MAR 5 1956

Memorandum No. 6

Subject: Study No. 7: Retention of Venue for Convenience of Witnesses

This study will be on the agenda of the meeting of March 12. Enclosed herewith are the following items relevant to it:

1. The staff report as revised;
2. A proposed Report and Recommendation of the Commission to the Legislature; and
3. The minutes of the meeting of the Southern Committee on February 10, which report the discussions and the recommendations of the committee concerning this study.

If the commission should decide to accept the staff report and proposed Report and Recommendation, it will be appropriate to consider whether these should be sent immediately to interested parties throughout the State for consideration and comment. Such parties might include: (1) the State Bar; (2) the Judicial Council; (3) various local bar associations; (4) various law professors in the State; (5) the members of the Senate and Assembly Judiciary Committees; (6) a representative group of judges; and (7) others.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

REPORT AND RECOMMENDATION OF LAW REVISION COMMISSION TO LEGISLATURE RELATING TO RETENTION OF VENUE IN AN IMPROPER COURT FOR CONVENIENCE OF WITNESSES

By Resolution Chapter 207 of the Statutes of 1955 the Law Revision Commission was authorized and directed to make a study to determine whether, when a defendant moves to change the place of trial of an action, the plaintiff should in all cases be permitted to oppose the motion on the ground of convenience of witnesses. A report of the commission's staff on this matter is printed as Appendix ____ to this report. On the basis of its consideration of the staff report and of its own deliberations the commission has reached the conclusions and determined upon the recommendations set forth below:

CONCLUSIONS OF COMMISSION

The present California law provides that when a plaintiff files an action in a court other than a "proper" court, i.e., other than a court designated by Code of Civil Procedure Sections 392 to 395.1, and the defendant moves to transfer the case to a proper court, a counter motion to retain the case where filed for the convenience of witnesses may be considered only if the defendant has answered.

A defendant will, therefore, ordinarily file a motion to change venue before answering, with the result that the action must be transferred to the "proper" court. The plaintiff may then, in an appropriate case, have the case transferred back to the original court for convenience of witnesses on a motion made pursuant to Code of Civil Procedure Section 397(3) after the defendant has answered.

This cumbersome transfer-retransfer procedure is based on two rules adopted by the California courts in the last century:

1. That a motion to retain or change venue for convenience of witnesses cannot be determined prior to answer because the court cannot then know what the issues at the trial will be and whose testimony will, therefore, be required; and
2. That a motion to change venue to the proper court and a counter motion to retain venue for convenience of witnesses cannot be continued for hearing and decision until the answer is filed because the defendant has a right to have all further proceedings in the action take place in the proper court and, if his motion were postponed until answer, it would be necessary for the improper court to entertain further proceedings, such as hearing defendant's demurrer.

These two rules were codified by an amendment of Code of Civil Procedure Section 396b in 1933.

The commission believes that it is not necessary in every case to have an answer on file in order to decide a motion to retain venue for the convenience of witnesses. Under a procedure suggested below, it should be possible in at least some cases to obtain sufficient information to enable the court to decide the motion prior to answer from affidavits and through interrogation of counsel by the court at the hearing on the motion.

The commission believes, on the other hand, that in some cases a motion to retain venue for the convenience of witnesses cannot be properly decided even though an answer is on file because the issues to be tried will still be obscure due to the fact that the answer consists of denials stated in general

terms and generally stated affirmative defenses. It is desirable, therefore, to make the procedure flexible enough to permit the motion to be continued in such cases until the issues have been sufficiently clarified by proceedings subsequent to answer and prior to trial to enable the court to decide what the issues and who the witnesses at the trial will probably be.

The commission believes that there is no need for rigid adherence to the rule that when a motion to change venue is filed the court cannot entertain any other matter in the cause until the motion has been determined. The court where an action is filed should be authorized to continue a motion to change venue when a counter motion to retain venue for convenience of witnesses has also been filed until both motions have become ripe for decision, by the filing of the answer or otherwise, and to entertain and decide other matters in the cause until such time.

The commission believes that, in order to facilitate the early decision of motions to retain venue for the convenience of witnesses, the courts should be authorized, in deciding such motions, to consider affidavits of the parties as to what issues will be pressed at the trial and who the necessary witnesses will be, as well as pleadings and other papers on file.

If Section 396b, which governs motions to retain venue for the convenience of witnesses is revised, parallel revisions should logically be made in Code of Civil Procedure Section 397(3) which governs the procedure on motions to change venue for the convenience of witnesses.

RECOMMENDATIONS OF COMMISSION

The Code of Civil Procedure should be revised to provide a more flexible procedure on motions to retain and to change venue for the convenience

of witnesses. To this end the Law Revision Commission respectfully recommends to the Legislature that it:

1. Abolish the requirement that the answer be on file before such a motion can be decided;
2. Authorize the courts to decide such a motion when it comes on for hearing or to continue it until such other time prior to trial, whether before, when, or after the answer is filed, as it becomes ripe for decision;
3. Authorize the courts to entertain and decide other matters in the cause while a motion to change venue and a counter motion to retain venue for the convenience of witnesses which have been continued are pending; and
4. Authorize the courts, in deciding such a motion, to consider affidavits of the parties as to what issues will be pressed at the trial and who the necessary witnesses will be, as well as pleadings and other papers on file.

PROPOSED REVISION OF CODE OF CIVIL PROCEDURE

The commission has drafted proposed revisions of Code of Civil Procedure Sections 396b and 397, the enactment of which will achieve the several changes which it recommends. The following shows the changes from the present law which the enactment of these proposed revisions would involve:

§ 396b. Except as otherwise provided in Section 396a, if an action or proceeding is commenced in a court having jurisdiction of the subject-matter thereof, other than the court designated as the proper court for the trial thereof, under the provisions of this title, the action may, notwithstanding, be tried in the court where commenced, unless the defendant, at the time he answers or demurs, files with the clerk, or with the judge if there be no clerk, an affidavit of merits and notice of motion for an order transferring

the action or proceeding to the proper court, together with proof of service, upon the adverse party, of a copy of such papers. Upon the hearing of such motion the court shall, if it appears that the action or proceeding was not commenced in the proper court, order the same transferred to the proper court; provided, however, that the court in an action for divorce or separate maintenance, may, prior to the determination of such motion, consider and determine motions for allowance of temporary alimony, support of children, counsel fees and costs, and make all necessary and proper orders in connection therewith; provided further, that in any case, ~~if an answer be filed,~~ the court may consider opposition to the motion, if any, and may retain the action in the county where commenced if it appears that the convenience of the witnesses or the ends of justice will thereby be promoted.

When a motion for transfer to the proper court and opposition thereto on the ground of convenience of witnesses comes on for hearing the court shall either decide the motion if it is able to determine what the issues and who the witnesses at the trial will be or continue the motion until such time prior to trial, whether before, when, or after the answer is filed, as it is able to make such determination, and the court may entertain any proceeding in the cause prior to the determination of the motion.

In deciding a motion for transfer to the proper court and opposition thereto on the ground of convenience of witnesses the court may consider affidavits of the parties concerning issues to be pressed at the trial and necessary witnesses, as well as pleadings and other papers on file.

§ 397. The court may, on motion, change the place of trial in the following cases:

1. When the court designated in the complaint is not the proper court;

2. When there is reason to believe that an impartial trial can not be had therein;

3. When the convenience of witnesses and the ends of justice would be promoted by the change; . When a motion for transfer on the ground of convenience of witnesses comes on for hearing the court shall either decide the motion if it is able to determine what the issues and who the witnesses at the trial will be or continue the motion until such time prior to trial, whether before, when, or after the answer is filed, as it is able to make such determination. In deciding the motion the court may consider affidavits of the parties concerning issues to be pressed at the trial and necessary witnesses, as well as pleadings and other papers on file.

4. When from any cause there is no judge of the court qualified to act;

5. When an action for divorce has been filed in the county in which the plaintiff has been a resident for three months next preceding the commencement of the action, and the defendant at the time of the commencement of the action is a resident of another county in this State, to the county of the defendant's residence, when the ends of justice would be promoted by the change. If a motion to change the place of trial shall be made under this subsection, the court may, prior to the determination of such motion, consider and determine motions for allowance of temporary alimony, support of children, temporary restraining orders, counsel fees and costs, and make all necessary and proper orders in connection therewith.

STUDY NO. 7 -- RETENTION OF VENUE

The committee considered the revised draft of the staff report on this study and decided: (1) that the separate document entitled "Author's Analysis of Policy Questions Presented" should be inserted in the report immediately preceding the portion entitled "Methods of Changing the Law to Avoid the Transfer-Retransfer Procedure"; (2) that the commission should decide whether the portion of the report beginning on page 5, last paragraph ("It is difficult to determine, etc.") and continuing to the bottom of page 6, and the portion of the "Author's Analysis" beginning on page 28, last paragraph ("Furthermore, the general principle which underlies, etc.") and continuing to the end of the "Author's Analysis" should be retained; and (3) that as thus changed the staff report should be accepted for publication by the commission.

The committee also considered a revised draft of a Report and Recommendation of the Law Revision Commission to the Legislature which had been prepared by the staff. The committee made several changes in the revised draft and in the proposed revision of Code of Civil Procedure Sections 396b and 397. As thus amended the Report and Recommendation was approved for recommendation to the commission.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

Grant v. McAuliffe
41 C.2d 859, 264 P.2d 944 (1953)

TRAYNOR, J. - On December 17, 1949, plaintiffs W. R. Grant and R. M. Manchester were riding west on United States Highway 66 in an automobile owned and driven by plaintiff D. O. Jensen. Defendant's decedent, W. W. Pullen, was driving his automobile east on the same highway. The two automobiles collided at a point approximately 15 miles east of Flagstaff, Arizona. Jensen's automobile was badly damaged, and Jensen, Grant and Manchester suffered personal injuries. Nineteen days later, on January 5, 1950, Pullen died as a result of injuries received in the collision. Defendant McAuliff was appointed administrator of his estate and letters testamentary were issued by the Superior Court of Plumas County. All three plaintiffs, as well as Pullen, were residents of California at the time of the collision. After the appointment of defendant, each plaintiff presented his claim for damages. Defendant rejected all three claims, and on December 14, 1950, each plaintiff filed an action against the estate of Pullen to recover damages for the injuries caused by the alleged negligence of the decedent. Defendant filed a general demurrer and a motion to abate each of the complaints. The trial court entered an order granting the motion in each case. Each plaintiff has appealed. The appeals are based on the same ground and have therefore been consolidated.

The basic question is whether plaintiffs' causes of action against Pullen survived his death and are maintainable against his estate. The statutes of this state provide that causes of action for negligent torts survive the death of the tort feasor and can be maintained against the administrator or executor of his estate.

(Civ. Code, § 956; Code Civ. Proc., § 385; Prob. Code, §§ 573, 574.) Defendant contends, however, that the survival of a cause of action is a matter of substantive law, and that the courts of this state must apply the law of Arizona governing survival of causes of action. There is no provision for survival of causes of action in the statutes of Arizona, although there is a provision that in the event of the death of a party to a pending proceeding his personal representative can be substituted as a party to the action (Arizona Code, 1939, § 21-534), if the cause of action survives. (Arizona Code, 1939, § 21-530.) The Supreme Court of Arizona has held that if a tort action has not been commenced before the death of the tort feasor a plea in abatement must be sustained. (McClure v. Johnson, 50 Ariz. 76, 82 [69 P.2d 573]. See, also McLellan v. Automobile Ins. Co. of Hartford, Conn., 80 F.2d 344.)

Thus, the answer to the question whether the causes of action against Pullen survived and are maintainable against his estate depends on whether Arizona or California law applies. In actions on torts occurring abroad, the courts of this state determine the substantive matters inherent in the cause of action by adopting as their own the law of the place where the tortious acts occurred, unless it is contrary to the public policy of this state. (Loranger v. Nadeau, 215 Cal. 362 [10 P.2d 63, 84 A.L.R. 1264].) "[N]o court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A

foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs." (Learned Hand, J., in Guiness v. Miller, 291 F. 769, 770.) But the forum does not adopt as its own the procedural law of the place where the tortious acts occur. It must, therefore, be determined whether survival of causes of action is procedural or substantive for conflict of laws purposes.

This question is one of first impression in this state. The precedents in other jurisdictions are conflicting. In many cases it has been held that the survival of a cause of action is a matter of substance and that the law of the place where the tortious acts occurred must be applied to determine the question. . . . The Restatement of the Conflict of Laws, section 390, is in accord. It should be noted, however, that the majority of the foregoing cases were decided after drafts of the Restatement were first circulated in 1929. Before that time, it appears that the weight of authority was that survival of causes of action is procedural and governed by the domestic law of the forum. . . . The survival statutes do not create a new cause of action, as do the wrongful death statutes. . . . They merely prevent the abatement of the cause of action of the injured person, and provide for its enforcement by or against the personal representative of the deceased. They are analogous to statutes of limitation, which are procedural for conflict of laws purposes and are governed by the domestic law of the forum. (Biewend v. Biewend, 17 Cal.2d 108, 114 [109 P.2d 701, 132 A.L.R. 1264].) Thus, a cause of action arising in another state, by the laws of which an action cannot be maintained thereon because of lapse of time, can be enforced in California by a citizen of this state, if

he has held the cause of action from the time it accrued. (Code Civ. Proc., § 361; Stewart v. Spaulding, 72 Cal. 264, 266 [13 P.661]. See, also, Biewend v. Biewend, supra; and Western Coal & Mining Co. v. Jones, 27 Cal.2d 819, 828 [167 P. 719, 164 A.L.R. 685].)

Defendant contends, however, that the characterization of survival of causes of action as substantive or procedural is foreclosed by Cort v. Steen, 36 Cal.2d 437, 442 [224 P.2d 723], where it was held that the California survival statutes were substantive and therefore did not apply retroactively. The problem in the present proceeding, however, is not whether the survival statutes apply retroactively, but whether they are substantive or procedural for purposes of conflict of laws. "'Substance' and 'procedure'...are not legal concepts of invariable content" . . . and a statute or other rule of law will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made.

Defendant also contends that a distinction must be drawn between survival of causes of action and revival of actions, and that the former are substantive but the latter procedural. On the basis of this distinction, defendant concludes that many of the cases cited above as holding that survival is procedural and is governed by the domestic law of the forum do not support this position, since they involved problems of "revival" rather than "survival." The distinction urged by defendant is not a valid one. Most of the statutes involved in the cases cited provided for the "revival" of a pending proceeding by or against the personal representative of a party thereto should he die while the action is still

pending. But in most "revival" statutes, substitution of a personal representative in place of a deceased party is expressly conditioned on the survival of the cause of action itself.[1] If the cause of action dies with the tort feasor, a pending proceeding must be abated. A personal representative cannot be substituted in the place of a deceased party unless the cause of action is still subsisting. In cases where this substitution has occurred, the courts have looked to the domestic law of the forum to determine whether the cause of action survives as well as to determine whether the personal representative can be substituted as a party to the action. . . . Defendant's contention would require the courts to look to their local statutes to determine "revival" and to the law of the place where the tort occurred to determine "survival," but we have found no case in which this procedure was followed.

Since we find no compelling weight of authority for either alternative, we are free to make a choice on the merits. We have concluded that survival of causes of action should be governed by the law of the forum. Survival is not an essential part of the cause of action itself but relates to the procedures available for the enforcement of the legal claim for damages. Basically the question is one of the administration of decedants' estates, which

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[1] For example, Code. Civ. Proc., § 385: "An action or proceeding does not abate by the death, or any disability of a party if the cause of action survive or continue." (Emphasis added.) See also 28 U.S.C.A., Rule 25(a)(1) [leg. hist., U.S.Rev.Stat., § 955 (1874); Judiciary Act of 1789, § 31]:"If a party dies and the claim is not thereby extinguished, the court. . . may order substitution . . ." of the personal representative. (Emphasis added.) The exact language of Rule 25(a)(1) is repeated in Arizona Code, 1939, § 21-530.

is a purely local proceeding. The problem here is whether the causes of action that these plaintiffs had against Pullen before his death survive as liabilities of his estate. Section 573 of the Probate Code provides that "all actions founded . . . upon any liability for physical injury, death or injury to property, may be maintained by or against executors and administrators in all cases in which the cause of action . . . is one which would not abate upon the death of their respective testators of intestates. . . ." Civil Code, section 956, provides that "A thing in action arising out of a wrong which results in physical injury to the person . . . shall not abate by reason of the death of the wrongdoer. . . ," and causes of action for damage to property are maintainable against executors and administrators under section 574 of the Probate Code. . . . Decedent's estate is located in this state, and letters of administration were issued to defendant by the courts of this state. The responsibilities of defendant, as administrator of Pullen's estate, for injuries inflicted by Pullen before his death are governed by the laws of this state. This approach has been followed in a number of well-reasoned cases. . . . It retains control of the administration of estates by the local Legislature, and avoids the problems involved in determining the administrator's amenability to suit under the laws of other states. The common law doctrine actio personalis moritur cum persona had its origin in a penal concept of tort liability. (See Prosser, Law of Torts 950-951; Pollock, The Law of Torts (10th ed.) 64, 68.) Today, tort liabilities of the sort involved in these actions are regarded as compensatory. When, as in the present case, all of the parties were residents of this state, and the estate of the deceased tort feasor

is being administered in this state, plaintiffs' right to prosecute their causes of action is governed by the laws of this state relating to administration of estates.

The orders granting defendant's motions to abate are reversed, and the causes remanded for further proceedings.

Gibson, C. J., Shenk, J., and Carter, J., concurred.

SCHAUER, J. - I dissent. In Cort v. Steen (1950), 36 Cal. 2d 437, 442 [224 P.2d 723], this court held that under the doctrine of nonsurvivability the abatement of an action by the death of the injured person through the tort feasor's act or otherwise, or by the death of the tort feasor, abates the wrong as well; that the effect of a survival statute is to create a right or cause of action rather than to either continue an existing right or revive or extend a remedy theretofore accrued for the redress of an existing wrong; and that consequently a survival statute enacted after death of the tort feasor did not apply to the tort or cause of action involved. And more recently, in Estate of Arbulich (1953), ante, pp. 86, 88-89 [257 P.2d 433], we recognized the rule that the burden of proof provisions of the Probate Code sections (259 et seq.) dealing with reciprocal inheritance rights are not merely procedural in nature, but rather, are substantive statutes regulating succession, and that consequently such rights are to be determined by the law as it existed on the date of decedent's death. (See, also, Estate of Giordano (1948), 85 Cal.App.2d 588, 592, 594 [193 P.2d 771].)

Irreconcilably inconsistent with the cases cited in the preceding paragraph, the majority now hold that "Survival is not an

essential part of the cause of action itself but relates to the procedures available for the enforcement of the legal claim for damages. Basically the question is one of the administration of decedents' estates, which is a purely local proceeding." If the above stated holding is to prevail, then for the sake of the law's integrity and clarity, and in fairness to lower courts and to counsel, the cited cases should be expressly overruled. But even more regrettable than the failure to either follow or unequivocally overrule the cited cases is the character of the "rule" which is now promulgated: the majority assert that henceforth "a statute or other rule of law will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made," thus suggesting that the court will no longer be bound to consistent enforcement or uniform application of "a statute or other rule of law" but will instead apply one "rule" or another as the untrammeled whimsy of the majority may from time to time dictate, "according to the nature of the problem" as they view it in a given case. This concept of the majority strikes deeply at what has been our proud boast that ours was a government of laws rather than of men.

Although any administration of an estate in the courts of this state is local in a procedural sense, the rights and claims both in favor of and against such an estate are substantive in nature, and vest irrevocably at the date of death. . . . Since this court has clearly held that a right or cause of action created by a survival statute is likewise substantive, rather than procedural, we should hold, if we would follow the law, that the trial court properly granted defendant's motions to abate.

Spence, J., concurred.

EDMONDS, J. - I concur in the conclusion that the order granting the defendant's motion to abate should be affirmed.

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Office of the Executive Vice President

CALIFORNIA LAND TITLE ASSOCIATION

433 South Spring Street - Los Angeles 13

March 5, 1956

Mr. John R. McDonough
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California

Dear John:

I will list the questions as presented in your letter, together with my answers.

(1) Do title companies now pass title where an action has been brought against the heirs of a person rather than having a special administrator appointed?

The general practice is to require the appointment of an administrator. Title based upon an action against the heirs of a person would not be passed.

One problem, as you suggest, is whether or not a decree obtained against all the "heirs" was in fact based upon service upon the heirs. Even though the decree quieting title found that all of the heirs were named and properly served as defendants, such a decree would not be an effective adjudication of this fact. It would, therefore, leave a break in the record chain of title. This defective record title could be the basis for a claim that the title was unmarketable where, for example, the property was subsequently the subject of a contract of sale and the vendee was opposing specific performance. (As you may know, both our lenders' and owners' policies insure marketability.)

(2) Have the title companies had occasion to consider the acceptability of titles based on proceedings under Revenue and Taxation Code Sections 3950 - 3963 and, if so, what position have they taken?

These sections were enacted as part of an extensive legislative program adopted from 1943 to 1949, designed to strengthen tax titles to facilitate the sale of tax deeded lands. This legislation includes curative acts validating procedural defects, conclusive presumptions, and short statutes of limitation. In passing quiet title actions under these sections of the Revenue and Taxation Code the title company has the protection of the intervening tax sale, which in

turn is protected by the legislation referred to. As a practical matter, therefore, a title company need not feel, if it passes a quiet title decree under these sections, that it is placing complete reliance in the validity of the procedure authorized by the statute.

The title companies have taken the position that a company should, if it is unable to insure a tax title because of some defect or irregularity, insist upon a quiet title decree and, for this purpose and to this extent, the validity of such a decree is recognized.

(3) What are your views as to the constitutionality and desirability of a statute similar to Revenue and Taxation Code Sections 3950 - 3963 for general use?

To some extent, these sections provide for a quiet title action comparable to that which could be obtained by combining an action under C.C.P. Sections 738 and 749 et seq. Under Section 749, unknown persons may be served by publication. This is considered both desirable and constitutional, and decrees entered thereunder are regarded as valid by the title companies.

In addition, of course, the Revenue and Taxation Code permits suit against heirs and devisees. It does not appear that under R & T Sec. 3952 the heirs and devisees may be sued as such unless their identity is unknown, and cannot be ascertained after the use of "due diligence" by plaintiff (Sec. 3960). Even this procedure, therefore, would not be of benefit to plaintiff in most cases.

As to those occasions where, after diligent search, the identity of the heirs or devisees cannot be ascertained, there seems to be considerable doubt as to the constitutionality of service by publication. In upholding such service in an "all persons" action, the State Supreme Court emphasized that such service must be reasonable and necessary. Title & Document Restoration Co. v Kerrigan, 150 Cal. 289, involving the McEnerney Act, "All substituted service must rest upon the ground of necessity . . ." (page 312).

It is not clear that it is "necessary" to permit substituted service upon unknown heirs and devisees. One seeking to quiet title against the heirs and devisees of a deceased person can have an administrator appointed, and quiet title against the administrator, obtaining a judgment that will be binding on the heirs and devisees.

(4) If such a statute were enacted for general use, would title companies pass titles based upon it?

As has been suggested in the answer to (3), to a large extent existing law provides for an action comparable to that provided for in the Revenue and Taxation Code sections. As to the matter which is peculiar to those sections, permitting constructive service upon unknown heirs and devisees, I do not believe title companies would be willing to rely upon decrees so obtained until the validity of the legislation has been upheld by higher courts.

I have discussed this matter with attorneys for title companies who have had many occasions to discuss proposed quiet title actions with attorneys for prospective plaintiffs. They do not report that the bar generally regards the prevailing title company requirements as being excessively burdensome. One of the title company attorneys whose experience reaches back to 1930 pointed out that quiet title actions are far less common now than they were twenty years ago, a change which he attributes to the fact that tax titles are supported by so much legislation that they may often be insured without a quiet title action.

Very truly yours,

/s/ Richard E. Tuttle,
Richard E. Tuttle,
Executive Vice-President

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January 11, 1956

Mr. Richard Tuttle
California Land Title Association
433 So. Spring Street
Los Angeles 13, California

Dear Dick:

The Law Revision Commission has a problem with which we hope you can help us.

One of the topics currently under study by the Commission is a study to determine whether a statute should be enacted to make it unnecessary to have an administrator appointed in a quiet title action involving property to which some claim was made by a person since deceased. (See page 30 of our 1955 Report) Our research to date indicates that it is not necessary to have a special administrator appointed in such a case; the plaintiff may, alternatively, serve all of the heirs of the deceased person. We do not know, however, whether title companies decline to pass title in the event that the latter procedure is used because of the danger that some heir may have been overlooked.

In any event, either serving all of the heirs or appointing a special administrator involves considerable effort and expense, often disproportionate to the importance of the claim involved. One question which the Commission is considering is whether a more expeditious procedure than either of these can be devised. We note that Revenue and Taxation Code §§ 3950 - 3963 provide for quieting title, in the circumstances to which they apply, against a claim held by a person since deceased by naming as parties to the action "the heirs of" that person. The Commission has some doubt concerning the constitutionality of this procedure as applied to such heirs. It also has some doubt as to whether a title company will pass a title based on this procedure.

The questions on which I would appreciate your views, then, are the following:

(1) Do title companies now pass title where an action has been brought against the heirs of a person rather than having a special administrator appointed?

(2) Have the title companies had occasion to consider the acceptability of titles based on proceedings under Revenue and Taxation Code Sections 3950 - 3963 and, if so, what position have they taken?

(3) What is your view as to the constitutionality and desirability of a statute similar to Revenue and Taxation Code Sections 3950 - 3963 for general use?

(4) Do you think title companies would pass titles based on proceedings under such a statute?

I would appreciate your views on these questions and any comments you may have concerning the advisability of the study or the direction which it should take.

Sincerely,

John R. McDonough, Jr.
Executive Secretary

JRM:fp

cc: Mr. Thomas E. Stanton, Jr.
Mr. John Harold Swan
Mr. Stanford C. Shaw
Mr. John D. Babbage
Mr. Joseph A. Ball