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Improving California's Quiet Title Laws

By MICHAEL A. WILLEMSSEN*

THE removal of a defect in title is often an unfortunate prerequisite to the sale or development of property. Various and assorted remedies existed at common law and in equity that depending on the particular facts of the case, could be used to clear title.¹ These remedies, however, have been largely supplanted by the statutory action to quiet title.² California, for reasons unclear to me, provides two alternative quiet title remedies. An action to quiet title against the specific claim of a known claimant must be brought under California Code of Civil Procedure section 738.³ This section does not operate in rem, and as a result has little advantage over the traditional remedies,⁴ and probably none over a modern action for declaratory relief.⁵ The usefulness of a section 738 action is that for little additional expense, it can be combined with an action in rem under Code of Civil Procedure sections 749 or 749.1,⁶

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1. The principal remedy at common law was the action of ejectment, which, however, was not available to a plaintiff in undisturbed possession. Comment, *Enhancing the Marketability of Land: The Suit to Quiet Title*, 68 YALE L.J. 1245, 1266 (1959) [hereinafter cited as *Quiet Title*]. Equity offered the bill to remove a cloud on title, the bill of peace, and the bill quia timet. Finnegan, *Problems and Procedures in Quiet Title Actions*, 26 NEB. L. REV. 485, 486-88 (1947); 38 S. CAL. L. REV. 608, 609 (1965); 68 YALE L.J. 1266-67 (1959). These equitable procedures were not available to a plaintiff out of possession, presumably because ejectment was an adequate remedy at law.

2. For a review of the quiet title legislation of other states, see *Quiet Title*, *supra* note 1, at 1245.

3. CAL. CODE CIV. PROC. § 738 provides: "An action may be brought by any person against another who claims an estate or interest in real or personal property, adverse to him, for the purpose of determining such adverse claim"

4. It does, however, avoid the equity requirement that the plaintiff be in possession of the land. *Thomson v. Thomson*, 7 Cal. 2d 671, 676; 62 P.2d 358, 360 (1936).

5. Cf. *Ephraim v. Metropolitan Trust Co.*, 28 Cal. 2d 824, 172 P.2d 501 (1946).

6. CAL. CODE CIV. PROC. § 749 provides: "An action may be brought, either as a separate action, or joined with an action under Section 738 of this code, to determine the adverse claims to and clouds upon title to real property by a person who, by himself or by himself and his predecessors in interest, has been in the actual, exclusive and adverse possession of such property continuously for 20 years prior to the filing

thus obtaining a combined decree that quiets title against all persons, known and unknown, and against all defects.⁷

of the complaint, claiming to own the same in fee against the whole world, and who, by himself or by himself and his predecessors in interest, has paid all taxes of every kind levied or assessed against the property and which were payable during the period of five years continuously next preceding the filing of the complaint. Said action shall be commenced by the filing of a verified complaint averring the matters above set forth.

"Defendants. The said complaint may include as defendants in such action, in addition to such persons as appear of record to have, all other persons who are known to the plaintiff to have, some claim or cloud on the real property described in the complaint adverse to plaintiff's ownership, and other persons unknown claiming any right, title, estate, interest or lien in such real property, or cloud upon the title of plaintiff thereto, and the plaintiff may describe such unknown defendants in the complaint as follows: 'also all other persons unknown, claiming any right, title, estate, lien or interest in the real property described in the complaint adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto.'

"Unknown claimants. If the person or all persons having a claim or cloud on the title to said real property are unknown to plaintiff, the latter may describe them in the complaint as 'all persons unknown, claiming any right, title, estate, lien or interest in the real property described in the complaint adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto.'

"Defendant claiming through plaintiff. If any known defendant named in the complaint is a person claiming any right, title, estate, lien or interest in and to the real property under the plaintiff or any predecessor in interest of the plaintiff, which claim has arisen, or has been created by the plaintiff or any predecessor in interest of the plaintiff, within 20 years prior to the filing of the complaint, then as to any such defendant the complaint shall contain allegations appropriate to an action under Section 738 of this code, and as to any such defendant the action shall be deemed and considered brought under the provisions of Section 738 and sections pertinent thereto of this code, and as to any such defendant the proceedings in the action shall be governed by the provisions of said Section 738 and said sections pertinent thereto; and the provisions of Section 750 of this code shall not apply to the proceedings as to any such defendant.

"Lis Pendens. Within 10 days after the filing of the complaint, plaintiff shall file, or cause to be filed, in the office of the county recorder of the county where the property is situated, a notice of the pendency of the action, containing the matters required by Section 409 of this code."

CAL. CODE CIV. PROC. § 749.1 provides for a quiet title action based upon 10 years adverse possession and payment of taxes. The action is deemed brought under section 738 as to defendants claiming through plaintiff whose claims arise within 10 years of the filing date. In all other respects section 749.1 is identical to section 749.

7. A judgment under section 749 or section 749.1 of the Code of Civil Procedure operates in rem. See *Taliaferro v. Riddle*, 166 Cal. App. 2d 124, 128, 332 P.2d 803, 806 (1958) (by implication). Consequently it is effective against all defects to title. It serves, in effect, as a new starting point for future title search. A judgment under CAL. CODE CIV. PROC. § 738 is not binding upon unknown claimants. In particular, it is not effective to bar unborn claimants unless a guardian ad litem has been appointed. Comment, *California Procedures for Obtaining Judicial Decrees Binding on Unborn or Unascertained Persons*, 5 HASTINGS L.J. 199, 201-03 (1954).

For further discussion of the advantages of an in rem action, see *Quiet Title*, *supra* note 1, at 1280-86; 38 S. CAL. L. REV. 608 (1965).

The portion of the action against unknown claimants, according to the terms of sections 749 and 749.1, must be based on adverse possession. As a practical matter, it may be necessary to ground the action on adverse possession even though the plaintiff has good title. To establish adverse possession, the plaintiff must prove that he and his predecessors have held possession and paid all taxes assessed for the statutory period. Whatever problems this presents may appear trivial compared to the immense difficulties of proving good title, which for example, might require proving the terms of an unrecorded and subsequently lost deed, or that an 1880 survey was in error, or that an 1892 deed incorrectly expressed the parties' intention. In addition, the plaintiff must often start with the knowledge that all parties to the conveyances in question, and all witnesses to their execution and delivery, are long since dead. Adverse possession, thus, is often turned to as the most practical remedy for a true owner seeking to render his title marketable.⁸

This article will propose certain statutory changes with the object of facilitating the in rem action to quiet title in California and of expanding the variety of situations in which that action is effective to clear title defects. The proposed changes are as follows:

(1) To permit an in rem quiet title action based upon five years adverse possession and payment of taxes, thus bringing the limitation periods of sections 749 and 749.1 into conformity with the statute of limitations pertaining to the recovery of real property.⁹

(2) To facilitate the bringing of a quiet title action where the claimant of record is deceased, and his estate is not and has not been subject to administration (or the administration has lapsed or terminated without a decree distributing the subject property), by (a) permitting an action and decree against "the heirs and devisees" of the decedent as a class; and (b) authorizing the appointment of an administrator ad litem¹⁰ with rights and duties specifically tailored for, and

8. Facilitating proof of good title is one of the reasons for legal recognition of title by adverse possession. "The [adverse possession] statute has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing." Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135 (1918) [hereinafter cited as Ballantine]; see P. BASYE, *CLEARING LAND TITLES* 107-08 (1953); *Quiet Title*, *supra* note 1, at 1277.

9. CAL. CODE CIV. PROC. § 318 provides that "the plaintiff, his ancestor, predecessor, or grantor, [must have been] seized or possessed of the property in question, within five years before the commencement of the action."

10. See text accompanying note 65 *infra*.

limited to, the defense of the quiet title action.

(3) To permit an in rem quiet title action based upon record title from a date antecedent to all claims at issue.

(4) To permit the cancellation, in a quiet title action brought by the surface owner, of any severed mineral interest that has not been exploited for 20 years or more preceding the bringing of the action, and whose exploitation is not economically feasible.

In Rem Action Based Upon Five Years Adverse Possession and Payment of Taxes

The statutes creating the in rem quiet title actions—sections 749 and 749.1 of the Code of Civil Procedure—require, respectively, 20 years adverse possession with five years of tax payments, or 10 years of tax payments. California Civil Code section 1007, however, states that “[o]ccupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all” The “period prescribed by the Code of Civil Procedure” is plainly not the 10 or 20 year occupations of the in rem statutes, which were not in existence when section 1007 was enacted,¹¹ but the five year statute of limitations on an action of ejectment contained in Code of Civil Procedure section 318.¹² And in contrast to the in rem quiet title sections, but in harmony with sections 318 and 1007, the in personam action to quiet title¹³ requires only five years adverse possession with payment of taxes.¹⁴

The result of the inconsistencies outlined above is that an adverse possessor, after completing five years possession with payment of taxes, enters a state of limbo. Although Civil Code section 1007, if it means what it plainly says, gives the adverse possessor good title, the adverse possessor does not have record title, and until he completes five to fifteen more years of possession, he cannot bring an in rem action to acquire record title. If his problem is some specific adverse claim asserted by a known claimant, an action and decree in personam may satisfy the title insurance company or whomever the plaintiff needs to satisfy.

11. CAL. CIV. CODE § 1007 dates from 1872. CAL. CODE CIV. PROC. § 749 was enacted in 1901, Cal. Stats. 1901, ch. 183, § 1, at 579. Section 749.1 was added in 1949, Cal. Stats. 1949, ch. 1025, § 1, at 1886.

12. *Bashore v. Mooney*, 4 Cal. App. 276, 281, 87 P. 553, 555-56 (1906); see note 9 *supra*.

13. CAL. CODE CIV. PROC. § 738.

14. *Mings v. Compton City School Dist.*, 129 Cal. App. 413, 418, 18 P.2d 967, 969 (1933).

In such a case, the plaintiff merely foregoes the bonus of extra protection against claims by unknown claimants. If, however, the cloud on the title is one in which unknown claimants may have an interest, then the adverse possessor is locked into the property. For at least five years he cannot sell or develop the land, and is likely to have difficulty borrowing against it.

This problem may confront the new owner who has acquired possession by gift, inheritance, or intrafamily conveyance—or title without title insurance. To obtain an in rem quiet title decree after he has held possession and paid taxes for five years, he must still prove the adverse possession and tax payments of his predecessors. Proof of possession is a matter of availability of witnesses and, for land not completely utilized, of proving compliance with Code of Civil Procedure sections 323 and 325.¹⁵ Proof of tax payments may be even more difficult. Although the county records will show that taxes were assessed, to whom assessed, and the fact of payment, they may not show who actually paid the taxes. Furthermore, there appears in the cases no presumption or inference that payment of taxes was by the person to whom the tax was assessed. To the contrary, the cases state categorically that adverse possession cannot be proved by inference, but that each essential element must be proved by convincing evidence.¹⁶ If plaintiff's predecessor saved his tax receipts and they are available to the plaintiff, there is adequate proof; if not, it may be impossible to find anyone with personal knowledge of the facts. A sympathetic judge,

15. CAL. CODE CIV. PROC. § 323 provides: "For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in the following cases:

"1. Where it has been usually cultivated or improved;

"2. Where it has been protected by a substantial inclosure;

"3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant;

"4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated."

CAL. CODE CIV. PROC. § 325 provides, in part: "For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:

"First—Where it has been protected by a substantial inclosure.

"Second—Where it has been usually cultivated or improved."

16. *Weller v. Chavarria*, 233 Cal. App. 2d 234, 242, 43 Cal. Rptr. 364, 370 (1965); cf. *Hart v. All Persons*, 26 Cal. App. 664, 673, 148 P. 236, 240-41 (1915).

a well-coached witness, and carefully framed leading questions may solve the problem. Otherwise, the plaintiff may have to wait another five years before selling, developing, or encumbering the land.¹⁷

The obvious solution to this problem is legislation permitting an in rem quiet title action after five years adverse possession and tax payments. Yet when a solution is this obvious, a second look is in order to see what reasons might justify the asymmetry of the statutes. Hostility toward adverse possessors and solicitude for true owners may explain the matter.¹⁸ This emotional response, however, overlooks the logic of the situation. With a few exceptions, which will be discussed shortly, five years adverse possession will as effectively bar the previous owner as would 10 or 20 years. Under the present law, the "true owner," after his land has been adversely possessed for five years, is left with a paper title he can neither sell nor enforce in possession. What he can do, and all he can do, is compel the possessor to pay him a fraction of the land value for the privilege of selling or developing the land five years earlier. My sympathies in this situation are with the possessor; surely the statutory purpose was not to permit or encourage such nuisance-value consolitums.¹⁹

It has also been suggested that 10 or 20 years possession is more likely to give the true owner notice than five years possession.²⁰ But if the owner does not discover the possession within five years, assuming the possession was open and notorious, discovery later will do him

17. It does not seem at all likely that the appellate courts will reduce the strict requirement of proof in quiet title actions. A problem of this character reaches appellate courts only in a context of contested litigation, probably involving a conflict of evidence whether tax payments were made by the adverse possessor or by the claimant. In rejecting inferential proof in this type of contested action, the courts reacted naturally and, I think, correctly, to the case at hand.

18. L. SIMES & C. TAYLOR, *IMPROVEMENT OF CONVEYANCING BY LEGISLATION* 365 (1960), explains the California statutes as follows: "[T]he 5-year ordinary period is regarded as too short to permit it to serve as the basis of a conclusive title determination procedure in which service by publication is permitted. A more orthodox limitations period is required. The provisions are typical of a good many existing in various jurisdictions in which the equivalent of 'substantive limitations' is incorporated directly into the provisions made for quieting or determining titles. In other words, limitations or limitation-like provisions are placed directly in the context in which they usually become important—in a suit to establish, untangle, or promote the marketability of titles." This argument might justify a longer limitation period were it not for the fact that adverse possession is used primarily as a method of clearing meritorious titles, not as a method of stealing land. It does not justify a statutory inconsistency the effect of which is to render legally sound titles temporarily unmarketable.

19. See Ballantine, *supra* note 8, at 140.

20. 38 S. CAL. L. REV. 608, 611 (1965).

little good; his right to recover possession is barred by the five year limitation of section 318. If we simply want the owner to know he has lost his land, service of the quiet title summons is much quicker than continued unobserved possession.

When a claim is not yet barred by the five year limitation period, an in rem action against the claimant involves a risk, in view of the liberal notice and publication requirements, that the claimant may be unjustly deprived of his interest. Can the present statutory inconsistency be justified by those exceptional cases in which five years adverse possession, with payment of taxes, do not bar the owner's claim? An examination of such cases shows that the statutes are not written with a view toward protecting exceptional claimants. A claimant under a disability—infancy, imprisonment or the like, as specified in Code of Civil Procedure section 328²¹—may bring an action of ejectment to recover possession long after the five year period has run. Section 328 specifies a maximum period of disability of 20 years, and since the claimant would then have five years in which to bring suit, 25 years adverse possession is needed to bar such claims.²² If protection of disabled claimants is the statutory goal, however, the 20 year period of Code of Civil Procedure section 749 is five years too short. Likewise, the 10 and 10 alternative of Code of Civil Procedure section 749.1 makes no

21. CAL. CODE CIV. PROC. § 328 provides: "If a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof, or to make any entry or defense founded on the title to real property, or to rents or services out of the same, is, at the time such title first descends or accrues, either:

"1. Under the age of majority;

"2. Insane;

"3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than life;

"The time, not exceeding twenty years, during which such disability continues is not deemed any portion of the time in this chapter limited for the commencement of such action, or the making of such entry or defense, but such action may be commenced, or entry or defense made, within the period of five years after such disability shall cease, or after the death of the person entitled, who shall die under such disability; but such action shall not be commenced, or entry or defense made, after that period."

In addition to the disabilities specified in section 328, statutes of limitations are tolled during active military service, or by fraudulent concealment of the cause of action. See M. OGDEN, CALIFORNIA REAL PROPERTY LAW 839 (1956) [hereinafter cited as OGDEN].

22. Under rare circumstances more than 25 years could be required. Periods during which an action is stayed by injunction, or the claimant is on active military service, are not counted toward the 20 year maximum disability period. CAL. CODE CIV. PROC. §§ 354, 356. If the claimant died before the statute ran, his representative would have six months after death in which to bring the action. *Id.* § 353.

sense at all; five additional yearly tax payments have no effect on the period of disability under section 328.

Another claimant whose claim may survive five years adverse possession is the holder of a future interest. If, for example, a fee is divided between a life tenant and remainderman, the statute of limitations will not begin to run against the remainderman until the life tenant dies.²³ The requirements of sections 749 and 749.1, however, bear no relation to the protection of persons holding future interests. A rational quiet title statute cannot serve this end; the possessor cannot be denied a quiet title for the lifetime of all who might assert claims, plus 21 years. And, depending in part on the constitutionality and interpretation of Civil Code section 715.8, there may exist claims to future interests that could not be barred by adverse possession for hundreds of years.²⁴

It is possible that a claimant could avoid the five year limitation by casting his action in a form other than that provided in section 318, which is drawn in terms of a statute of limitations on the common law action of ejectment. At one time, in the case of *Brusie v. Gates*,²⁵ the California Supreme Court stated that actions to quiet title were not subject to the limitations of section 318. The reasons given by the court, in my opinion, derive from the court's implicit assumption that quiet title actions are equitable in character,²⁶ and thus immune from statutes of limitations. Fortunately, subsequent court decisions have ignored the *Brusie* dictum, and have established that a dispossessed owner cannot quiet title after five years adverse possession is proved against him.²⁷

Most other alternative forms of action have limitations of less than five years.²⁸ An action for fraud, however, can be brought within three years from discovery.²⁹ Section 338(4) of the Code of Civil Procedure speaks of actions "for relief on the ground of fraud" without specifying the nature of the relief; section 318 speaks of the remedy of recovery of real property without discussing the right to this remedy. On linguistic analysis, both should apply to an action to rescind a fraudulent transfer of real property. The courts, however, assumed that a

23. *Pryor v. Winter*, 147 Cal. 554, 82 P. 202 (1905).

24. See text accompanying notes 101-06 *infra*.

25. 80 Cal. 462, 465, 22 P. 284, 285 (1889) (dictum).

26. A quiet title action is equitable where there is no prayer for possession. *Thomson v. Thomson*, 7 Cal. 2d 671, 681, 62 P.2d 358, 362 (1936); *Title & Doc. Restoration Co. v. Kerrigan*, 150 Cal. 289, 309, 88 P. 356, 359 (1907); *Dills v. Delira Corp.*, 145 Cal. App. 2d 124, 130, 302 P.2d 397, 401 (1956).

27. *Haney v. Kinevan*, 73 Cal. App. 2d 343, 166 P.2d 361 (1946); see *South Tule Independent Ditch Co. v. King*, 144 Cal. 450, 455, 77 P. 1032, 1034 (1904).

28. See CAL. CODE CIV. PROC. §§ 335-49¾.

29. *Id.* § 338(4).

choice between the two was necessary and, after a confusing array of decisions, chose section 338(4). In *Leeper v. Beltrami*,³⁰ this choice barred a claimant who had brought his action within the five year period of section 318, but had failed to give prompt notice of rescission. The implication of *Leeper*, however, is that a defrauded claimant who discovered the fraud more than five years later could still, with prompt notice of rescission, successfully bring an action to recover possession. *Leeper* thus creates a third class of claimants whose claims may survive five years adverse possession; however, the present quiet title requirements find little more justification as a basis for protecting defrauded vendors. Neither five, ten, nor twenty years adverse possession will give secure title against a claimant fraudulently dispossessed but still unaware of his cause of action. The more years that pass, the less the likelihood that such undiscovered claims will be asserted; but, in all probability, five years would be sufficient for the majority of these claims. Again, the 10 year alternative of section 749.1, conditioned upon five years additional tax payments, has no relevance to the protection of this class of claimant.

This review of the various claims—those of persons under disability, holders of future interests, and defrauded vendors—that may survive five years adverse possession reveals no justification for the 10 or 20 year periods imposed by sections 749.1 and 749, respectively. Neither 10 nor 20 years is sufficient to bar with certainty any of these three types of claims, while conditioning the 10 year period upon five additional tax payments makes no sense with respect to any of these claims. Moreover, the procedural requirements of quiet title actions afford considerable protection to such claims. Claimants of record cannot be sued and served as “unknown persons,” but must be named and served specifically—this is the clear implication of the statutes³¹ and is probably a constitutional requirement as well.³² Thus, the danger that the liberal notice requirements of an in rem action will lead to judgments foreclosing still viable interests is obviated where the interest, and its present owners, appear of record.³³

I think it is fair to conclude that the claims protected by the 10

30. 53 Cal. 2d 195, 347 P.2d 12, 1 Cal. Rptr. 12 (1959).

31. See text accompanying note 62 *infra*.

32. See text accompanying note 63 *infra*.

33. If the interest does not appear of record, it can be destroyed by sale to a bona fide purchaser. See CAL. CIV. CODE § 1214. This, however, is not the case where the interest is recorded but the owner of record is not the present owner. Unrecorded interests, of course, do not generally cloud titles, but recorded interests whose present owners are unknown are a common problem.

and 20 year requirements are trivial in number, that the protection afforded is arbitrary and haphazard, and that the quiet title statutes can be brought into alignment with the five year limitations of Civil Procedure sections 318 and 325 without noticeable harm.

Quiet Title Action Where the Claimant Is Deceased

Frequently, the record owner of the claim clouding the title is long since deceased. If his estate was probated, title to the claim may have passed through decree of distribution to living persons who can be named and served as defendants. If his estate was not probated, complex practical and ethical problems arise.³⁴

The problems created by the latter situation may be illustrated by a hypothetical case. Suppose the plaintiff acquired land by inheritance from his grandfather who received a deed and possession from one Williams in 1902. Record title, however, is in Jones, who acquired it from the federal patentee in 1880. While neighborhood legend is that Williams bought the land from Jones, admissible evidence is lacking. A search reveals that Jones died in 1907, that before death he put all other real property (but not the land in question) into joint tenancy with his wife, and that his estate was never probated. Mrs. Jones died in 1911. Although her will did not specifically mention this property, it did contain a clause that divided undiscovered property equally among six children. On these facts, who should the plaintiff name and serve as defendants? The law is clear that he cannot name Jones as sole defendant and effect service by publication.³⁵ This leaves two choices: (1) locate and serve the heirs, or (2) procure appointment of an administrator for Jones and serve the administrator.

Action Against "Heirs and Devisees" of Deceased Claimant

Title to realty, although subject to administration, passes directly to the heirs;³⁶ hence, bypassing administration by serving the heirs seems justified. The problems here are practical ones. Our plaintiff's search has identified the heirs as of 1911 but the cost of identifying, locating and serving the present heirs may be prohibitive. Assuming that service is made and that the plaintiff successfully receives judgment, it will nevertheless not be a judgment against Jones by name.

34. The same problems arise in the rarer cases of estates whose administration has lapsed without distribution, or whose decree of distribution failed to distribute the property in question.

35. *Jones v. Walker*, 47 Cal. App. 2d 566, 118 P.2d 299 (1941).

36. CAL. PROB. CODE § 300.

Since there will be nothing of record to show that the persons served were in fact heirs, and the only heirs, of Jones, there will still be a gap in the plaintiff's chain of title. The plaintiff's title policy will continue to feature an exception for the interest if any, of any heirs of Jones not named and served as defendants.³⁷

When an action to quiet title is brought by the purchaser of a tax deed, chapter 10 of the Revenue and Taxation Code provides an alternative procedure which goes part way toward meeting the chain of title problem discussed in the preceding paragraph.³⁸ Section 3952 permits an action against the "heirs and devisees" of a claimant of record known, or believed, to be dead.³⁹ In our hypothetical case, plaintiff's suit would lie against the heirs and devisees, not only by name, but also as "the heirs and devisees of John Jones." Consequently, all papers in the action—the complaint, the summons, the *lis pendens*, and the judgment—will state the name of the deceased claimant of record, thus providing an orderly chain of record title. A judgment would conclusively determine whether the persons served as heirs and devisees had any claim to title. It may be questioned, however, whether the judgment conclusively establishes that the persons so served were the only heirs and devisees. Of course, the practical problem of identifying, locating and serving heirs is not alleviated.

If the plaintiff, on the other hand, has not acquired title by tax deed, he cannot avail himself of chapter 10 of the Revenue and Taxation Code. Can he obtain the same advantages by bringing an ordinary class action under section 382 of the Code of Civil Procedure, naming as defendant the class "all heirs and devisees of John Jones"? If two

37. Cf. Audrain, *Title Insurance of Oil and Gas Leases*, 3 U.C.L.A.L. REV. 523, 525 (1956).

38. CAL. REV. & TAX. CODE §§ 3950-72.

A similar procedure is used in a general quiet title action in Nebraska. See NEB. REV. STAT. § 25-526 (1943); Finnegan, *Problems and Procedures in Quiet Title Actions*, 26 NEB. L. REV. 485, 507-10 (1947).

39. CAL. REV. & TAX. CODE § 3952 provides: "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 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."

On the operation of this section see OGDEN, *supra* note 21, at 850. There appear to be no reported cases construing this section.

or three heirs of Jones were to bring a class action as plaintiffs, on behalf of the heirs and devisees of Jones, their action might fail because each individual's claim would require litigation of separate fact and law issues. In *Gerhard v. Stephens*,⁴⁰ the court held a class action inappropriate where "each alleged member of the class would be required to establish his individual deraignment of title"—language fully applicable to our hypothetical case—and where affirmative defenses might create factual disputes as to each member's claim.⁴¹ Although actions against a class of defendants are rarer and close precedents are lacking,⁴² the principles would not seem to differ. Perhaps the plaintiff might be able to limit his pleadings to those issues common to all members of the defendant class. However, even if the plaintiff does no more than plead adverse possession, there always remains the possibility that the limitation period is tolled as to some members of the class, but not others.⁴³

A class action, in any case, will not give our plaintiff benefits equivalent to chapter 10 of the Revenue and Taxation Code. Under the procedure provided in chapter 10, the plaintiff must use due diligence to locate and serve heirs,⁴⁴ but if the search proves unsuccessful, he is permitted to serve the class by publication. Under section 382 of the Code of Civil Procedure, however, it would appear that the plaintiff is saddled with the additional requirement of serving at least one member of the class, who can then defend as the representative of the class interest.⁴⁵

Action Against Administrator Ad Litem

If the plaintiff elects to arrange the appointment of an administrator, instead of proceeding against the heirs directly, the difficulties are ethical rather than practical. The decedent's estate presumably will consist solely of a claim to the realty in question—all other assets having

40. 68 Cal. 2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968).

41. *Id.* at 912, 442 P.2d at 728, 69 Cal. Rptr. at 648; see 2 LOYOLA L. REV. 152 (1969); 21 STAN. L. REV. 1227 (1969).

42. Most have been actions against members of religious bodies or similar unincorporated associations. See, e.g., *Rosicrucian Fellowship v. Rosicrucian Fellowship Nonsectarian Church*, 39 Cal. 2d 121, 245 P.2d 481 (1952); *Wheelock v. First Presbyterian Church*, 119 Cal. 477, 51 P. 841 (1897).

43. See text accompanying note 21 *supra*.

44. CAL. REV. & TAX. CODE § 3960.

45. CAL. CODE CIV. PROC. § 382 reads in part: "[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all."

long since been distributed—which is barred by the plaintiff's adverse possession. As a result, the decedent's estate is valueless and the legal compensation provided in Probate Code section 901 will not be adequate to compensate the administrator for his services.⁴⁶ The plaintiff must either pay the administrator or hire an attorney to perform the work of administration behind the facade of the normal administrator; in either case, conflict of interest problems begin to appear.

What are the duties of the administrator? Statutory requirements notwithstanding, it would be pointless for him to publish notice to creditors⁴⁷ or to seek recovery of long-since-distributed assets.⁴⁸ More to the point, what are his duties with respect to the quiet title action?⁴⁹ Should he put the plaintiff to his proof in the hope that with effective objections to evidence and rigorous cross-examination, the plaintiff will fail to prove some element of adverse possession? By merely filing an answer, the administrator may force the plaintiff to place the case on the trial calendar rather than the default calendar, and thereby delay the hearing several months. The administrator, in short, can be a considerable nuisance and a possible danger—should he use this leverage to induce the plaintiff to “buy” the decedent's claim?

If the plaintiff arranges the appointment of the administrator before he files the quiet title action, the administrator can utilize the procedure provided in Probate Code sections 851.5 and 852. Section 851.5 states in part that “[i]f a person dies in possession of, or holding title to, real or personal property which, or some interest in which, is claimed to belong to another, the executor or administrator may file with the clerk of the court a verified petition setting forth the facts upon which the claim is predicated.” Hearing and notice are provided for, “and, if the court is satisfied that the conveyance or transfer should be made, it shall make an order authorizing and directing the executor or administrator to execute the same to the party entitled thereto”⁵⁰ This procedure cannot be used “if objection thereto is made, or if a civil action is then pending, or if the court determines the matter

46. The administrator receives 7 per cent of the first thousand dollars, and lesser percentages of additional assets. CAL. PROB. CODE § 901. Defense of a quiet title action is an extraordinary service entitling the administrator to additional fees under CAL. PROB. CODE § 902, but if the estate has no assets there is no fund from which the administrator can draw his fees, ordinary or extraordinary.

47. See CAL. PROB. CODE § 700.

48. See *id.* § 571.

49. The administrator, of course, has a duty to defend the estate against adverse claims to estate property. See *Estate of Hart*, 51 Cal. 2d 819, 337 P.2d 73 (1959).

50. CAL. PROB. CODE § 852.

should be determined by civil action."⁵¹ This proviso creates problems whenever the decedent is one of many defendants, since the plaintiff is forced to delay service upon the other defendants and publication while he is setting up administration for the deceased claimant. Furthermore, there will be cases where a claimant's death occurs, or is first discovered by the plaintiff, after the civil action has been filed.

Ogden, in *California Real Property*, describes the normal title company recommendation that the administrator file an answer and put plaintiff to his proof, but cooperate in expediting trial and waiving post-trial rights.⁵² Although the administrator, by answering, has compelled a hearing on the merits, Ogden does not suggest that the administrator should investigate, construct, and present a case for the defendant.

The administrator who follows Ogden's recommendation will protect the quiet title plaintiff, whose judgment is secure so long as there was a hearing on the merits and the plaintiff himself did not participate in fraud.⁵³ Since the plaintiff is protected, his title insurer is protected. However, whether the administrator is free from liability is another question.⁵⁴ The cases clearly hold that an administrator who is aware

51. *Id.*

52. Ogden reports: "When inquiry is made as to the rule of title practice when suing a representative (e.g., in an action by a tax title holder to quiet title against a representative of the estate of a deceased record owner), the answer of most title insurers is this: The representative should file an answer denying the allegations of the complaint, thus placing the plaintiff upon proof; he should not disclaim or stipulate that judgment be taken against him, unless duly authorized to do so by order of the probate court; but he may stipulate as to *procedural* matters, such as hearing the matter on the short cause calendar, or he may, after judgment, waive his rights to appeal or to move for a new trial. This, it will be recognized is a conservative rule of practice which is calculated to assure that the judgment will not be subject to attack on the ground that the representative wrongfully permitted it to be taken against him. Exceptions to the rule might be made where justified; for instance, a judgment by default might be considered valid where the time to apply for relief under C.C.P. 473 had expired, at least where the interest of the plaintiff had passed to an innocent purchaser." OGDEN, *supra* note 21, at 880-81.

53. See *Merrill v. Bachelder*, 123 Cal. 674, 56 P. 618 (1899); *Hollyfield v. Geibel*, 20 Cal. App. 2d 142, 148, 66 P.2d 755, 758 (1937); *cf.* *Newport v. Superior Court*, 192 Cal. 92, 230 P. 168 (1922). A judgment based upon a stipulation by the administrator going to the merits, or upon default, would be on shaky ground. See *Jordan v. Clausen*, 13 Cal. App. 2d 16, 20, 56 P.2d 240, 242 (1936); *Fickes v. Baker*, 36 Cal. App. 129, 171 P. 819 (1918). A settlement, with court approval should be safe if the court examined the merits of the action and the plaintiff did not participate in fraud. See *Merrill v. Bachelder*, *supra*.

54. The administrator may submit his proposed course of action for judicial scrutiny in several ways. He can petition for instructions, CAL. PROB. CODE § 588, for approval of a compromise, *id.* § 718.5, or for directions to convey under Probate Code sections 851.5 and 852. See text accompanying note 50 *supra*. Whether

of a defense to a quiet title action, and fails to present it, is liable to the heirs.⁵⁵ At the same time, they leave open two questions that should be of concern to any prospective administrator: (1) Does the administrator have any duty to use due diligence to discover possible defenses? (2) Does he have any duty to seek, in good faith, to obtain the best possible compromise for the estate?⁵⁶

If the former obligation is imposed, the prudent administrator should interview heirs and witnesses, obtain a title report, and seriously consider deposing the plaintiff. If the latter obligation is imposed, the administrator who sits by while the plaintiff proves a minimum case, but who could have settled out of court for \$200 or \$300, is liable to the heirs. Impose both requirements and the administrator is a true adversary, representing the rights of the heirs as vigorously as would any independent administrator; however, the imposition of both requirements has made the action to quiet title inordinately expensive and somewhat dangerous.

At this point plaintiff's attorney will begin to regret that he ever heard of Jones. Should he have limited his search to the 20 years preceding the filing of the complaint, thus remaining *ostensibly* ignorant of Jones' claim? Of course, if the plaintiff were really ignorant of Jones' claim he would not be suing; it is precisely because of Jones' record title that the plaintiff needs a quiet title decree. Nevertheless, is the plaintiff's ostensible ignorance sufficient? This query was answered in *Gerhard v. Stephens*: "Persons who appear of record at any time to have some claim to the property are 'known' persons and plaintiff must use reasonable diligence to discover their identity."⁵⁷

Perhaps the attorney should have limited his search to the Book of Deeds, and eschewed the inquiries in the probate records and the de-

judicial approval is complete protection is questionable but it should be effective against all heirs notified of the proceeding. The practical problem is that unless the court will act on presentation by affidavit, the plaintiff may have to prove his case twice—once in the probate court of the county of administration to support the petition for instructions, and once in the superior court of the county of the quiet title action.

55. Estate of Auslender, 53 Cal. 2d 615, 349 P.2d 537, 2 Cal. Rptr. 769 (1960); Estate of McSweeney, 123 Cal. App. 2d 787, 792, 268 P.2d 107, 112 (1954).

56. In the case of Estate of Pillsbury, 175 Cal. 454, 166 P. 11 (1917), a doctor was sued for malpractice and the matter was tried, resulting in a verdict against the doctor for \$9,018.32. Two days later he died. Judgment was entered, and the administrator did not appeal or seek a compromise. The court, noting that no showing was made that an appeal would succeed, stated that "we are cited to no law, and know of none, which makes it the duty of any trustee to seek to compel a creditor to accept less than his just demand." *Id.* at 464, 166 P. at 15.

57. 68 Cal. 2d at 904, 442 P.2d at 726, 69 Cal. Rptr. at 646 (emphasis added).

partment of vital statistics that led to his discovery of Jones' death. This, arguably, would leave Jones as a known defendant of unknown residence, who could be lawfully served by publication in the county where the land is located. Can the plaintiff avoid the whole problem by proceeding in wilful ignorance of Jones' death? The code imposes an explicit requirement of due diligence to locate only those defendants whose claims arose within 20 years of the filing of the action, or 10 years if the plaintiff is using the alternative period in section 749.1.⁵⁸ The statutory formula to reach that result is complicated. Under section 749, a quiet title action is deemed to be brought as an action against a known claimant under section 738⁵⁹ if the defendants acquired their claim within the preceding 20 years; section 749.1 makes the same provision for claims acquired within 10 years.⁶⁰ Section 750 of the Code of Civil Procedure provides that for any defendant sued under section 738, service by publication must be made pursuant to an order given under section 415.50 of that code, which requires an affidavit of due diligence.⁶¹ The necessary implication is that claims not acquired within 20 or 10 years preceding the action are not deemed brought under section 738. As to such defendants, if their whereabouts are unknown, section 750 merely requires that the plaintiff file an affidavit stating, among other things, "the names of the defendants not served whose place of residence is unknown to the plaintiff." Upon the filing of the affidavit, the court is required to make an order for service of publication in a newspaper of general circulation in the county where the land is located. The requirements of the section 750 affidavit are specific and do not include a showing of diligent search to locate known defendants of unknown residence.

Although this particular argument was not raised in *Gerhard v. Stephens*, the thrust and language of that opinion indicate that the argument is foredoomed to failure. The defendants in that case had failed to either name or serve, in any fashion, the successors of a claimant of record. The court, however, indicated that merely naming the

58. See note 6 *supra*.

59. See note 3 *supra*.

60. See note 6 *supra*.

61. CAL. CODE CIV. PROC. § 750 states in part: "In the event that service of any summons shall be required to be by publication as to any defendant, including a defendant as to whom the action is brought under the provisions of Section 738, the order for such publication, made pursuant to the provisions of Section 415.50 may be made either as a part of the order for publication of summons made as to unknown defendants, or as a separate order, as the court or a judge thereof may consider proper in the particular case." Although this language will not become operative until July 1, 1970, the present language of section 750 is to the same effect.

successors and giving service by publication would not have been sufficient; "to meet the standard of reasonable diligence they were obligated to undertake some effort to locate the stockholders or their heirs."⁶²

I do not quarrel with the standard of reasonable diligence imposed by *Gerhard v. Stephens*. This standard is essential to prevent the deliberate shaping of quiet title actions in a fashion designed to deny a hearing to holders of outstanding claims.⁶³ However, in closing the loopholes in the statutory language, *Gerhard* has made imperative the enactment of a legislative solution to facilitate quieting title against deceased claimants of record.

As a practical matter, there are cases where it is easier to serve the heirs, and cases where it is easier to arrange administration. In cases of the former type, the plaintiff's dilemma is resolved most easily by giving Revenue and Taxation Code chapter 10 general applicability to all quiet title actions. The heir who is not served should be treated simply as we now treat any "person unknown who may claim an interest"—such a person can void the judgment as it pertains to him if he can prove that the plaintiff failed to use due diligence to locate and serve him, and that the property has not passed into the hands of a bona fide purchaser.⁶⁴

For those cases best handled by the appointment of an administrator, I propose the creation of a new legal person—an administrator ad litem.⁶⁵ He would not have the obligations of a general administrator, such as notice to creditors, tax returns and appraisals, etc.; his rights and duties would be limited to the title controversy. Ogden's recommendations might well serve as a starting point. While the administrator should not default or stipulate to the merits, he should cooperate fully with the procedural expedition of the action.⁶⁶ The administrator ad litem, chosen and paid by the plaintiff, should not undertake an active defense nor press settlement demands on behalf of heirs who may not care. If an active defense is in order, it should be fi-

62. 68 Cal. 2d at 909-10, 442 P.2d at 726, 69 Cal. Rptr. at 646.

63. This standard may also be essential to constitutional due process. See OGDEN, *supra* note 21, at 864; cf. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

64. Compare *Gerhard v. Stephens*, 68 Cal. 2d 864, 909-10, 442 P.2d 692, 726 69 Cal. Rptr. 612, 646 (1968) (judgment void where plaintiffs failed to use due diligence to serve claimants), with *Garrison v. Blanchard*, 127 Cal. App. 616, 622, 16 P.2d 273, 275 (1932) (bona fide purchaser prevails even though claimant dead at time of quiet title action and affidavit of personal service was fraudulent).

65. Compare the proposal for a quasi-guardian ad litem to represent all persons served by publication in *Quiet Title*, *supra* note 1, at 1303-04.

66. See text accompanying note 52 *supra*.

nanced by the heirs and conducted by an administrator of their choosing. Thus, one additional duty should be impressed upon the administrator *ad litem*—the requirement that he use due diligence in locating and notifying the heirs of the quiet title action. A practical limit, however, has to be put on the time and money expended in performing this duty. I would think in most cases, 60 days and \$300 (or one percent of the value of the land, if greater) would be a reasonable maximum.

Upon locating an heir and explaining the action, the administrator *ad litem*, should notify the heir in writing (1) that the administrator does not intend to undertake an active defense nor to seek a favorable settlement; (2) that the heir may petition for a substitute administrator *ad litem*, for the replacement of the administrator *ad litem* by a general administrator, or for leave to intervene in the quiet title action; and (3) that the administrator will not oppose any such petition. Thus, any heir who desires and can finance an active defense, may assume control of the action.

Finally, the statute should make it clear that a plaintiff may select and pay the administrator *ad litem*, and that such conduct does not constitute fraud on either of their parts, nor breach of fiduciary duty or unlawful conflict of interest on the part of the administrator.

In Rem Action Based On Record Title

Although the common law gave various remedies to an owner claiming under a conveyance, it afforded no remedy by which an adverse possessor could establish his title. In what appears to be an overcorrection of this lacuna, the legislature created an *in rem* quiet title action for the adverse possessor, but left the record owner with only an *in personam* action. This anomaly in the statutes has been explored in detail in another article,⁶⁷ which recommends legislative authorization of an *in rem* action based upon a showing of record title.

Upon further thought, a possible justification for the present statutory distinction appears. In all but a few rare situations (discussed in part one of this article), proof of adverse possession for the 5 years preceding the action will prove good title against all persons, including owners of record. Proof of perfect record title, on the other hand, does not achieve this end, for it does not preclude the risk that title was lost through adverse possession.

Nevertheless, an *in rem* action based on record title could serve several useful purposes. First, a record owner of unused land may be

67. 38 S. CAL. L. REV. 608 (1965).

able to prove that no one has possessed the land adversely to his claim, even though he cannot affirmatively prove adverse possession on his own behalf because of noncompliance with Code of Civil Procedure sections 323 or 325,⁶⁸ or inability to prove payment of taxes. Second, and more important, there are situations in which adverse possession of the particular interest clouding the title is either impractical or impossible. One example is a plaintiff who seeks a judicial determination that restrictions on the use of his land are invalid.⁶⁹ Since adverse possession would require him to risk open and notorious violation of the restrictions, his only remedies are a section 738 action or a declaratory relief action, neither of which binds unknown claimants. Another example is that of a plaintiff seeking to clear severed mineral rights.⁷⁰

How far back must a plaintiff trace a perfect record title in order to prove a cause of action under our proposed legislation? I suggest the plaintiff be allowed to specify the operative date in his complaint. If he can show perfect record title from 1910, he so pleads and proves and should receive a decree quieting title against any claims of record arising after 1910. If in addition he proves that no one has possessed adversely to the record title since 1910, his decree will quiet title against all claims arising after that date. If he can trace his title to Adam, so be it. The principle is simple: Plaintiff is entitled to a decree quieting title against all claims, and only those claims, whose invalidity he can demonstrate.

Action to Cancel Unexploited Severed Mineral Interests

In California, it is common practice for grantors to retain an interest in mineral rights, even where there is no reasonably foreseeable possibility that such rights will be exploited. The bare possibility of a bonanza is there, and if the particular grantee is satisfied with surface rights, the grantor will retain a mineral interest. However, when it later becomes necessary or economically desirable to put together a full and unencumbered fee title, identifying and locating the owners of the retained mineral interest may be a difficult task.⁷¹ Negotiating for its

68. CAL. CODE CIV. PROC. § 323 sets out the sufficiency of possession, use or inclosure for the purpose of constituting adverse possession. Section 324 provides that where possession is under a claim of title not founded upon some writing, only the land actually occupied is deemed held adversely.

69. See 38 S. CAL. L. REV. 608, 608-09 (1965).

70. See text accompanying notes 73-77 *infra*.

71. See 1 H. WILLIAMS & C. MEYERS, OIL & GAS LAW 105 (1965) [hereinafter cited as WILLIAMS & MEYERS]; L. SIMES & C. TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION 241 (1960); DuPuy, *Clouds on Title*, 18 TEXAS B.J.

purchase is often difficult, since the value of the mineral interest as an impairment of the fee title may exceed its intrinsic value as a source of possible future income from mineral exploitation.⁷²

Where the mineral interests are owned in fee, quiet title actions are generally ineffective to clear title, since normal surface use is not hostile to severed mineral rights and therefore does not constitute adverse possession.⁷³ In theory at least, if the surface owner exploits the mineral rights for the statutory period, he should acquire title by adverse possession.⁷⁴ Courts of other jurisdictions disagree, however, whether exploitation at one site confers prescriptive title to the entire tract,⁷⁵ and whether exploitation of particular kinds of minerals gives title to other unexploited minerals⁷⁶—although it is obviously impractical for the surface owner to exploit all possible minerals at all possible sites throughout the property. In *Gerhard v. Stephens*, the California Supreme Court raised the question of constructive adverse possession of minerals, cited the authorities pro and con from other states, and moved on without resolving the controversy.⁷⁷ The practical consequence for clearing of titles is plain: An attorney can hardly advise his client to drill several unproductive oil wells or open an unprofitable quarry so that, after five years, the client can litigate unsettled questions of law.

Gerhard v. Stephens did, however, raise the possibility that title could be cleared by obtaining a judicial determination that the mineral owner has abandoned his interest. The court held that an estate in "fugacious minerals" is a profit a prendre,⁷⁸ an incorporeal hereditament, which can be terminated by abandonment.⁷⁹ "Fugacious"

275 (1955) [hereinafter cited as DuPuy]; Webster, *The Quest for Clear Land Titles*, 44 N.C.L. REV. 89, 95-96 (1965); 21 STAN. L. REV. 1221, 1232-33 (1969).

72. See Dupuy, *supra* note 71, at 276.

73. See *Gerhard v. Stephens*, 68 Cal. 2d 864, 898-99, 442 P.2d 692, 719, 69 Cal. Rptr. 612, 639 (1968); Stoeck, *Adverse Possession of Servable Minerals*, 68 W. VA. L. REV. 274, 279-80 (1966) [hereinafter cited as Stoeck]. See generally 1 WILLIAMS & MEYERS, *supra* note 71, at § 224.1.

74. See generally 2 AMERICAN LAW OF PROPERTY § 10.7 (A.J. Casner ed. 1952); 1 WILLIAMS & MEYERS, *supra* note 71, at § 224.4; Stoeck, *supra* note 73, at 282-91.

75. See 1 WILLIAMS & MEYERS, *supra* note 71, at § 224.4 nn.12-13 & cases cited therein; Stoeck, *supra* note 73, at 284-85 & cases cited therein.

76. See generally Stoeck, *supra* note 73, at 286-87.

77. 68 Cal. 2d at 900-01, 442 P.2d at 720, 69 Cal. Rptr. at 640.

78. *Id.* at 878-80, 442 P.2d at 705-07, 68 Cal. Rptr. at 625-26. For analysis of this holding see 2 LOYOLA L. REV. 52, 55-56 (1968); 21 STAN. L. REV. 1227, 1228-30 (1969). On the possible classifications of oil and gas interests and their various legal consequences see 1 WILLIAMS & MEYERS, *supra* note 71, at § 209.

79. 68 Cal. 2d at 882-83, 442 P.2d at 707-08, Cal. Rptr. at 627-28; see 1 WILLIAMS & MEYERS, *supra* note 71, at § 210.1.

means "wandering"; it refers to oil and gas, not to such hydrocarbons as asphalt, nor to ores, rocks, gravels, and other solid minerals.⁸⁰ The implication of the court's language, therefore is that estates in nonfugacious minerals are corporeal hereditaments and cannot be terminated by abandonment.⁸¹ Such a distinction raises problems in construing conveyances which the *Gerhard* court barely began to face. In *Gerhard*, the conveyances were of "all petroleum, coal oil, naptha, asphalt, maltha, brea, bitumen, natural gas and other kindred or similar substances and deposits and rock, gravels or other formations containing or yielding any of said substances."⁸² Asphalt, at least, was nonfugacious.⁸³ Did the grantee acquire a fee interest in asphalt but a profit a prendre in oil and gas? The court found that the grantors "did not intend to convey two different types of estates in the same instrument"⁸⁴ and that "they were primarily concerned with transferring the oil and gas rights."⁸⁵ Thus the conveyance of the asphalt was "incidental," and the grantees' estate in all hydrocarbons was held to be a profit a prendre.⁸⁶

How would the court treat a conveyance of "all oil, gas hydrocarbons and other minerals on or under the described lands"?⁸⁷ A conveyance of "all mineral rights"?⁸⁸ Apparently in each case, the courts

80. *Gerhard v. Stephens*, 68 Cal. 2d 864, 897-98; 442; P.2d 704, 718, 69 Cal. Rptr. 624, 638 (1968).

81. 21 STAN. L. REV. 1221, 1234-35 (1969). *Gerhard v. Stephens* cited Callahan v. Martin, 3 Cal. 2d 110, 43 P.2d 788 (1935), as establishing the distinction between fugacious and nonfugacious minerals, and as rejecting the position that a severed interest in fugacious minerals is a defeasible fee. 68 Cal. 2d at 878, 442 P.2d at 704, 69 Cal. Rptr. at 624. Severed rights in nonfugacious minerals, however, can be held in fee. See Callahan v. Martin, 3 Cal. 2d 110, 43 P.2d 788 (1935); Nevada Irrigation Dist. v. Keystone Copper Corp., 224 Cal. App. 2d 523, 36 Cal. Rptr. 775 (1964). A fee interest in the substratum is, under the common law, a corporeal hereditament. See *Gerhard v. Stephens*, 68 Cal. 2d 864, 898, 442 P.2d 692, 718, 69 Cal. Rptr. 612, 638 (1968). It cannot be abandoned. 1 WILLIAMS & MEYERS, *supra* note 71, at 101.

82. 68 Cal. 2d at 873 n.4, 442 P.2d at 701 n.4, 69 Cal. Rptr. at 621 n.4.

83. *Id.* at 893 n.39, 442 P.2d at 718 n.39, 69 Cal. Rptr. at 638 n.39.

84. *Id.* at 898, 442 P.2d at 718, 69 Cal. Rptr. at 638. This conclusion is criticized in 2 LOYOLA L. REV. 152, 157 (1969).

85. 68 Cal. 2d at 898, 442 P.2d at 719, 69 Cal. Rptr. at 639.

86. *Id.*

87. This was the form of conveyance in *Victory Oil Co. v. Hancock Oil Co.*, 125 Cal. App. 2d 222, 270 P.2d 604 (1954).

88. See Maxwell, *A Primer of Mineral and Royalty Conveyancing*, 3 U.C.L.A.L. REV. 449, 451 (1956), which states that "[i]t seems clear that a conveyance in terms of 'all minerals' would, in the absence of limiting language, pass oil and gas in California but there has been no substantial litigation on this phase of the interpretation of oil and gas conveyances in this state." See also 1 WILLIAMS & MEYERS, *supra* note 71, at 242-66.

must first determine, as a question of fact, whether the parties intended to create one estate or two different estates. Should the former be the case, the court must next decide as a question of fact whether the parties were "primarily" concerned with fugacious or nonfugacious minerals. If their primary concern was with fugacious minerals, all mineral interests would be treated as profits a prendre, which can be abandoned; if concerned with nonfugacious minerals, the estate in fugacious minerals would, at most, be all that could be abandoned.

Abandonment, moreover, requires both nonuser and an intent to abandon.⁸⁹ In *Gerhard*, the court held that 47 years of nonuser, coupled with such a number of cotenancy interests that a court appointed receiver would be needed for development, was not sufficient to show abandonment.⁹⁰ It is, therefore, safe to conclude that abandonment is not often a useful device for clearing title.

A deed may also retain mineral interests for a term of years. Typical language will except and reserve to the grantor all interests in minerals on or below the surface for a period of 20 years and so long thereafter as minerals are extracted in paying quantities. In *Victory Oil Co. v. Hancock Oil Co.*,⁹¹ this apparently innocent clause collided with the Rule Against Perpetuities. The interest of the grantee in the mineral rights (arising after the grantor's term) was held to be invalid as violating the Rule Against Perpetuities. The grantee argued that the grantor's interest was not an exception but "a reservation of a profit a prendre" and that therefore, the grantee held a fee interest not subject to the Rule.⁹² The trial court, however, found it to be an exception, and the court of appeal agreed. Consequently, the grantee's interest was categorized as a contingent mineral interest that would not necessarily vest within 21 years and that was therefore invalid. The court further indicated that even if the deed were construed to create a reservation rather than an exception, the grantee's interest would still be in violation of the Rule.⁹³ This was dictum, however, and directly contrary to the common law.⁹⁴ This issue was raised in *Brown v. Terra*

89. See 3 AMERICAN LAW OF REAL PROPERTY § 159, at 806-07 (A.J. Casner ed. 1952).

90. 68 Cal. 2d at 893-95, 442 P.2d at 716-17, 69 Cal. Rptr. at 635-36.

91. 125 Cal. App. 2d 222, 270 P.2d 604 (1954). For discussion and analysis of this case see Jones, *The Rule Against Perpetuities As It Affects California Oil and Gas Interests*, 7 U.C.L.A.L. REV. 261, 265-69 (1960); Simes, *Perpetuities in California Since 1951*, 18 HASTINGS L.J. 247, 263-64 (1967) [hereinafter cited as Simes].

92. 125 Cal. App. 2d at 231-32, 270 P.2d at 611.

93. 125 Cal. App. 2d at 233, 270 P.2d at 611-12.

94. See 2 AMERICAN LAW OF PROPERTY § 8.24 (A.J. Casner ed. 1952); Simes, *supra* note 91, at 264-65.

Bella Irrigation District,⁹⁵ but the court specifically reached no decision touching it.⁹⁶ *Gerhard v. Stephens*, by reaffirming that an estate in oil is a profit a prendre,⁹⁷ which arguably cannot take effect as an exception under the common law,⁹⁸ will encourage relitigation of the exception versus reservation problem.

The *Victory Oil* decision appears to have reached most undesirable results.⁹⁹ First, the obvious intent of the parties to the transaction was frustrated. Second, the decision transformed a limited term interest in mineral rights into a perpetual one. This perpetual separation of fee ownership from mineral ownership is a greater barrier to free alienability of property than is any uncertainty relative to the date on which the grantee's interest will vest.¹⁰⁰ Finally, a grantor unaware of the *Victory Oil* decision will normally assume that his interest terminated when minerals were not discovered within the 20 year period. Consequently, on the death of the grantor, his estate will not list the mineral interest as an asset and will not file a decree of distribution in the county in which the property is located. When the sale or mortgage of the property is subsequently considered, it may therefore be impossible to determine who owns the mineral interest.

The 1963 amendments to the California Rule Against Perpetuities may or may not solve the problem, but they certainly confuse the issue. Section 715.5 of the Civil Code permits an interest void under the Rule to be reformed to validate that interest,¹⁰¹ but there appear to be no cases indicating in what manner the courts are likely to use this section. Section 715.8 redefines "vested interest" favorably enough to solve the *Victory Oil* problem,¹⁰² but it validates with such sweeping and indis-

95. 51 Cal. 2d 33, 330 P.2d 775 (1958). For discussions of this case, see 11 HASTINGS L.J. 197 (1959); 58 MICH. L. REV. 285 (1959).

96. 51 Cal. 2d at 36, 330 P.2d at 777.

97. See text accompanying note 78 *supra*.

98. 2 WILLIAMS & MEYERS, *supra* note 71, at 180-81.

99. For discussion of the title insurance problems and uncertainties created by *Victory Oil* see Audrain, *Title Insurance of Oil and Gas Leases*, 3 U.C.L.A.L. REV. 523, 534-36 (1956).

100. See 2 WILLIAMS & MEYERS, *supra* note 71, at 182, 58 MICH. L. REV. 285, 288 (1959); cf. J. GRAY, *THE RULE AGAINST PERPETUITIES* § 279 (4th ed. 1942).

101. CAL. CIV. CODE § 715.5 provides: "No interest in real or personal property is either void or voidable as in violation of Section 715.2 of this code if and to the extent that it can be reformed or construed within the limits of that section to give effect to the general intent of the creator of the interest whenever that general intent can be ascertained. This section shall be liberally construed and applied to validate such interest to the fullest extent consistent with such ascertained intent."

102. CAL. CIV. CODE § 715.8 provides: "An interest in real or personal property, legal or equitable, is vested if and when there is a person in being who could convey or there are persons in being, irrespective of the nature of their respective interests,

criminate force that it cannot be relied upon and may be unconstitutional.¹⁰³ Article 20, section 9 of the California Constitution declares that "[n]o perpetuities shall be allowed except for eleemosynary purposes." Two court of appeal decisions have held that this provision, in effect, enacted the John Chipman Gray Rule Against Perpetuities in haec verba.¹⁰⁴ I am not in sympathy with any construction of article 20, section 9 so narrow that the legislature would have to go to the voters to solve the problem of the unborn widow¹⁰⁵ and similar such curiosities. Nevertheless, it appears that the legislature has gone beyond defining and modifying the Rule Against Perpetuities and has, in effect, repealed it and permitted those future interest monstrosities the common law and article 20, section 9 sought to avoid. A look at the types of interests validated under a literal construction of the language of Civil Code section 715.8¹⁰⁶ certainly suggests that this section has gone beyond constitutional bounds.

The application of the 1963 legislation to conveyances made prior to its enactment is equally confused. Section 8 of the 1963 act provided that "this Act does not invalidate or modify the terms of any interests

who together could convey a fee simple title thereto.

"An interest is not invalid, either in whole or in part, merely because the duration of the interest may exceed the time within which future interests in property must vest under this title, if the interest must vest, if at all, within such time."

103. CALIFORNIA WILL DRAFTING § 15.6 (Cal. Cont. Educ. Bar ed. 1965); Dukeminier, *Perpetuities Revision in California: Perpetual Trusts Permitted*, 55 CALIF. L. REV. 678, 682-83 (1967); Simes, *supra* note 91, at 261, 266; Note, *California Revises the Rule Against Perpetuities—Again*, 16 STAN. L. REV. 181-82 (1963).

104. Estate of Sahlender, 89 Cal. App. 2d 329, 346, 201 P.2d 69, 79 (1948); Dallapi v. Campbell, 45 Cal. App. 2d 541, 545, 114 P.2d 646, 648-49 (1941).

105. The "unborn widow" problem arises in the case of a devise such as "to A for life, then to A's surviving widow, then to A's surviving children." The remainder to the children may violate the rule against perpetuities. The reasoning is that the widow may conceivably be a person not yet born at the testator's death; consequently the only available measuring life is A's and if the widow survives A by more than 21 years the remainder will not vest within the lives in being plus 21 years. See Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 644 (1938).

CAL. CIV. CODE § 715.7 was enacted to "solve" the "unborn widow" problem. See Simes, *supra* note 91, at 256. CAL. CIV. CODE § 715.7 provides: "In determining the validity of a future interest in real or personal property pursuant to Section 715.2 of this code, an individual described as the spouse of a person in being at the commencement of a perpetuities period shall be deemed a "life in being" at such time whether or not the individual so described was then in being."

106. Section 715.8 would appear to validate such limitations as "to B corporation, as long as it does X volume of business per year, and when it ceases to do X volume of business, to C and his heirs; Blackacre to the grantor's last surviving grandchild; or Blackacre to Y charity in fee simple, but if the land should ever cease to be used as an orphanage, then to C and his heirs in fee simple." Note, *California Revises the Rule Against Perpetuities—Again*, 16 STAN. L. REV. 177, 181-82 (1963).

which would have been valid prior to its enactment, and any such interest which would have been valid prior to the effective date of this Act is valid irrespective of the provisions of this Act." Our concern, however, is not about the invalidating of a previously valid interest, but the validating of a previously invalid interest. Is the reversionary interest of the grantor, which arises only because the grantee's interest violates the Rule against Perpetuities, an "interest" protected under section 8 of the act?

Perhaps some day the California courts will overrule *Victory Oil*.¹⁰⁷ Pending that blessed event, corrective legislation is in order. The specific holding of *Victory Oil* could be reversed by the enactment of a narrowly drawn statute excluding from the prescription of the Rule interests in a grantee which arise or vest upon termination of an excepted or reserved profit a prendre. Such an enactment, in effect, would simply correct the erroneous interpretation of the common law made in *Victory Oil*, and adopt the argument of the grantee in that case. I would prefer, however, a broader statute. A statute that depends upon the classification of interests into profits a prendre and fee interests leads to the fugacious—nonfugacious minerals dichotomy of *Gerhard v. Stephens* and to the construction problems mentioned earlier.¹⁰⁸ An exception in the grantor of all interests in minerals on or below the surface for a period of 20 years and so long thereafter as minerals are extracted in paying quantities (in essence, the language of the *Victory Oil* deed) would still involve the Rule Against Perpetuities as to nonfugacious minerals. Therefore, any legislation on this subject should encompass all mineral interests even though in its application to nonfugacious minerals it may not conform to the common law classifications of interests.

Several states have passed laws terminating undeveloped mineral interests after 20-50 years of nonuser.¹⁰⁹ Such legislation, in my view,

107. *Wong v. DiGrazia*, 60 Cal. 2d 525, 386 P.2d 817, 35 Cal. Rptr. 241 (1963), held that "a document should be interpreted if feasible to avoid the conclusion that it violates the rule against perpetuities." *Id.* at 539-40, 386 P.2d at 827, 35 Cal. Rptr. at 251. This plainly was not the approach of the *Victory Oil* court; that decision seems typical instead of the rigid and remorseless applications of the rule condemned in *Wong*. See 60 Cal. 2d at 533-34, 386 P.2d at 823, 35 Cal. Rptr. at 247.

108. See text accompanying notes 80-88 *supra*.

109. Ten states have marketable title acts which, under various conditions, may clear titles of claims not recorded within the preceding 20 to 50 years (depending upon the particular statute). ILL. ANN. STAT. ch. 83, § 12.1 (Smith-Hurd 1966); IND. ANN. STAT. §§ 56-1101 to -1110 (Burns Supp. 1969); IOWA CODE §§ 614.17-20 (Supp. 1969); MICH. COMP. LAWS ANN. §§ 565.101-109 (1967); MINN. STAT. § 541.023 (Supp. 1969); NEB. REV. STAT. §§ 76.288-298 (1966); N.D. CENT. CODE

should meet the following criteria: (1) Interests should be terminated after no more than 20 years of nonuser. Thirty to fifty years is too long a period to tie up land, and increases the problem of locating the owners of the dormant interest. (2) The statute should apply to all mineral interests, not just oil and gas interests. (3) The statute should apply to royalty interests, and make clear that a dormant royalty interest terminates in favor of the mineral interest owner. The action to terminate the mineral interest could be brought under Code of Civil Procedure section 738, as an in rem action under sections 749 or 749.1, or under the proposed legislation permitting an in rem action based on record title. Regardless of the form of action, the plaintiff would have to prove the nonuser.

Some state laws provide that rerecording, although without any effort to develop the mineral interests, tolls the statutory period.¹¹⁰ This provision seems doubtful, since it permits the inactive owner to hold out for nuisance money indefinitely. However, unusual economic conditions or policy considerations may make "storage" of mineral discoveries in situ for extended periods desirable. An obvious example is gold; many valuable mines have been shut down indefinitely due to government policy fixing the price of gold. Also, there may be a growing tendency for conservation organizations or subdividers to acquire mineral rights with the objective of ensuring that such rights will not be exploited. An attempt to distinguish such owners from the owner seeking a pay-off for a worthless title might turn on questions of motive and good faith; if this is undesirable in land title litigation, where certainty and predictability are important, it might be better to permit renewal of interests by rerecording.

Conclusion

I have attempted in this article to point out some of the anomalies

§§ 47-19A-01 to -11 (1960); OHIO REV. CODE ANN. §§ 5301.47-.56 (Page Supp. 1968); S.D. COMP. LAWS §§ 43.29-1 to -10 (1967); WIS. STAT. § 893.15 (1966).

Three states have statutes specifically intended to clear off dormant mineral estates. MICH. COMP. LAWS ANN. §§ 541.291-.294 (1967); TENN. CODE ANN. § 64-704 (Supp. 1968); VA. CODE ANN. § 55-154 to -155 (1969). For a comparative analysis of the various laws see Smith, *Methods for Facilitating the Development of Oil and Gas Lands Burdened with Outstanding Mineral Interests*, 43 TEXAS L. REV. 129, 150-66 (1964).

None of the various laws are fully satisfactory in view of the criteria presented in the text.

110. E.g., IND. ANN. STAT. § 56-1104 (Burns Supp. 1969); MICH. COMP. LAWS ANN. §§ 554.291-.293 (1967); MINN. STAT. ANN. 541.023 (Supp. 1969); NEB. REV. STAT. § 76.290 (1966); OHIO REV. CODE ANN. § 5301.51 (Page Supp. 1968); WIS. STAT. § 893.15 (1966).

and inefficiencies in the California quiet title laws. The last amendment to these statutes was in 1949, and the entire statutory scheme for the clearing of land titles has never been reviewed and revised as a whole. The waste and frustration caused by inefficiencies in the law are individual and local, and cannot be presented to the legislature as an imperative social problem; on the other hand, the remedies needed are relatively simple, not subject to political controversy, and would be a real practical benefit to the landowner and attorneys practicing in this field.

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