#23 6/19/75

First Supplement to Memorandum 75-43

Subject: Study 23 - Partition of Real and Personal Property

Attached are comments of the Commission's consultant, Mr. Elmore, with respect to a few matters raised in Memorandum 75-43.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

First Supplement to
Memorandum 75-43

EXHIBIT I

6/18/75

Subject: Study 23 - Partition of Real and Personal Property

Memorandum of Garrett Elmore, consultant, on changes in text (A.B. 1671)

Reference is made to Staff Memorandum dated 6/12/75; also to earlier material: Consultant's Memorandum dated 4/22/75; Staff Memorandum dated 4/28/75; Minutes, May 8 and 9, 1975.

Summary of views herein expressed: (1) As to the minor or smoothing out changes in the Staff Memorandum of 6/12/75, on which the writer's name appears, the writer concurs therein, except for further thoughts on one item, discussed below; (2) As to three items, discussed below, the writer respectfully disagrees with the treatment proposed, and submits alternative proposals.

I. Minor Changes. The one item is subdivision (f) in the Operative Date section (Staff Memorandum, p. 10). By background, the Commission determined to delete present provisions that make the partition remedy available, in substance, to persons who have acquired tax liens or titles as against persons who have improvement liens or titles, and vice versa, which are the so-called "lien on a parity" provisions.

Normally, the statute of limitations does not run on the right to judicial partition. Persons who have acquired the liens or titles described above presently can avail themselves of the general partition law at any time, and thus obtain a judgment which will terminate the "co-ownership."

If it can be determined that there is a substitute remedy, so that this "co-ownership" can be "unlocked," subdivision (f) is probably unnecessary.

The writer does not know of any research on this point, and has the impression that there may be no substitute remedy available. For this reason, subdivision (f), which provides a "grace period" of six months to bring actions under the present law, was proposed by the writer. Though the change in form is procedural, if a substitute remedy is not available, fairness, and perhaps constitutional requirements, require a "grace period," on analogy to statutes shortening the time to assert a substantive cause of action.

On further review, if subdivision (f) is to be retained, the writer favors a longer "grace period," for example, until December 31, 1978 ("to and including December 31, 1977")-one year.

II. Major Changes. The writer respectfully disagrees with the present proposed treatment in the following sections:

A. § 872.210; also § 872.710. (Who May Partition).

The concern of the writer is, first, permitting partition of community property is socially and economically undesirable and is not compelled by the 1974 community property amendments; further, that the change will lead to multiple litigation and "gamesmanship" as between the partition action and a domestic relations proceeding, and, second, in other areas, the two sections cited will lead to uncertainty and confusion, with dubious social and economic results. That this concern was not earlier expressed was due to the writer's attention to other points.

In brief, it is submitted the disadvantages of providing for partition of community property, on balance, substantially outweigh the occasional case where the spouses do not wish to have a marital proceeding. The Legislature, in 1974, did not extend the partition remedy as part of the equal rights amendments. Conceivably, it may wish to do so. It is submitted the change should be made only after a separate study. Among the disadvantages are the following:
1 - The wife often is not in a position to employ counsel and defend a partition action. If the matter is handled in a marital proceeding, the court may make

an award for attorney's fees. Further, under C.C. 4800, the division may be handled inexpensively by decree of court. 2 - Unless existing law is also to be changed as to homesteads (no partition during marriage), the extension to community property will be only partially effective, because either spouse may declare a homestead on community property. A change in the law as to partition of a homestead encounters probems of social policy; it permits termination of the homestead during marriage by the act of one of the spouses, contrary to the intent of the homestead sections in the Civil Code. See Walton v. Walton, 59 Cal. App.2d 26. 3 - A serious objection lies in the curtailment of the court's jurisdiction in a marital proceeding. As illustrated by the homestead cases cited in the Staff Memorandum, a partition action and a marital proceeding may be pending concurrently; in fact, one may be a "defensive" measure against the other. Multiplicity of action is not in the interest of the parties or the courts. Often, the principal asset of the spouses is the family home. The marital court now has problems under the "equal division" provisions of the Family Law Act. See Juick v. Juick, 1971, 21 Cal. App.3d 421. These problems are compounded if such property is being partitioned.

The words "concurrent interests" are not defined. Hence, a question exists as to whether the intent is to permit the general partition law to be availed of in partnership and joint venture dissolution proceedings, in corporate dissolution proceedings, as a matter of right, to cite two examples. The better view, in the writer's opinion, is to permit adoption of the partition procedure where appropriate in such situations. A partition action is not appropriate when there are unsecured creditors' claims to be paid, in a dissolution proceeding. There is some authority for use of the partition remedy in a winding up or breach of partnership proceeding. See, e.g., Hooper v. Barranti, 81 Cal. App.2d 570 (no debts); Larson v. Thoresen, 36 Cal.2d 66.

Moreover, it still may be a matter for the courts to determine whether the "lien on a parity" repeal controls, as against the contention that the co-owners have "concurrent interests."

Suggested Provisions:

Amend § 872.210(b) to read: (b) An owner of an estate of inheritance, an estate for life, or an estate for years in real property , when the property or estate is owned as a joint tenant or tenant in common .

Add new subdivision (c) to read: (c) An owner of a life estate subject to a remainder, whether absolute or contingent and an owner of a remainder, whether absolute or contingent, subject to a life estate.

Add new Section 872.215, to read: 872.215. A partition action may be commenced and maintained, or the procedure of this title adopted, whenever concurrent interests in property exist and the procedure of this title is deemed suitable in the circumstances, but this section does not permit such an action, or the adoption of such procedure, except by consent of the parties, for the partition of community property, including community property upon which a homestead has been declared, during the marriage of the parties.

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Finally, in explanation, it appears, upon further study, that present wording of the two sections, based in part, upon the writer's draft, inadvertently could be used to break a long term lease. There is no definition of "successive interests." It seems advisable to revert to wording concepts in present Section 752, which refer specifically to the life tenant-remainderman situation, without adopting the present limited construction thereof, as found in the Akagi case.

B. § 872.850 (new). "Interests" Versus "Property" Approach.

The writer has respectfully disagreed with the "interests" approach. In brief, this approach is not in present California law, and, in the writer's

opinion, it would be prejudicial to the owner whose interests are to be excluded by partition. In case of division, with 4 co-owners, equality of division is more difficult to perceive, because there is not the same comparison between 4 one-quarter parts and a three-quarter-one-quarter part. In case of sale, it seems to the writer that the consequences would be disastrous as to the co-owner being excluded. The new purchaser, at any time, could be subjected to a new partition action by the "majority." Where the property is sold, this danger does not exist. Generally, as to sale, see Schwartz v. Shapiro, 229 Cal. App.2d 238 (sale is a sale of the entire interest and not of individual interests of owners). As to division, it is the present framework that liens for partition costs are upon "shares." Should not these sections be amended to provide for a joint and several liability, or for proration, when there is no partition as between 3 of 4 co-owners?

If the co-owners desiring to remain use the new procedure for acquiring one co-owner's interest (assuming the co-owner consents) or if they successfully bid in the property on sale, they can thus retain the property and avoid, in appropriate cases, a capital gains tax.

Suggested Provisions:

Re-write proposed § 872.850, to read:

872.850. When the court has ordered that the property be sold, the court, with the written consent of the parties and upon a finding that the sale of an interest only would probably result in a fair and adequate price and would not be inequitable, may order the sale of the interest or interests of a party or parties, in lieu of the sale of the property.

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Add a new section under "Division" to read:

_____. When the court has ordered that the property be divided, the court, with the written consent of the parties and upon a finding that

the procedure would permit an adequate basis for review of the division and would not be inequitable, may order that no partition be made as between certain parties and, as to them, the property shall remain undivided. The costs of partition shall be a joint and several obligation, and shall be a lien upon the property interest, of the parties whose interests remain undivided.

C. §§ 872.860, 872.150. (Conformance to Law).

The writer respectfully repeats prior objections to § 872.860 which is proposed to be retained, but with the additional provisions of § 872.150 (new) re court modification, and re-wording that eliminates reference to the referee.

In brief, it is submitted: 1 - The present form may well be construed as an expression of legislative policy, even though the words "where applicable" are used; 2 - Many phases of the laws cited are uncertain; 3 - The provisions are of a catch-all nature and appear to contemplate that every division or sale will result in a developed subdivision, whereas such is not the case; 4 - The mere mention of these provisions in the context indicated ("shall comply") singles out this judicial sale from all other judicial sales (execution, mortgage foreclosure, trust deed foreclosure, receiver's sales, sales in equity proceedings) and in this single instance makes the court an "enforcement" agency. More importantly, the text does not spell out whether the transaction is voidable by persons other than the purchaser, nor within what time a proceeding for modification must be brought. Also involved, in the writer's opinion, is the effect on ability of a purchaser to obtain title insurance. Finally, § 872.150, as proposed, does not seem sufficient, or workable. How does it modify the purchaser's rights under the Subdivision Map Act, if it does? Is the court to make a new contract for the parties if violations appear?

It is understood that the argument in favor of leaving in these provisions is to "call attention" to them. It is submitted that the provisions go beyond this, and that it is difficult to draft any type of legislation designed to "call attention" to other laws, without in some form affecting such other laws.

Without having great familiarity with the laws cited, the writer notes that BP § 8762.5 as to the recording of surveys is one means of enforcement. More importantly, the Subdivision Map Act, effective March 1, 1975, contains a variety of provisions as to the effect of contracts and deeds in violation, denial of permits, notice of violation, request of owner for determination as to compliance. See Govt. Code §§ 66499.21 et seq. Also, as noted in a prior memorandum, there is case law to the effect that the parties may not use a partition action to circumvent subdivision regulations. See Pratt v. Adams, 229 Cal. App.2d 602.

Suggested Provisions:

If the purpose is to "call attention" to the laws cited (which may or may not apply in particular cases), it seems this might be handled as follows:

1 - Add a section under the "Division" provisions, to read: ____ In determining the allocations, the referee shall take into consideration restrictions or possible restrictions on the use of the property under laws relating to zoning, environmental protection, subdivisions, and building ordinances.

2 - Add a section under the "Sale" provisions, to read: ____ The terms of sale may include provisions as to the obligation of the seller or purchaser, or both, to make reports and obtain permits under laws relating to environmental protection and subdivisions and may provide for release of the purchaser and cancellation of the transaction if required permits or other action is not obtained.

The foregoing wording is to express the concept.

In addition, the Comment, under 1 above might state in effect, that the partion procedure may not be used to circumvent subdivision laws, citing the Pratt cases.

The writer believes that, on balance, the answer lies in "education" and not in statutory provisions, and that the effect of provisions in this Act will be to indirectly effect other laws, which stand on their own.

 /s/ Garrett Elmore