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A TAX TITLE QUIETED

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WHEN an abstract showing title based on an unadjudicated treasurer's deed is presented to the lawyer he promptly turns it down. Courts have gone to remarkable extremes to set aside such titles. The strictest rules of construction have been adopted, and nearly any defect or omission suffices to defeat a tax title.

In the early days when lots were cheap and plentiful, one could insist on a good "fee" title. However, "fee" lots are now becoming more scarce. Occasionally a client insists on certain tax title lots and the lawyer is requested to make the title marketable. The usual method employed is a suit to quiet title. A great many of such suits are brought annually and a large percentage of quiet title actions are defective and would not withstand an assault in court. This is true in other forms of action where substituted service has been attempted. Unless the lawyer has made a careful study of our laws and decisions he is apt to overlook some small essential requirement. A valid treasurer's deed cuts off all claims of every person (excepting minors and persons under legal disability) existing prior to or at the time of the issuance of the treasurer's deed, and substitutes a new title in place thereof. There is an exception to this rule not necessary to mention here. The purpose of the quiet title proceedings is really to obtain a determination that the treasurer's deed is valid, and a properly conducted quiet title proceeding renders the title good and marketable, regardless whether the treasurer's deed was valid or not. This principle of law is elementary.

The lawyer's first duty is to determine what persons and parties ought to be made defendants. Every person who might have any claim to the property from any source whatsoever, had no treasurer's deed been issued, should be made a defendant.

Having decided on the known defendants, the lawyer should make a search and investigation to learn the whereabouts of each of such defendants. In a great many instances no information can be gained concerning some of the defend-

ants. It is not known whether they are alive. If any defendant has passed into the realm where no real estate titles perplex a lawyer, then the heirs, devisees or persons who may have succeeded to his interest in the real estate must be made parties to the suit, so that the actual owners of the interest may have their day in court. A search should be made through the records of the estates in the county where the real property is situated to discover if any estate for the respective defendant has been probated. The courts require of the plaintiff and of his attorney reasonable diligence to discover the identity of the unknown persons.

The known defendants are determined from the abstract examination and subsequent investigation, but unless personal service can be obtained on each defendant there will be no affirmative showing in the record as to whether the defendant was alive and the uncertainty of whether the successors of the defendant have any claim unadjudicated will cause a lawyer to hesitate before he approves the suit. It therefore becomes imperative to bring in the unknown parties, that is, those who may have succeeded to the interest of the known defendant if the known defendant has died.

In so far as tax titles are concerned another class of parties should be made defendants and that is those who may have acquired some interest by way of conveyance, mortgage or otherwise, from a defendant claiming through the fee title. Our Supreme Court held that our former Recording Act and the notice thereof did not apply to persons claiming through different chains, that is, that a person claiming under a patent chain of title could convey, mortgage or otherwise affect his fee interest and that no document need be recorded so far as the owner of the tax title chain was concerned.

We attempted in the 1927 Real Estate Act to correct this condition and we believe we have effectively done so. As to instruments executed prior to the amendment, the courts will probably hold that the notice under the Recording Act is a present condition, and all instruments must be of record. However, to be safe, the holders of unrecorded instruments affecting the title should also be made unknown defendants.

The question naturally arises, how shall the unknown defendants be properly brought into the cause. Under Section

50 of the Code as amended in 1923, it is sufficient to describe them in the title or caption as "all unknown persons who claim any interest in and to the subject matter of this action".

As to the known defendants, upon whom personal service will be secured, it is sufficient to allege in the complaint the fact of ownership, possession and that the defendants claim some right, title or interest adverse to the plaintiff and that such claims are invalid but such allegations are not sufficient as to unknown parties.

Section 50 of the Code as amended requires the plaintiff to describe the interest of the unknown persons and how derived so far as the plaintiff's knowledge may extend. This is a jurisdictional requirement. What is sufficient compliance with this requirement? Some lawyers insert a paragraph in the complaint and allege that the unknown persons claim some interest through, by or under some of the known defendants. It is very doubtful if such general allegation is sufficient. The object in such suit is to remove any question affecting the marketability of a title. The lawyers should set forth that if the certain defendant, naming him, is dead, then his heirs, legatees, assignees, etc. claim some right, title and interest in and to the property because the known defendant in his lifetime claimed some right, title and interest in and to the property, having been named grantee in a certain deed giving the date, book and page thereof (or describing the interest of the known defendant whatever it may be). This is a technical requirement and should be fully complied with. Our courts have construed actions in which substituted service was attempted very strictly.

There are a great number of complicated questions that will arise as to the manner of handling different conditions in the title.

An unreleased trust deed appears in the chain of title, in which the private trustee is designated. It is not known whether the trustee is dead or some other disability has occurred vesting the trust in the sheriff or other officer of Arapahoe County (the trust deed having been executed before the creation of the City and County of Denver.) The private trustee will be named as a defendant but the successor in trust must also be named as a defendant. Which officer should be

named, the one in Arapahoe County or the one in the City and County of Denver? Examining the statutes one finds that the only powers delegated to the Sheriff of the City and County of Denver in such case was the power of releasing the trust deed. It is best, therefore, to make both officers party defendants.

The next question arises how to bar the beneficiary. No knowledge or information can be gained concerning the beneficiary. He may be dead or he may have transferred the security. In addition to allegations concerning the heirs, etc. of the beneficiary, it is advisable to insert an allegation that the present holder of the note is unknown; that the original beneficiary may have transferred the note or security or that through some other means to the plaintiff unknown some other person may now be the owner or holder of the security and because thereof claim some right, title and interest in and to the property.

A similar situation is presented in regard to outstanding unredeemed tax certificates. Not only should the record holder of the tax certificate be named but the fact should be set forth that there may be some other person unknown to plaintiff who holds the tax certificate by assignment or otherwise. In addition to making the holder of the tax certificate a party defendant, the Treasurer of the county should be a party so that the court may direct the treasurer to cancel the outstanding certificate.

The writer generally after he has fully described the various possible claims of the unknown parties incorporates in his complaint a paragraph setting forth that there may be other parties unknown to the plaintiff who claim some right, title and interest to the property through sources and origins, because of facts which are to the plaintiff unknown.

A problem occurs as to corporations whose corporate existence has expired. Where is the title? Naturally in the last and surviving board of directors or trustees of the corporation, but who are they? On examination of the records of the office of the Secretary of State if it is found that a year or two before the corporation was dissolved, in the last annual report three parties were named as the board of directors. But were they the directors at the time of dissolution? Or, no annual report

was ever filed and no information can be obtained. The safest way is to name such persons who might have been the last board of directors and in the complaint set forth the facts fully and allege that the actual board of directors are unknown, and to describe the source and origin of their claims.

The complaint has been duly filed. The sheriff has served some of the parties and has made the usual "non est" return as to the other defendants. Under rule 14A, promulgated by our Supreme Court prior to the passage of the 1927 Summons Act, the Sheriff is required to set forth the efforts he has made to obtain service and the reasons for his failure, showing that his efforts were bona fide. The lawyer should see that the return of the sheriff complies with this requirement. It is proper at this stage to call attention to the fact that if one of the defendants is a domestic corporation the usual return is not sufficient. Section 46 of the Code amended in the 1927 Summons Law requires the Sheriff to make a special affidavit.

The summons is then returned to the attorney. The whereabouts of some of the non-resident defendants is known. In such case it is advisable for the purpose of the record to have personal service by the Sheriff of the state where such defendants may reside. However, neither the attorney nor the plaintiff, after a careful investigation, have been able to learn anything concerning some of the defendants. Under the old practice the attorney prepared an affidavit stating that such defendants were non-residents. The plaintiff signed the affidavit without actually knowing whether the facts therein stated were true or not. In order to eliminate this evil there was incorporated in the 1927 Summons Act the provision authorizing service by publication when the defendant's whereabouts is to the plaintiff unknown and he cannot be found in the county where the action is pending. The constitutionality of this provision has been sustained in other states. The affidavit for publication should set forth in detail the efforts made by the plaintiff and his attorney to discover the residence or address of those defendants whose address is unknown.

It is advisable in the order for publication to incorporate an express finding that the efforts of the sheriff to obtain service upon the defendants were bona fide and the court is satisfied with such efforts to comply with the requirements of rule

14A. The old code provision required an order by the clerk. There was always a question as to the constitutionality of such order by the clerk, most courts having sustained such provision, but there is authority to the contrary. Under rule 14A an additional order was required by the Court. In the 1927 Summons Act the provision in reference to the order for publication was changed so that the order was made by the court. This new amendment supersedes rule 14A in so far as an order by the clerk is required and no order by the clerk is now necessary. There should be incorporated in the order of publication an order for publication against the unknown defendants and if there is one or more domestic corporations who are defendants, and no personal service was had upon them, the order of court should direct service by publication against such domestic corporation.

Most of the technical requirements have been discussed. The publication is made and the proper time has elapsed for the decree to be entered. After the entry of the decree (no writ of error having been taken) all of the defendants who were personally served are effectually shut out and the plaintiff's title is absolute and perfect. However, as to the parties against whom personal service was not had, including the unknown persons, a year's period of grace is given and if no action is taken within that year to set aside the decree and proper service, though by publication has been had, all such parties are effectually and permanently barred. The title should not be questioned and ought to be accepted and approved by all lawyers. There are certain lawyers who will never pass such quiet title action, but they do not hesitate to accept a fee from a client to undertake such action. The logic thereof is hard to understand.

The 1927 Real Estate Act contains two provisions intended to aid such titles. Section 39 of the Act provides a limitation of seven years in which any action may be brought to question the decree upon any ground whatsoever and Section 44 adopts a liberal rule of construction in favor of such decree.

There are probably a great many points which could and should have been mentioned in this article, but are not here treated owing to the short time allowed to the writer to prepare this article.