 Cal. Jur. 2d, Homesteads, section 16-19, at 310-17 (1955).

Johnson v. Brauner, 131 Cal. App. 2d 711, 281 P.2d 50 (1955), and Kaupe v. Kaupe, 131 Cal. App. 2d 511, 280 P.2d 856 (1955), the husband and wife were still married at the time of the partition suit.

In Lang v. Lang, 182 Cal. 765, 190 Pac. 181 (1920), the court approved partition of former community real property which had been converted to a tenancy in common by the parties' divorce. 182 Cal. at 770.<sup>6</sup> Limited to its facts, the Lang case holds no more than that divorce "terminates the wife's homestead interest in what had been her husband's separate property, unless assigned to her." California Bank v. Schlesinger, 159 Cal. App. Supp. 854, 866-67, 324 P.2d 119 (1958).

Thus, if the Squibb, Walton, and Lang decisions are read in harmony with one another, all cotenancies subject to a homestead may be partitioned, except a cotenancy subject to a marital homestead declaration filed by the wife where the marriage remains intact.

It is difficult to see why community property subject to homestead must be divided, awarded to one of the parties, or sold in a proceeding for legal separation,<sup>7</sup> while a cotenancy

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<sup>6</sup>Despite language to the contrary in the Lang case, the marital homestead does not terminate ipso facto upon divorce. California Bank v. Schlesinger, 159 Cal. App. 2d Supp. 854, 859, 324 P.2d 119 (1958) (exhaustive review of case law at pages 859-67). See Civil Code sections 4800(a), 4810; In re Marriage of Paddock, 18 Cal. App. 3d 355, 95 Cal. Rptr. 652 (1971).

<sup>7</sup>Civil Code section 4800(a).

subject to homestead remains immune from partition until the marriage is dissolved.<sup>8</sup> On the other hand, the court has considerable flexibility with respect to community property under the Family Law Act, while partition is available, if at all as a matter of right.<sup>9</sup> In denying partition to the husband, the Walton decision furthered judicial policy of reserving a home for the wife with minor children. Arguably, the court should have discretion to grant or deny partition of property subject to a marital homestead prior to a decree of dissolution of marriage, but this situation is so limited that specific legislation anticipating this eventuality may be undesirable. The best course is probably to leave the matter to the courts to apply or not to apply the Walton decision in the future.

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<sup>8</sup>With the repeal of Civil Code section 4808, the court now appears to lack the power to assign a homestead in the husband's separate property to the wife. See Maher v. Maher, 216 Cal. App. 2d 30, 31, 30 Cal. Rptr. 516 (1963); Barba v. Barba, 103 Cal. App. 2d 395, 396, 229 P.2d 465 (1951).

<sup>9</sup>DeRoulet v. Mitchel, 70 Cal. App. 2d 120, 122-24, 160 P.2d 574 (1945). The Law Revision Commission recommendation affords partition as a matter of right to owners of concurrent interests, and makes partition discretionary as to owners of successive interests. Proposed Civil Code section 872.710.

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STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Partition of Real and Personal  
Property

January 1975 .

CALIFORNIA LAW REVISION COMMISSION  
Stanford Law School  
Stanford, California 94305

*Cover  
repro  
for  
title*

## RUNNING HEAD

## RECOMMENDATION

## INTRODUCTION

The statute governing actions for partition of real and personal property<sup>1</sup> was enacted in 1872 and has remained basically unchanged since. Many sections of the statute are obsolete. Some are unduly lengthy or deal with several subjects. Their order is often haphazard. A few duplicate matters are handled more adequately by general provisions of law governing civil actions. Nearly all contain archaic or obscure language.

For these reasons alone, the Law Revision Commission recommends that the partition statute be reorganized, revised, and modernized. In addition, reforms of partition procedure of a more substantive character are desirable. The major changes recommended by the Commission are discussed below; the lesser changes are noted in the Comments to the sections of the proposed legislation following this preliminary part.

## RIGHT TO PARTITION

Under the existing partition statute, a coowner of real or personal property may obtain partition of the property.<sup>2</sup> In addition, the sole owner of a life estate or a sole lienholder (where the lien is on a parity with that on which the owner's title is based) may compel partition of the property. In each of these cases, partition is a matter of right.<sup>3</sup> The Commission recommends changes relating to partition of successive estates, partition by a lienholder, and partition as to selected interests.

## Partition of Successive Estates

Property held in successive estates generally is not

<sup>1</sup> Chapter 4 (commencing with Section 752) of Title 10 of Part 2 of the Code of Civil Procedure.

<sup>2</sup> Code Civ. Proc. §§ 752 and 752.1.

<sup>3</sup> The unqualified right to partition is subject to the doctrine of waiver. For a discussion, see generally 3 B. Witkin, *Summary of California Law, Real Property* § 227 (8th ed. 1973).





subject to partition. However, 1927 legislation did add the right in California of a life tenant to partition as against a remainderman, with limitations as to the manner of partition and provisions for disposition of proceeds in case of sale.<sup>4</sup>

There appear to be three primary reasons that successive estates generally are not subject to partition: (1) historically, partition as a remedy developed in the context of concurrent estates; (2) successive estates cannot ordinarily be physically divided; and (3) the relative values of successive estates, particularly where the remainder or other future interest is contingent, are not self-evident. These reasons no longer carry the force they might once have had since physical division is no longer entitled to a strong preference<sup>5</sup> and determination of value based on actuarial tables and the like in appropriate situations is now commonplace.

The Commission recommends that any owner of a successive interest in a fee or an estate for life or years be permitted to seek partition of the property. To prevent hardship, the person seeking partition should be required to show that partition is in the best interest of all parties. In making the determination, the court should consider, among other factors: (1) the character of the property and any changes in the character of the property since creation of the successive interests, (2) the circumstances under which the successive interests were created and any changes in the circumstances since their creation, (3) the expense of ordinary and extraordinary repairs, and (4) whether taxes or other annual charges have made the possessory interest unduly burdensome. In cases where partition of successive estates is appropriate but hardship may result from sale and division of the proceeds, the court should have authority to establish a trust of the proceeds for the benefit of the successive interest holders.<sup>6</sup>

### Partition by a Lienholder

<sup>4</sup> Cal. Stats. 1927, Chs. 755-757; see Code Civ. Proc. §§ 752, 763, 781. Cf. *Geary v. De Espinosa*, 51 Cal. App. 52, 196 P. 90 (1921).

<sup>5</sup> See discussion, *infra*, under "Manner of Partition."

<sup>6</sup> This recommendation would expand Code of Civil Procedure Section 781, as amended in 1927. See text at note 4, *supra*.



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Code of Civil Procedure Section 752 permits partition by the holder of a lien "on a parity with that on which the owner's title is based." This provision is the result of a 1943 amendment<sup>7</sup> and is contrary to the general rule that only holders of substantial interests in the property may compel partition. It is clearly special legislation designed to avoid the statutory limits on foreclosure of an improvement bond lien.<sup>8</sup> As such, the Commission recommends the repeal of this anomalous provision.

### Partition as to Selected Interests

The existing partition statute appears to require joinder of all interests in the property being partitioned.<sup>9</sup> This requirement may be to the disadvantage of the parties where, for example, there is a favorable mortgage on the property which the parties do not desire to discharge in the action or there are numerous inconsequential interests which will not be materially affected by the partition.

In such situations, the Commission recommends that the party seeking partition be given the flexibility to select the interests as to which partition is to be made. This discretion would, of course, be subject to the general authority of the court to order the joinder of any other parties necessary to the proper disposition of the action.<sup>10</sup>

## MANNER OF PARTITION

### Partition by Division

Traditionally, physical division of the property has been the preferred manner of partition. California provides for physical division in the normal course of events unless it appears that division can only be made with "great prejudice" to the parties.<sup>11</sup> The Commission recommends

<sup>7</sup> Cal. Stats. 1943, Ch. 892, § 1.

<sup>8</sup> See, e.g., *Elbert, Ltd. v. Nolan*, 32 Cal.2d 610, 197 P.2d 537 (1949); *Elbert, Ltd. v. Clare*, 40 Cal.2d 498, 254 P.2d 20 (1953); *Elbert, Ltd. v. San Diego*, 116 Cal. App.2d 660, 254 P.2d 98 (1953); *Paules v. Elbert, Ltd.*, 136 Cal. App.2d 326, 288 P.2d 948 (1955).

<sup>9</sup> See, e.g., Code Civ. Proc. §§ 753 (the interests of all persons in the property must be "set forth" in the complaint) and 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").

<sup>10</sup> Code Civ. Proc. § 389 (mandatory joinder).

<sup>11</sup> See Code Civ. Proc. §§ 752, 752a, 763.



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continuation of the statutory preference for physical division with the modification discussed immediately below.

**Partition by Sale**

In many modern transactions, sale of the property is preferable to physical division since the value of the divided parcels frequently will not equal the value of the whole parcel before division. Moreover, physical division may be impossible due to zoning restrictions or may be highly impractical, particularly in the case of urban property.

The Commission recommends that partition by physical division be required unless sale would be "more equitable." This new standard would in effect preserve the traditional preference for physical division while broadening the use of partition by sale.

**Partition by Appraisal**

There are situations where physical division is inequitable or impossible, and sale will result in an unwanted tax liability or in loss of property which one of the owners desires to keep. As an alternative in such situations, the Commission recommends that a third manner of partition be authorized—partition by appraisal.

Under the Commission's proposal, if all the parties agree, a referee will appraise the property and any of the parties may acquire the interests of the others at their appraised value. This manner of partition will be an expeditious and effective means of terminating the differences among the coowners, while at the same time allowing one to retain the property without the expenses of sale and without the imposition of undesired tax liability.<sup>12</sup>

**PROCEDURAL DETAIL**

The existing partition statute provides some detail concerning practical procedural problems involved in a

<sup>12</sup> See J. Rabkin & M. Johnson, *Federal Income, Gift and Estate Taxation* § 43.01 (1975) (a partition sale is normally a taxable disposition but, if the purchase is by a coowner, it is treated as an acquisition of the other's interest, and the continuing owner has no taxable gain or loss).



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partition action. However, that detail is fragmentary and often obsolete.

### Authority of Court

The Commission recommends that the authority of the trial court over procedural details in the partition action be made clear. The court should have basic authority and control over the action, including the authority to enforce its orders in the action by restraining order and injunction.

### Authority of Referee

Individual provisions of the existing partition statute appear to grant the referee<sup>13</sup> substantial powers of a judicial character. These "judicial" powers of the referee should not be continued. The referee is appointed to aid the court in the practical aspects of the partition and should not have decision-making authority. Where there is a question concerning the referee's duties, the referee or a party should be permitted to petition the court for instructions.

### Obsolete Provisions

The obsolete procedural provisions of the existing partition statute should be eliminated. Enacted over 100 years ago, these provisions are either unnecessary or inappropriate under modern conditions or their function is served by other statutes of more general application. Below is an illustrative listing of principal provisions<sup>14</sup> of this sort that the Commission recommends be repealed:

§ 763 (partition of property that includes site of incorporated city or town; death or disability of party during action)

§ 764 (abandonment of public road on recommendation of referee and order of court)

§ 766 (effect of death or disability of party on

<sup>13</sup> Code of Civil Procedure Section 763 provides for appointment of three referees unless the parties agree to appointment of one. The Commission recommends reversal of this provision and appointment of one referee unless the parties agree to three.

<sup>14</sup> All sections are in the Code of Civil Procedure. The explanatory statement following each section number indicates that portion of the section which the Commission recommends not be continued. See the Comment to each section in the Appendix to this report for a statement of the reason for the repeal of the provisions.

- judgment; conveyance of property during pendency of action)
- § 771(3) (amount due on lien verified by affidavit)
- § 773 (proceeds paid into court if no directions given)
- § 774 (continuance for determination of claims to proceeds)
- § 776 (proceeds invested for unknown owners, infants, parties out of the state)
- § 777 (security taken in name of county clerk)
- § 778 (prejudgment estimate of value of tenancy)
- § 789 (security taken in name of county clerk)
- § 790 (agreement of parties to portions; receipt)
- § 791 (duties of county clerk making investments)
- § 793 (share of infant paid to guardian)
- § 794 (share of insane person paid to guardian)
- § 798 (reimbursement in same kind of money)
- § 800 (persons qualified to make title report)

## SALE PROCEDURES

### Terms of Sale

The existing partition statute lacks procedural detail concerning partition sale procedure. For example, the conduct of public and private sales is not fully prescribed, nor are procedures provided for sale of personal property. The Commission recommends that necessary detail be supplied, either by reference to procedural provisions governing execution sales or by adaptation, where appropriate, of provisions governing probate sales.

The court should also be given flexibility to determine sales procedures and terms of sale for particular properties. The court should have available all tools helpful in obtaining the maximum sale price for the property, including use of brokers, minimum bids, and additional notice by advertising in regional or national publications.



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## Confirmation of Sale

The Commission was specifically directed by the Legislature to study not only whether partition procedure generally should be revised, but also whether the provisions of the Code of Civil Procedure relating to the confirmation of partition sales and the provisions of the Probate Code relating to the confirmation of sales of real property of estates of deceased persons should be made uniform.<sup>15</sup>

While the probate confirmation provisions and the partition confirmation provisions differ in many matters of detail, there are three important distinctions:

(1) Private sales in probate must be for at least 90 percent of the appraised value of the property;<sup>16</sup> there is no such requirement in partition sales.<sup>17</sup>

(2) In probate sales, the minimum amount of an increased offer in court is 10 percent of the first \$10,000 and five percent of amounts in excess of \$10,000;<sup>18</sup> partition sales require an increased offer of a full 10 percent in excess of the amount named in the return.<sup>19</sup>

(3) The amount of increased offers in probate sales are determined on a gross basis without regard to agents' commissions,<sup>20</sup> and the court allows, fixes, divides, and limits the commissions;<sup>21</sup> the partition statute contains no such provisions.

The probate 90-percent minimum bid requirement is inappropriate in partition sales. Unlike probate, in which an appraisal required for other purposes is normally available, an appraisal is rarely required in partition. A 90-percent minimum bid requirement would impose added expense and delay in every partition sale without real advantage. The Commission recommends, however, that the court be given discretion to prescribe a minimum bid requirement in appropriate cases,<sup>22</sup> and that the court continue to be

<sup>15</sup> Cal. Stats. 1959, Res. Ch. 218.

<sup>16</sup> Prob. Code § 784.

<sup>17</sup> But see Code Civ. Proc. § 784 (court may vacate sale if sum bid is "disproportionate" to value).

<sup>18</sup> Prob. Code § 785.

<sup>19</sup> Code Civ. Proc. § 784.

<sup>20</sup> Prob. Code § 785.

<sup>21</sup> Prob. Code §§ 760, 761, 761.5.

<sup>22</sup> See discussion, *supra*, under "Terms of Sale."



authorized to set aside a sale if the price is disproportionate to value.<sup>23</sup>

The probate increased offer requirement—10 percent of the first \$10,000 and five percent of amounts in excess thereof—is advantageous in partition sales. The lower probate formula facilitates the making of an increased offer where the amounts involved are large and aids parties who may otherwise be unable to make an increased offer.

The probate requirement that the amount of an increased offer be determined on a gross basis without regard to agents' commissions should be adopted as a general rule, but should not be applied to all partition sales. Parties to the partition action frequently make increased offers directly on the property without an agent. In such cases, to determine the amount of a non-party's increased offer on a gross basis might yield a lower net on the sale as well as result in transfer of the property to an outsider. The Commission recommends that, where the parties so agree or the court so orders, if a party acting without an agent makes an increased offer, the amount of an increased offer of a non-party be determined on a net basis, taking into account agents' commissions. To fill the gap in the existing partition statute, the court should in all cases allow, fix, limit, and divide agents' commissions in the manner provided for probate sales.

## COSTS OF PARTITION

The general rule in partition is that recoverable costs include all expenditures made for the common benefit.<sup>24</sup> The Commission recommends a change in the classification of attorneys' fees as recoverable costs and proposes a method of recovery for unpaid costs.

### Attorney's Fees

Section 796 of the Code of Civil Procedure makes clear that the costs of partition include reasonable attorney's fees incurred for the common benefit in the partition action. However, where a party has prosecuted or defended a

<sup>23</sup> See Code Civ. Proc. § 784.

<sup>24</sup> See Code Civ. Proc. §§ 796, 798.



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related action for the common benefit in protecting, confirming, or perfecting title to the property, or has made a survey of the property for the common benefit, attorney's fees are not included in the costs of partition even though the fees were incurred for the common benefit.<sup>25</sup> To remedy this inconsistency, and to assure that the parties will be able to obtain adequate legal counsel when necessary, the Commission recommends that recovery of attorney's fees be authorized in both situations.

### Unpaid Costs

The costs of partition are normally paid out of the proceeds of sale of the property.<sup>26</sup> Where the property is divided, unpaid costs become a lien on the property allocated to the nonpaying parties, enforceable by execution on the property.<sup>27</sup>

This scheme for payment of the costs of partition is inadequate because it gives no assurance to third persons who have furnished services in the partition action of reasonably prompt payment or adequate security. If the action is settled after services have been rendered, no means of payment is provided; if an appeal is taken, the lien may not be enforceable; whether the lien for costs takes preference over other liens on the property is unclear; and in any case, execution on the shares of the parties is not an appealing remedy to persons who have furnished services in the expectation of prompt payment.

The Commission recommends that a lien for costs be expressly made prior to all other liens on the property, except other liens for costs in the action, and that it be made enforceable directly by foreclosure, upon a showing of good cause, before or after judgment.<sup>28</sup>

## EFFECT OF JUDGMENT

The judgment in a partition action binds, among others,

<sup>25</sup> Code Civ. Proc. § 798.

<sup>26</sup> Code Civ. Proc. § 771.

<sup>27</sup> Code Civ. Proc. § 796.

<sup>28</sup> As an added inducement to third persons whose services are necessary in the partition action, the Commission recommends that provision be made for allowing, in contracts for their services, interest in case of delay in payment.





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persons who were not parties to the action but who had unrecorded interests in the property at the time of commencement of the action.<sup>29</sup> This rule is unduly harsh and is of dubious constitutionality in cases where the unrecorded interest is actually known to the plaintiff.

Where there is an occupant on the property, or the owner of an interest in the property is actually known to the plaintiff, and such persons are not parties to the action, the Commission recommends that the judgment not affect their interests in the share of the proceeds or property allocated to the plaintiff. This rule would protect bona fide purchasers as well as the other parties to the action.

## PROPOSED LEGISLATION

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to amend Sections 1354 and 1355 of the Civil Code, to amend Section 801.13 of, to add Title 10.5 (commencing with Section 872.010) to Part 2 of, and to repeal Chapter 4 (commencing with Section 752) of Title 10 of Part 2 of the Code of Civil Procedure, and to amend Section 3965 of the Revenue and Taxation Code, relating to partition of real and personal property.

The people of the State of California do enact as follows:

## CONFORMING REVISIONS

## Civil Code § 1354 (amended)

SECTION 1. Section 1354 of the Civil Code is amended to read:

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*

<sup>29</sup> Code Civ. Proc. § 787.



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*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) .**

**SEC. 2.** Section 1355 of the Civil Code is amended to read:

**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



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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.

Comment. Section 1355 is amended to reflect the fact that



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the substance of former Code of Civil Procedure Section 752b is continued in Section 1354.

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

SEC. 3. 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)**

SEC. 4. Section 801.13 of the Code of Civil Procedure is amended to read:

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 10, 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.

**TITLE 10.5. PARTITION OF REAL  
AND PERSONAL PROPERTY**

SEC. 5. Title 10.5 (commencing with Section 872.010) is added to Part 2 of the Code of Civil Procedure, to read:

**TITLE 10.5. PARTITION OF REAL  
AND PERSONAL PROPERTY**

## 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 in this title.

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.

## § 872.020. Scope of title

872.020. This title governs actions for partition of real property and, except to the extent not 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 types of cases specifically governed by other statutes.

It should be noted that there may be provisions of this title which, although phrased in general terms, are not applicable to personal property. See, e.g., Section 873.080 (zoning requirements, subdivision map requirements, land dedication requirements, street opening and closing provisions).

**§ 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).

**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.

**§ 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 for powers that the court, to a large extent, apparently 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 (1929)), 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.



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**§ 872.130. Temporary restraining orders and injunctions**

872.130. In the conduct of the action, 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 partition 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.

**§ 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 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. See, *e.g.*, *Hunter v. Schultz*, 240 Cal. App.2d 24, 49 Cal. Rptr. 315 (1966) (equitable adjustment offsetting use value of property against expense of improvements). For a provision for payment of owelty in cases of unequal division, see Section 873.250.

**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 coowner 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 special legislation of extremely limited application and was an exception to the rule that only the holder of a substantial property interest is entitled to demand partition.

#### § 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(f). Provisions relating to the title report formerly found in Section 800 are omitted as outmoded and inappropriate under modern conditions. For allowance of cost of procuring the title report, see Section 874.010.

#### § 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



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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 seeks sale of the property, an allegation of the facts justifying such relief in ordinary and concise language.

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. For interests sufficient to maintain the action, see Section 872.210. Where the plaintiff has a lien on the property as well as an interest sufficient to maintain the action, he must allege his lien as well as his other interest.

Subdivision (c) supersedes the first portion of former Section 753. Unlike the former provision that required all interests to be set out regardless of whether the interests would be affected, subdivision (c) limits the requirement to only those interests the plaintiff reasonably believes will be materially affected by the partition action. 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. It should be noted that there may be interests of record in personal property filed to perfect a security interest under the Commercial Code.

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 where the plaintiff seeks sale. Should the plaintiff



fail to seek sale at the time of filing the complaint, he may do so thereafter by amending the complaint subject to the general rules governing amendment. See Sections 471.5, 472, and 473. The defendant may request sale by appropriate pleading in the answer. See Section 872.410.

§ 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. Where different parties are interested in real and personal property joined in the action, severance may be appropriate. See Section 1048 (severance and consolidation of issues and causes).

§ 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. The requirement of recording a lis pendens is not jurisdictional. *Rutledge v. Rutledge*, 119 Cal. App.2d 114, 120, 259 P.2d 79, 82 (1953). Failure to so file, however, may result in subsequent bona



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fide purchasers and encumbrancers of record at the time the judgment is recorded not being bound by the partition judgment. See Section 874.220 (persons not bound by judgment).

Subdivision (b) is new. The duty under subdivision (b) is upon the person seeking to join additional 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 important 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.

## 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 872.230(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(a) (2) (requiring the summons to contain the names of the parties to the action).

Subdivision (b) makes clear that, where unknown parties (Section 872.550) or heirs (Section 872.530(b)) are involved, service on such parties must be by publication. This continues in part the first sentence of former Section 757. 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, such order shall be subject to the following conditions:

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

(c) The publication shall describe the property that is the subject of the action. In addition to particularly describing the property, the publication shall describe the property by giving its street address, if any, or other common designation, if any; but, if a legal description of the property is given, the validity of the publication shall not be affected by the fact that the street address or other common designation recited is erroneous or that the street address or other common designation is omitted.

**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 provision in the last sentence of former Section 757; the language concerning the street address or other common designation is drawn from Section 692 (execution). See also Civil Code § 2924f (sale under deed of trust). Where personal property is involved, an appropriate manner of special service may be ordered. See Section 413.30.

**§ 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).



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## 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.

(c) Where the defendant seeks sale of the property, an allegation of the facts justifying such relief in ordinary and concise language.

Comment. Section 872.410 continues portions of former Section 758; subdivision (c) is new. 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 now contained 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. Where the defendant has or claims a lien on the property, his answer shall set forth the date and character of the lien and the amount remaining due thereon.

Comment. Section 872.420 continues a portion of former Section 758. The provision for waiver for failure to disclose additional security formerly found in Section 758 is omitted because it was unduly harsh. It should be noted that nothing in Section 872.420 precludes the defendant from alleging such additional costs, fees, and expenses related to the lien as he may be entitled to in addition to the amount remaining due on the lien itself.

## Article 4. Parties

## § 872.510. Joinder of defendants

872.510. The plaintiff shall join as defendants in the action all persons having or claiming interests of record or actually known to the plaintiff as to which partition is sought.



**Comment.** Section 872.510 supersedes former Section 754 (no person having a lien or "conveyance" need be made a party unless of record). Under Section 872.510, only persons having interests as to which partition is sought need be joined. This provision is elaborated in the succeeding sections of this article. It should be noted that "interest" includes liens and that joinder of additional parties may be necessary under Section 389 (mandatory joinder).

For the effect of failure to join a recorded interest, see Section 874.220; for the effect of failure to join interests actually known to the plaintiff, see Section 874.230.

**§ 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, 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 ownership or the share or quantity of the interest of a person described in Section 872.510 is unknown, uncertain, or contingent, the plaintiff shall so state in the complaint. 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 are 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.



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## § 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) Where it is stated in the affidavit that such person is dead, 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.



**§ 872.550. Joinder of "all persons unknown"**

872.550. Where partition is sought as to all interests in the property, the plaintiff may 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 Sections 872.320 and 872.330. 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. See Section 872.410 (answer).

**§ 872.620. Ascertainment of state of title**

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, where a sale of the premises was necessary, that "the title must be ascertained by proof to the satisfaction of the court." Section 872.620 expands this requirement to any case, sale, division, or appraisal 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



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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.

(b) The court may appoint a referee to ascertain the facts necessary for the determination 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. The provision for ascertainment of other security is omitted. See former Section 772 and Comment thereto.

§ 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.

Article 2. Determination of Right  
to Partition

§ 872.710. Court determination of right to partition

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 barred by a valid waiver.

(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 charges, expense of ordinary or extraordinary repairs, character of the property and change in the character of the property since creation of the interests, circumstances under which the interests were created and change in the circumstances since creation of the interests, and all other factors that would be considered by a court of equity having in mind the intent of the creator of the successive interests and the interests and needs of the successive owners.

Comment. Subdivision (a) of Section 872.710 continues in substance the portion of former Section 763 which provided 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 § 1354 (limitations on partition of interests in condominium property).

Subdivision (b) is based on existing case law. See generally discussion in 3 B. Witkin, *Summary of California Law*, Real Property § 227 (8th ed. 1973). Subdivision (b) does not determine whether a purported waiver of the right to partition is valid but only that a valid waiver is a sufficient defense to the right of partition. The validity of a waiver is determined by case law.

Subdivision (c) is new. It is designed to give the court fairly broad discretion in the case of successive interests.

#### § 872.720. Interlocutory judgment

872.720. (a) 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.

(b) If the court determines that it is impracticable or highly inconvenient to make a single interlocutory judgment that determines, in the first instance, the interests of all the parties in the property, the court may first ascertain the interests of the original concurrent or successive owners and thereupon make an interlocutory



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judgment as if such persons were the sole parties in interest and the only parties to the action. 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.** Subdivision (a) of 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." Subdivision (b) 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. Court order of division

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. See former Sections 763, 752 (real property), 752a (personal property). In an appropriate case, the court may order partition by sale (Section 872.820) or appraisal (Chapter 7 (commencing with Section 873.910)).

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.

#### § 872.820. Court order of sale

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; in addition, partition by appraisal may be available under Chapter 7 (commencing with Section 873.910).

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. See former Sections 763, 752 (real property), 752a (personal property). The reference to a referee for determination whether partition by sale would be more equitable may include a further request for determination whether public or private sale would be more appropriate. See Section 873.520. 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 which permitted sale where the site of an incorporated town or city was included within the exterior boundaries of the property has not been continued because it is obsolete.

#### § 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, in its discretion, 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



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further action by the court pursuant to Section 873.840 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 concerning referee

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 provide for payment of the referee's 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.

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. See Section 874.010 and Comment thereto (costs incurred in

partition action).

Subdivision (b) (4), *permitting* the court to fix the date of commencement of the lien of the referee (see Section 874.120), 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 the court to receive and pass upon the account and final report of the referee and thereafter to discharge the referee. This applies particularly in, but not limited to, sales transactions. is

Subdivision (b) (6) restates 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.

#### § 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.

#### § 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 as a matter of course.

#### § 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 all parties have consented.

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



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**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.

**§ 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 former or present partner or employee of the judge.
- (c) A relative within the third degree of the judge or the judge's spouse or the spouse of such a relative.
- (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 acts necessary to exercise the authority conferred 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.

**§ 873.070. Petition for instructions**

873.070. The referee or any party may, on noticed motion, petition the court for instructions concerning the referee's duties under this title.

**Comment.** Section 873.070 is new. It is intended to enable the referee and parties expeditiously to resolve any administrative problems that arise in the execution of the referee's duties.

**§ 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 report and similar





requirements.

(c) Subdivision and parcel map requirements.

(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.

#### § 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) Upon confirmation of the referee's report by the court, subject to any necessary action by the appropriate public entities:

(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.



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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.

## 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. See Section 874.120 (lien for costs).

Former Sections 764 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 to approve contracts for services and with the corresponding duty to provide adequate lien protection for persons who render such services. Surveying services, for example, 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.

Similarly, 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. For the court's authority to fix agents' commissions on a sale, see Section 873.745.

**§ 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 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).

**§ 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 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



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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.

§ 873.160. Referee not liable on contracts

873.160. The referee is not personally liable on contracts made, or for expenses incurred, except as such liability is expressly assumed by the referee 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 (lien for costs).

## 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.

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). See also Section 872.720 (interlocutory judgment).

§ 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 improvements made by that party or that party's predecessor in interest. 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. This codifies the common law doctrine. See, e.g., *Seale v. Soto*, 35 Cal. 102 (1868). In the case

of sale rather than division of the property, California case law applies a comparable rule. See, e.g., *Ventra v. Tiscornia*, 23 Cal. App. 598, 138 P. 954 (1913); *Mercola v. Chester*, 97 Cal. App.2d 140, 217 P.2d 32 (1950).

#### § 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, the purchaser's heirs or assigns, or such other action shall be 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. The provisions of this section apply only to transfers made prior to commencement of the action.

#### § 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. Owelty

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 to correct 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 the minor's interest will be promoted thereby.

**Comment.** Section 873.250 continues the substance of the first sentence of former Section 792. The bar on requiring owelty



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of a minor applies to imposition of a lien on the share of the minor as well as to direct payment. The provision in this section for owelty 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 given priority over other interests of parties in payment of the proceeds. 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." See 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.

**§ 873.280. Referee's report of division**

873.280. (a) The referee shall file with the court a report of the proceedings and give written notice of the filing of such report 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 the referee 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 opening and closing public and private 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 873.250) and as to 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. Hearing on 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 or modify the report and enter judgment accordingly, or it may 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 873.290 continues the substance of the last sentence of former Section 765. See 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 second sentence 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



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**§ 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 either 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 the referee's report.

Comment. Section 873.520 continues a portion of the first sentence of former Section 775, but makes clear that there is no preference for either public or private sale. The reference to a referee for determination whether public or private sale would be more beneficial may be combined with a reference to determine whether partition by sale is more equitable than partition by division. See Section 872.820 and Comment thereto.

**§ 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 unknown owners are made parties unless a guardian ad litem has been appointed for them. On the other hand, the





consent of persons named as parties who are not served and who have not appeared is unnecessary 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. See 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, rejection of 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 has not 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. See Section 873.630.

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

(e) Escrow and title insurance expenses.

(f) Agents' commissions. See Sections 873.740 and 873.745 (permitting the court to make applicable to the confirmation hearing a modified "gross overbidding" procedure and to fix, divide, and limit agents' commissions).

(g) Procedure as to increased offers at court confirmation. See Section 873.740.

(h) Sale of items of personal property individually, in a single



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lot, or in several lots. See Section 873.620.

§ 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 real and personal property are sold as a unit, it is subject to a combined offer or "one bid." See 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 term. 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. See Section 873.810.

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

**§ 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.

(d) Where the court orders a new sale of property pursuant to Section 873.730 or Section 873.740, notice of sale shall be as provided in this section.

**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. For the requirement found in the execution provisions (Section 692) that notice be given to the debtor, subdivision (a) substitutes 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.

Subdivision (d) makes clear that, if at the confirmation hearing the court orders a new sale, full notice of the new sale must be given. This continues a provision of former Section 784.



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## § 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 place of 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 the referee's 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. See Section 873.610 and Comment thereto (court prescribes principal terms, including liens to which the sale is subject).

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. For a comparable provision, see 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 and will not prejudice the rights of other interested persons. See Section 873.730(b).

## § 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 result in loss or expense if 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 is 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.



**§ 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. See Section 694.

**§ 873.680. Conduct of private sale**

873.680. (a) A 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 private sale in the manner required in private sales of real property of estates of decedents. Section 873.680 incorporates 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

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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 and may participate.

### 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, in addition to such other information as may be appropriate, 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 opening and closing public and private 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).

#### § 873.720. Motion to confirm or set aside sale

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 not less than 10 days' notice of motion to:

- (1) The purchaser if the purchaser is not the moving party; and
- (2) All other parties who have appeared in the action.

Comment. Section 873.720 continues the substance of the



third sentence of former Section 784.

§ 873.730. Hearing on motion

873.730. (a) At the hearing, the court shall examine the report and witnesses in relation to the report.

(b) The court may confirm the sale notwithstanding a variance from the prescribed terms of sale if to do so will be beneficial to the parties and will not result in substantial prejudice to persons interested in the sale.

(c) The court may vacate the sale and direct that a new sale 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 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 thereof, determined after a reasonable allowance for the expenses of a new sale.

**Comment.** Section 873.730 continues the fourth sentence of former Section 784 with the exceptions noted below. Unlike the former section, subdivision (b) expressly authorizes confirmation of a sale that varies from the published terms. Subdivision (c) makes each ground for vacating a sale independently sufficient. The provision for notice of resale is found in Section 873.640. The 10-percent formula of former Section 784 is replaced by a 10-5 percent formula derived from Probate Code Section 785.

Where a credit sale is returned to the court for confirmation, the judge must determine whether the credit bidder is responsible before confirming the sale. See Section 873.740 (increased offers by "responsible" bidder). Agents' commissions on the sale, if any, are fixed by the court. See Section 873.745.



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**§ 873.740. Increased offers**

873.740. (a) If at the hearing under Section 873.730 a responsible bidder makes a written increased offer 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 thereof, the court in its discretion may do either of the following:

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

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

(b) Except as provided in subdivision (c), the amount by which an increased offer exceeds the sale price is determined on the basis of the gross amount of the increased offer including any commission on the increased offer to which an agent may be entitled.

(c) Where in advance of sale the court has so ordered or the parties have so agreed, if an increased offer is made by a party to the action who is not represented by an agent, the amount by which an increased offer of a non-party exceeds the sale price is determined on the basis of the net amount of the increased offer excluding any commission on the increased offer to which an agent may be entitled.

**Comment.** Section 873.740 supersedes the last sentence of former Section 784. The increased offer criterion of subdivision (a) is changed from the straight 10-percent formula of Section 784 to a 10-5 percent formula derived from Probate Code Section 785.

Subdivision (b) is new; the gross overbidding criterion is adopted from the Probate Code.

Subdivision (c) codifies the existing authority of the court sitting as a court of equity to accept increased offers on a "net overbid" basis. See generally *Estate of Cole*, 124 Cal. App.2d 615, 269 P.2d 73 (1954).

**§ 873.745. Agents' commissions on sale**

873.745. The amount of agents' commissions on the sale, if any, shall be fixed by the court and divided or limited in the manner provided for private sales of real property in decedents' estates.

**Comment.** Section 873.745 is new; it codifies the court's general authority to fix and, where necessary, limit and divide agents' commissions. See Section 873.110 (services of third





persons). For statutory provisions as to agents' commissions in private sales of real property in probate, see Probate Code Sections 760, 761, 761.5, and 785.

**§ 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 Section 785 and supersedes former Section 777. 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. Failure of purchaser to deliver proceeds**

873.760. If the purchaser, after the confirmation of the sale, fails to pay the sale price, the purchaser is subject to the court's jurisdiction and to further proceedings in the action. Upon such failure, a party, or the referee, may upon notice move the court to order either of the following forms of relief:

(a) Resale of the property upon notice as provided in this chapter. 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 purchaser who failed to pay.

(b) Maintenance by the referee of an action against the purchaser for the amount of the sale price. If the referee recovers judgment, the referee shall be awarded a reasonable attorney's fee against the purchaser.



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**Comment.** Section 873.760 continues the substance of the last sentence of former Section 785 with the added requirement of a court order on noticed motion of either a party or the referee and with the addition of express provisions for recovery of a reasonable attorney's fee. To facilitate recovery under this section, the defaulting purchaser remains subject to the jurisdiction of the court.

**§ 873.770. Taking setoff from party purchaser**

873.770. Where the purchaser is a party entitled to a share of the proceeds of sale, the referee may:

(a) Take the purchaser's receipt for so much of the proceeds of sale as belongs to the purchaser.

(b) Take security, or other arrangement satisfactory to the referee, for payment of amounts which are or may become due from the purchaser 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, if the referee and purchaser so agree and the court upon noticed motion determines it will not result in substantial prejudice to the parties, may make adjustments varying the terms of sale based on 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 make rulings regarding 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

##### § 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 in an institution whose accounts are 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 Sections 773 and 788. 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. See former Section 780 (requiring that the court provide for the protection of unknown parties). It should be noted that amounts invested in interest-bearing accounts under this section may exceed the amount insured by an agency of the federal government provide<sup>1</sup> that the accounts are in an institution which carries such insured accounts.

##### § 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) Payment of the expenses of sale.
- (b) Payment of the other costs of partition in whole or in part or to secure any cost of partition later allowed.
- (c) Payment of any liens of parties on the property in their order of priority except liens which under the terms of sale are to remain on the property.
- (d) Distribution of 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



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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).

**§ 873.830. Setoff in lieu of payment of estate  
for life or years**

873.830. 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 equitably 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 873.830 continues the substance of former Section 770.

**§ 873.840. Treatment of successive estates**

873.840. (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 or defeasible estate with remainder over, the court may direct that the entire proceeds of sale 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 under court supervision shall invest and reinvest the proceeds, pay the income from the investments, if any, to the life tenant or owner of the defeasible interest, and, upon termination of the life or defeasible estate, deliver or pay the corpus of the trust estate to the remainderman. 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 873.840 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 prejudgment estimate of the value of a tenancy for life or years which the owner may "consent" to accept is not continued because it is inappropriate under modern conditions.

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 Giacometti*, 192 Cal. App.2d 244, 13 Cal. Rptr. 245 (1961) (imposition of trust mandatory). Investment under this subdivision may be by purchase of other property for use of the parties where appropriate. It should be noted that, in the case of successive life or defeasible estates, the court may be required to formulate a more complex formula for investment and distribution than is specified in the statute.

For an exception to the requirements of Section 873.840, see Section 872.840 (disposition of property subject to an express trust).

## CHAPTER 7. PARTITION BY APPRAISAL

### § 873.910. Agreement of parties to partition by appraisal

873.910. When the interests of all parties are undisputed or have been adjudicated, the parties may agree upon a partition by appraisal pursuant to this chapter.

Comment. Section 873.910 and the other sections in this chapter are new. The purpose of this chapter is to provide an alternative method of partition for coowners who agree to use this method. A guardian ad litem may be appointed to represent contingent interests and may agree to the procedure under this



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chapter on their behalf. A statutory procedure based upon appraisal by a referee, with court supervision, may in some situations serve the interests of parties who find themselves in disagreement since an acquisition method does not involve the same tax consequences as a partition sale. See 3 J. Rabkin & M. Johnson, *Federal Income, Gift and Estate Taxation* § 43.01 (1975).

Although 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 (see Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure).

**§ 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 and their interests.
- (c) The names of the parties who are willing to acquire the interests.
- (d) The name or names of a person or persons to whose appointment as referee or referees the parties consent.
- (e) The date or dates as of which the interests to be acquired are to be appraised.
- (f) Other terms mutually agreed upon which may include, but are not limited to, provisions relating 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 procedure 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.

**§ 873.930. Court approval of agreement**

873.930. If the court determines that the agreement complies with Section 873.920 and that the terms and conditions are equitable, 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.

§ 873.940. Appointment of referee; referee's report

873.940. The court shall appoint one referee or, if provided in the agreement, 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.

Comment. Section 873.940 is new. It follows other partition procedures with respect to the referee's report.

§ 873.950. Motion to confirm, modify, or set aside report

873.950. Any party to the agreement or the referee, upon 10 days' notice to the other parties to the agreement and to the referee if the referee is not the moving party, may move the court to confirm, modify, or set aside the report.

Comment. Section 873.950 is new. It follows other partition procedures with respect to a motion for hearing on the referee's report.

§ 873.960. Hearing on referee's report

873.960. At the hearing, the court shall examine the report and witnesses. If the court finds that the proceedings have been regularly conducted, that transfer of title to the interests may regularly be made, and that no facts appear which would make such transfer inequitable, it shall confirm the report and order the interests transferred to the acquiring parties in proportion to their respective interests, or in such other proportion as is set out in the agreement. The court order is contingent 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 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 873.960 is new. It vests the court with equitable power to refuse to permit consummation of the transaction where it would be inequitable. The parties contract



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in the light of this power of the court.

§ 873.970. Effect of agreement

873.970. The agreement binds the heirs, executors, administrators, successors, and assigns of the parties. In the event of default, the aggrieved parties may specifically enforce the agreement by further proceedings in the action or may pursue any other remedy they may have at law or in equity.

**Comment.** Section 873.970 is new. Subject to the provisions of this chapter, the agreement is binding. Even though the subject of the agreement may be personal property, the agreement is specifically enforceable if the innocent party elects this remedy.

§ 873.980. Relation of agreement to other remedies

873.980. 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 873.970.

**Comment.** Section 873.980 is new. If the proceeding aborts or is not carried out, the parties are not prejudiced as to their normal rights of partition except that an innocent party may elect to proceed under the agreement pursuant to Section 873.970.

## CHAPTER 8. COSTS OF PARTITION

### Article 1. Allowance and Apportionment of Costs of Partition

§ 874.010. Costs incurred in partition action

874.010. The costs of partition include:

- (a) Reasonable attorney's fees incurred or paid by a party for the common benefit.
- (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 at the legal rate from the time of payment or, if paid before commencement of the action, from the time of commencement of the action.

(e) Other disbursements or expenses found by the court to have been incurred or paid for the common benefit.

**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 may 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. See subdivision (e). Section 874.010 is supplemented by Section 874.020 (costs incurred in related action).

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. The expenses of the referee may include attorney's fees where appropriate. See Section 873.120.

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

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

Subdivision (e) is new; it is derived from former Section 796.

#### § 874.020. Costs incurred in related action

874.020. The costs of partition include reasonable expenses, including attorney's fees, necessarily incurred by a party for the common benefit in prosecuting or defending other actions or other proceedings for the protection, confirmation, or perfection of title, setting the boundaries, or making a survey of the property, with interest thereon at the legal rate from the time of making the expenditures.

**Comment.** Section 874.020 supplements Section 874.010 (costs incurred in partition action). It is derived from 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. The exclusion of recovery of attorney's fees found in the former section is likewise eliminated.

**§ 874.030. Interest on disbursements**

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

Comment. Section 874.030 continues the substance of former Section 801.

**§ 874.040. Court apportionment of costs**

874.040. 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 874.040 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 874.040 is qualified by Section 874.050.

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. See former Section 796 (last sentence).

**§ 874.050. Apportionment involving future interests**

874.050. (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 at the legal rate, secured by a charge upon the future interest.

Comment. Section 874.050 is new. Where a share of the costs is apportioned to a future interest, the amount is discounted based on the present value of the future interest.

## 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. Lien for costs

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

(b) A lien imposed by this section has priority over any other lien on the share except those imposed under this section.

**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 such lien claimants without priority among them.

**Comment.** Section 874.130 is new. Liens imposed under this article have priority over all other liens but have no priority among themselves. The remedies provided in this section and in Section 874.140 are cumulative.



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**§ 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. See also Section 798. The remedies provided in this section and in Section 874.130 are cumulative.

**CHAPTER 9. JUDGMENT****§ 874.210. Persons bound by judgment**

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

(a) All persons known and unknown who were parties to 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 parties to 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, or if none was filed, at the time the judgment was recorded.

(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. For an exception to subdivision (c), see Section 874.230 (unrecorded interests known to plaintiff).

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

§ 874.220. Persons not bound by judgment

874.220. The judgment does not affect the interest of any person who was not a party to the action and who had an interest of record in the property or part thereof at the time the lis pendens was filed, or if none was filed, at the time the judgment was recorded.

Comment. Section 874.220 is new.

§ 874.230. Unrecorded interests known to plaintiff

874.230. Notwithstanding Section 874.210, where an occupant or other person having or claiming an unrecorded interest in the property or part thereof was not a party to the action but the occupancy reasonably should have been known or the existence or claim of the interest was actually known to the plaintiff at any time before entry of the interlocutory judgment, the judgment does not affect the interest of such occupant or other 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 372.510, making mandatory on the plaintiff the joinder of all persons "actually known" to the plaintiff having or claiming an interest in the property or part thereof as to which partition is sought.

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.



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## CONFORMING REVISION

## Revenue &amp; Taxation Code § 3965 (amended)

SEC. 6. Section 3965 of the Revenue and Taxation Code is amended to read:

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 10, 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 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 partition statute provides for appointment of a single referee. See Code Civ. Proc. § 873.010.

OPERATIVE DATE; APPLICATION  
TO PENDING ACTIONS

SEC. 7. (a) This act becomes operative January 1, 1977.

(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 applicable thereto prior to the operative date applies.

(c) Code of Civil Procedure Sections 872.210 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 applicable thereto prior to the



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operative date.

(e) If, on the operative date, securities have been taken, investments made, or funds deposited pursuant to former Code of Civil Procedure Sections 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 applicable thereto 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.



## APPENDIX

DISPOSITION OF EXISTING  
PARTITION STATUTE

Chapter 4 (commencing with Section 752) of Title 10 of Part 2 of the Code of Civil Procedure is the existing partition statute. This entire chapter, being superseded by the new partition statute, will be repealed when the new partition statute takes effect.

The text of each section of Chapter 4 is set out below. The disposition of the provisions of these sections is indicated in the Comments that follow the text of the sections.

CHAPTER 4. ACTIONS FOR THE  
PARTITION OF REAL [AND  
PERSONAL] PROPERTY

## § 752 (repealed). Real estate; right of action

752. When several 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.

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.

§ 752a (repealed). Personal property; right of action; sale; partition of real and personal property in same action

752a. When 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 can not 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 wherever applicable. Real and personal property may be partitioned in the same action.

Comment. The portion of former Section 752a that specified that the coowner 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.

§ 752b (repealed). Condominiums; right of action

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



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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 1 (commencing with Section 1350), Title 6, Part 4, Division Second of the Civil Code have been met.

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

§ 753 (repealed). Complaint; pleading interests  
of all parties; unknown parties or interests

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.

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.

§ 753.1 (repealed). Parties; persons having  
interests in oil and gas leases, unit agreements  
or pooling arrangements

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



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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 interests of such persons not made parties defendant.

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.

§ 754 (repealed). Parties; lienholders not  
of record

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.

§ 755 (repealed). Lis pendens

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.

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.

§ 756 (repealed). Summons; contents; parties  
to whom directed

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



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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.

Comment. The first portion of former Section 756 is superseded by Section 872.310; the last portion is continued in Section 872.520.

§ 757 (repealed). Summons; publication as to  
unknown parties; description of property

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.

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.

§ 758 (repealed). Effect of default; answer;  
contents

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.

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; the waiver provision, however, is omitted because it was unduly harsh.

§ 759 (repealed). Determination of rights of parties; determination of title before sale; unknown persons

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.

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.

§ 760 (repealed). Partial partition

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.

Comment. The substance of former Section 760 is continued in subdivision (b) of Section 872.720.



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§ 761 (repealed). Lienholders; joinder;  
reference to determine liens

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.

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. The provision for ascertainment of other security is omitted. See Comment to former Section 772.

§ 762 (repealed). Lienholders; notice to appear  
before referee; service of notice; report of  
referee

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.

Comment. Former Section 762 is superseded by Section 872.630, providing generally for the duties and procedure to be followed by the referee with regard to liens and providing for issuance of process in support of the referee's authority.

§ 763 (repealed). Procedure for partition or sale; representation

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



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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 shall cause to be executed by such referees a deed for such lot or subdivision in fee and in severalty 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.

**Comment.** The portion of former Section 763 providing for partition "according to the respective rights of the parties" on "requisite proofs being made" is superseded by Section 872.710. 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 of Title 10.5 of Part 2 of the Code of Civil Procedure.

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. On interpretation of these former 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).

The portion of former Section 763 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 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



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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 not continued because general provisions of law adequately cover the death or disability of a party. See, *e.g.*, Sections 385 (general provision), 669 (death after submission to trier of fact), 903 (appeal). It should also be noted that, in the case of a joint tenancy, death activates the right of survivorship.

§ 764 (repealed). Allocation according to  
rights of parties; sale of specific tract out  
of common land; allotment of improvements

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 sole, 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 cotenants 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 or in any part of the premises sought to be partitioned, and to locate the share of each cotenant, so as to embrace as far as practicable the improvements made by such cotenant 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.

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 8 3.210. The portion relating to employment of a surveyor is continued in Sections 873.110 and 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.



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## § 765 (repealed). Report of referees

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.

Comment. The first sentence of former Section 765 is continued in Section 873.280. The second sentence is continued in Section 873.290(a).

## § 766 (repealed). Report of referees;

confirmation, modification, etc.; conclusiveness of judgment; death of party; conveyance during pendency of action

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.

Comment. The first sentence of former Section 766 is superseded by Section 873.290(b). The second sentence is superseded by Section 873.290(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 873.840(b).

The paragraph of former Section 766, relating to the effect of a judgment on persons who die, is not continued because general provisions of law adequately cover the death of a party. See, e.g., Sections 385 (general provisions), 669 (death after submission to trier of fact), 903 (appeal). It should also be noted that, in the case of a joint tenancy, death activates the right of survivorship.

The last paragraph, relating to the effect of the judgment in case of a conveyance, is not continued since it duplicates the effect of its pendens provisions.

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§ 767 (repealed). Tenants for years less than  
ten unaffected by judgment

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. Former Section 767 is not continued; a tenant is affected by the partition judgment to the same extent as any other party or nonparty. See Chapter 9 (commencing with Section 874.210) of Title 10.5 of Part 2 of the Code of Civil Procedure relating to the effect of the judgment.

§ 768 (repealed). Expenses; apportionment

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.

Comment. Former Section 768 is continued in substance by Sections 873.010 (court authority concerning referee), 873.110 (services of third persons), 874.010 (costs incurred in partition action), and 874.030 (court apportionment of costs), providing for employment and equitable apportionment of the fee and expenses of the referee and surveyor.

§ 769 (repealed). Lien on undivided interest;  
charge on share assigned to obligor

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.

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



§ 770 (repealed). Estate of life or years;  
set off in portion not sold

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 873.830.

§ 771 (repealed). Sale of encumbered property;  
application of proceeds

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.

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

§ 772 (repealed). Lienholder having other  
securities

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.

Comment. Former Section 772 is not continued; the lienholder may share in the partition or proceeds regardless whether he has other security. See, *e.g.*, Section 873.820 (sale).



**§ 773 (repealed). Proceeds of sale;  
distribution**

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.

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.

**§ 774 (repealed). Proceeds of sale;  
payment into court**

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.

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

**§ 775 (repealed). Public or private sales**

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.

**Comment.** The portion of former Section 775 providing for sale at public auction or private sale if it will be beneficial to the parties is continued in Section 873.520; however, Section 873.520 makes clear that public auction is not preferred over private sale. 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.

#### § 776 (repealed). Direction of terms of credit

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.

**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.

#### § 777 (repealed). Credit sales; security for purchase money

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



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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.

Comment. The portion of former Section 777 providing for collection of the security by the referee is continued in Section 873.750. 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.

§ 778 (repealed). Sale of tenant's estate;  
right to compensation; consent

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.

Comment. Former Section 778 is not continued. The provision for a prejudgment estimate of the value of a tenancy which the owner may "consent" to accept is inappropriate under modern conditions. See Section 873.840 and Comment thereto.

§ 779 (repealed). Sale of tenant's estate;  
compensation fixed by court

779. If such consent 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.

Comment. The substance of former Section 779 is continued in Section 873.840(a).

**§ 780 (repealed). Unknown tenants; protection**

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. See also Section 873.840.

**§ 781 (repealed). Contingent future rights or estates; life estates; security value; jurisdiction for settlement of accounts**

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.

**Comment.** The first portion of former Section 781, relating to protection of the rights of persons having vested or contingent future interests, is continued in Section 873.840(b). The last portion of former Section 781, relating to treatment of a life estate, is superseded by Section 873.840(c).



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§ 782 (repealed). Sales; knowledge of terms;  
separate sales of farms or lots

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.

§ 783 (repealed). Persons ineligible to  
purchase

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.

Comment. Former Section 783 is superseded by Section 873.690.

§ 784 (repealed). Report of sale; hearing;  
confirmation or vacation of sale; direction for  
new sale; sale on offer made to court

784. After completing a sale of property, or any part thereof ordered to be sold, the referees must report the same to the court, with a description of the different parcels of land sold to each purchaser; the name of the purchaser; the price paid or secured; the terms and conditions of the sale, and the securities, if any, taken. The report must be filed in the office of the clerk of the county in which the action is brought. Thereafter any purchaser, 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 referee,



the  
expenses  
of

the sum bid disproportionate to the value, and if it appears that a sum exceeding such bid at least 10 per cent, exclusive of a new sale, may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given, and the sale conducted in all respects as if no previous sale had taken place. If an offer of 10 per cent 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.

**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. The portion relating to notice of resale is continued in Section 873.640(d). The portion relating to increased offers is superseded by Section 873.740.

**§ 785 (repealed). Order to execute conveyances and take securities; disposition of proceeds; resale on purchaser's default; actions against defaulting purchaser**

**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.

**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 remedies for refusal of the purchaser to deliver the proceeds is



continued in Section 873.760.

**§ 786 (repealed). Payment where party entitled to share or incumbrancer becomes purchaser**

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.

**§ 787 (repealed). Conveyances; recording; effect**

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.

**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.

**§ 788 (repealed). Proceeds belonging to unknown owner or nonresident; investment**

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.

**Comment.** Former Section 788 is superseded by Section 873.810.



§ 789 (repealed). Security taken and investments  
made in name of county clerk

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.

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.

§ 790 (repealed). Security taken in names of  
parties when interests ascertained

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.

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

§ 791 (repealed). Securities or investments; duties  
of clerk

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.



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**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.

**§ 792 (repealed). Unequal partition; compensation**

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.

**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.

**§ 793 (repealed). Share of infant; payment to guardian; security**

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.

**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.

**§ 794 (repealed). Share of insane person or incompetent; payment to guardian; undertaking**

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.

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.

§ 796 (repealed). Costs; counsel fees;  
apportionment; lien

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.

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 874.040. 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 874.040.

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§ 798 (repealed). Litigation for benefit  
of property; apportionment of expenses

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 setting 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.

Comment. The first portion of former Section 798 relating to the expenses for the common benefit of prosecuting or defending related actions is continued in Section 874.020 except the portion excluding counsel fees which is not continued. 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 (lien for costs). See Sections 874.130 (enforcement of lien), and 874.140 (execution to enforce judgment).

§ 799 (repealed). Procurement of abstract of title,  
title insurance, certificate of title, litigation  
report or guarantee; inspection and use; expense

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.

**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).

§ 800 (repealed). Abstract of title; making;  
verification; corrections

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.

**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.

§ 801 (repealed). Disbursements under direction  
of court; interest allowance

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.

**Comment.** The substance of former Section 801 is continued in Section 874.030.