February 19, 1957

Memorandum No. 8

Subject: Study No. 14 - Appointment of Administrator in a Quiet Title Action.

The "Memorandum to State Bar Committee on Cooperation with the Law Revision Commission" attached recounts the history of the Commission's consideration of this matter to the date of its decision, made at its meeting of March 12, 1956, to ask the State Bar for its view as to whether a study on this matter is justified.

The Commission thereafter received a report of the Committee on Administration of Justice dated September 6, 1956, which contained the following statement:

> "The Southern Section of this Committee, acting under information that this item did not appear to involve legislation proposed by the Commission for the 1957 session, referred the matter to one of its members, Mr. Lawrence L. Otis, and has not had an opportunity, as of this date, to go into the problem.
>
> "The Northern Section reviewed the matter and concluded that it could not answer the specific questions asked, without, in substance, making the complete study referred to in question (e). On general consideration, however, the Northern Section expressed doubt whether the studies outlined would be warranted."

Subsequently, the Commission received another communication from Mr. Hayes, dated January 11, 1957 which contained the following statement:

> "As you heretofore have been advised, the Board of Governors had before it at its December 1956 meeting, the December 11, 1956 Interim Report of the Committee on Administration of Justice.
>
> "Among the matters covered in that report were the following:
>
> * * *

"2. The quiet title study of the Law Revision Commission.

"With respect to these matters, the formal action of the Board was as follows:

"Approves the recommendation of the committee that there be transmitted to the California Law Revision Commission for its information a report on the subject prepared by a member of the committee and that the Commission be advised of the view of the committee that the proposal does not appear to warrant the broad study proposed."

* * *

"As to the quiet title study: The enclosed report, also prepared by Mr. Otis, was approved by the Southern Section of the committee and at the general meeting of the committee, in December 1956, it recommended that it be forwarded to the Law Revision Commission for its information in supplementation of the committee's previous report on the matter."

A copy of Mr. Otis' memorandum, referred to by Mr. Hayes, is attached.

The views of the State Bar having been received, the matter is once again before the Commission for action. The questions for decision are:

1. Should the study be carried forward or abandoned?

2. If the study is abandoned, what arrangement should be made with Professor Maxwell?

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

att.

Memorandum to State Bar Committee on Cooperation with the Law Revision Commission.

Subject: Appointment of administrator in quiet title action.

In August 1954, the Law Revision Commission received a letter from a member of the bar suggesting that "some sort of statute be enacted rendering it unnecessary in quiet title suits as against deceased persons to go through the procedure of causing administrators to be appointed and named as defendants."

On the basis of a preliminary study of this matter the Commission requested and was granted authority by the Legislature to make "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." This study was described in the Commission's 1955 Report to the Legislature as follows:

> "It is ordinarily necessary to join in a quiet title action each person whom the plaintiff wishes to be bound by the judgment in the action, however tenuous his claim to an interest in the property may be. When one of the persons required to be joined has died, the question arises whether the suit can be brought against his heirs or whether it can only be brought against a representative of the decedent's estate. If the latter is the case and no such representative has been appointed, it is necessary to have an administrator specially appointed for the purpose of being made a party to the action.

"The law of this State is not entirely clear on the matter. Section 573 of the Probate Code authorizes the executor or administrator to both maintain and defend quiet title actions. The heirs are expressly authorized only to maintain such actions. This would suggest that a quiet title action can be brought only against the executor or administrator. But the cases suggest that such actions can probably be brought against the heirs as well. Both the representative of the estate and the heirs are proper parties, but neither appears to be a necessary party.

"Because the appointment of a representative to defend a quiet title action is both time-consuming and expensive, a member of the bar has suggested that a statute should be enacted making it unnecessary to do so."

Professor Richard C. Maxwell of the School of Law of the University of California, Los Angeles, was engaged as a research consultant to make a study of this matter for the Commission. After preliminary consideration of the matter he reported that he doubted the wisdom of going forward with this study. He reported that it is clear that one wishing to quiet title against a claim owned by a person since deceased may either sue his administrator under Probate Code § 573 or bring the action against his heirs and that in the latter case the "unknown owner statute, Code of Civil Procedure, title X, Chapter 4" could be utilized. He thought that in many cases suing a special or general administrator would be the least expensive and most expeditious procedure and that Probate Code § 573 is, therefore, a bo rather than a problem to a quiet title action plaintiff.

These views were communicated to the member of the bar who had originally suggested the study. He said that what he had had in mind in making his suggestion was that a procedure like that provided in Sections 3950 to 3972 of the Revenue and Taxation Code should be make available for general use. These sections provide for an action to determine adverse claims to or clouds upon tax-sold or tax-deeded property purchased from the State. The immediately relevant sections are the following:

> § 3952. Same: Unknown Claimants: Heirs and devisees of dead claimant: Claimant believed to be dead. The complaint may further include as defendants persons unknown to plaintiff who claim any right, interest, lien or claim on the land or cloud upon the title of plaintiff thereto arising prior to the date of the deed from the State. In any case in which any person who appears to have had an interest in said land or any claim or cloud upon the title of plaintiff thereto is known to be dead, the heirs and devisees of such person may be sued as "the heirs and devisees" of said person, naming him or if such person is believed to be dead and such belief is alleged in the complaint on information and belief then the heirs and devisees of such person may also be sued as "the heirs and devisees" of said person, naming him, provided that such person is also named as a defendant.
>
> § 3957. Summons: Issuance: Contents. Within one year after the filing of the complaint, a summons must be issued which shall contain the matters required by Section 407 of the Code of Civil Procedure, and in addition, a description of the property and a statement of the object of the action. In the summons, the unknown defendants shall be designated as they are in the complaint.
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> § 3958. Same: Posting copy. Within 30 days after the issuance of the summons, the plaintiff shall post, or cause to be posted, a copy thereof in a conspicuous place on the property.
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> § 3959. Same: Service: Personal: Publication and mailing. All known defendants residing in the State of California, whose place of residence is known to the plaintiff, shall be served personally. All other defendants shall be served personally or by publication and mailing, as provided in Sections 412 and 413 of the Code of Civil Procedure, except that the publication need be made only once each week for a period of not less than four weeks, instead of two months.

§ 3960. Affidavit: Showing diligence in identifying and locating unknown defendants and heirs and devisees. In addition to the matters required to be set forth in the affidavit by the plaintiff pursuant to Sections 412 and 413 of the Code of Civil Procedure, it must appear by the affidavit that the plaintiff used due diligence to ascertain the identify and residence of the unknown defendants and to ascertain the identity and residence of any persons sued as heirs and devisees.

§ 3961. Rights of unknown defendants: When service by publication deemed complete: Conclusiveness of judgment. All unknown defendants served by publication shall have the same rights as are provided by law for other defendants upon whom personal service or service by publication is made. The action shall proceed against the unknown defendants in the same manner as against the other defendants who are served personally or by publication. Regardless of any legal disability, any unknown defendant, who has been served, and anyone claiming under him, who has or claims to have any right, title, estate, lien or interest in the property, or cloud upon the title thereto, or who owns or claims to own an interest in a special assessment lien adverse to plaintiff at the time of the commencement of the action, shall be concluded by a judgment in the action as if the action were brought against and personal service made upon that person by his or her name. Service shall be deemed complete upon the completion of the publication.

§ 3968. Same: Conclusiveness of decree. The decree, after it has become final, is conclusive against all the persons named in the complaint who have been served and all unknown persons and the heirs and devisees of any named defendant served as in this chapter provided.

The Law Revision Commission considered the views of Professor Maxwell and of the originator of the suggestion on which this study was based at its meeting of January 6 and 7, 1956. It then directed its Executive Secretary to ascertain the views of Mr. Richard E. Tuttle, Executive Vice President of the California Land Title Association, on this matter. The Executive Secretary wrote Mr. Tuttle asking four questions relating to this matter. Mr. Tuttle's reply was as follows:

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.

The Law Revision Commission considered Mr. Tuttle's letter at its meeting of March 12, 1956. It then decided, in view of Mr. Tuttle's statement that the bar generally does not apparently regard prevailing title company requirements as being excessively burdensome, to seek the views of the State Bar as to whether any change in existing law pertaining to quieting title against a claim held by a person since deceased is necessary or desirable.

Questions Presented

The Commission would appreciate the views of the State Bar with respect to the following questions:

1. Do Sections 738, 749, 749.1 and 750 of the Code of Civil Procedure cover all cases in which it may be desired to quiet title against a claim held by a person since deceased without appointing an administrator, authorizing service by publication on both known and unknown heirs in lieu thereof? If they do, the enactment of new provisions for general use similar to the provisions of the Revenue and Taxation Code quoted above would appear to be unnecessary because the procedure provided for therein is quite similar to that provided for in these sections of the Code of Civil Procedure. If they do not - and considerable question on this point arises upon a reading of these sections of the Code of Civil Procedure - it would appear to be necessary under existing law to appoint an administrator in at least some cases in order to quiet title to a claim held by a person since deceased.

2. If there are now some situations in which it is necessary to appoint an administrator in a quiet title action, should a statute similar

to the Revenue and Taxation Code sections quoted above be enacted for general use? Is there any good reason for requiring the appointment of an administrator in a quiet title action - i.e., does this usually provide substantial protection to the interests which he represents or is it largely a matter of form?

3. Is Mr. Tuttle's suggestion that any statute purporting to authorize substituted service on the heirs and devisees of a deceased person would be unconstitutional because the alternative of appointing an administrator makes such procedure unnecessary well taken? If it is, this would appear to make both the Revenue and Taxation Code provisions quoted above and Sections 749, 749.1 and 750 of the Code of Civil Procedure unconstitutional insofar as they authorize such procedure.

4. Is the bar in general satisfied with the existing situation in respect of quieting title against a claim owned by a person since deceased?

5. Would a study be desirable which would (a) fully explore the procedures available to one desiring to quiet title against a claim which could have been asserted by a decedent, (b) evaluate the adequacy and efficiency of those procedures, and (c) suggest legislation to fill in such gaps as might be found to exist?

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Extract from Memorandum

From Law Revision Commission to the State Bar

Questions Presented

The Commission would appreciate the views of the State Bar with respect to the following questions:

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2. If there are now some situations in which it is necessary to appoint an administrator in a quiet title action, should a statute similar to the Revenue and Taxation Code sections quoted above be enacted for general use? Is there any good reason for requiring the appointment of an administrator in a quiet title action - i.e., does this usually provide substantial protection to the interests which he represents or is it largely a matter of form?

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Agenda Item 38

Answers to Questions Submitted by

Law Revision Commission

on

Appointment of Administrator in Quiet Title Action

1. Sections 738, 749, 749.1 and 750 C.C.P. do not cover all cases where it may be desired to quiet title against (or otherwise dispose of) a claim held by a person since deceased.

Section 738 must be excluded because a decree thereunder can only be entered against named defendants.

The proposal can only be applied to "all persons" actions, e.g., C.C.P. secs. 749, 749.1, sec. 751.01 (McEnerney Act), 753 (partition) and 1245.3 (eminent domain - which already so provides). The designation of "heirs and devisees" would not embrace those claiming under the decedent as creditors or those who might later take by purchase from the representative in due course of administration. The very practical objection to the proposal is the danger that no "due diligence" will be exercised in attempting to ascertain the identity and address of such heirs and devisees.

2. In the case, other than "all persons" actions, where it is necessary to appoint a representative, the substitution of provisions comparable to the Revenue and Taxation Code Sections would not be consistent with due process, not being the procedure best suited to the circumstances (see Covey v. Somers, 100 L. Ed. (adv. Rep. 1956) 570; Mullane v. Central Etc. Bank, 94 L. Ed. 865).

There is good reason for appointing an administrator, (a) being necessary, except in "all persons" actions, and (b) being the procedure, in "all persons" actions, best designed to protect the interests of all persons claiming through or under the decedent. It is not merely a matter of form, it being the duty of the administrator to appear and defend, if there is any defense. He has as good an opportunity to ascertain the merits of the case and, at least, has knowledge of the action, which the interests he represents are unlikely to receive by the usual publication of summons merely directed to "the heirs and devisees" of the decedent.

3. Except in "all persons" actions, the proposal would probably be held unconstitutional under the cases cited. We know of no other type of action where the proposed procedure has been sanctioned, in California or elsewhere.

The apposite provisions in the Revenue and Taxation Code have not been passed upon, and the action authorized thereby is now seldom employed. Changing C.C.P. sections 749 and 749.1 in the manner proposed would cast doubt upon the sufficiency of their present provisions upon the strength of which (although never directly passed upon by any court) a great many titles have been perfected. It is only where the owner of a claim or cloud of record is known to be dead that the appointment of a representative is considered necessary.

4. No general dissatisfaction with the existing procedure is known or believed to exist.

5. No further study of the proposal is considered desirable.