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STANDARD PLEADING SAMPLES TO BE USED IN QUIET TITLE LITIGATION

The Forms Standardization Committee of the Colorado Bar Association suggests that the following pleading samples may be used in quiet title suits.[1]

The Committee realizes that the facts in any given case may be such as to require a departure from these samples, but it is felt that the samples as submitted afford a concise and complete compliance with the requirements of the Rules of Civil Procedure and applicable statutes and decisions.

It cannot be emphasized too strongly that the suggestions of the Committee need not be followed exactly as to context. More words or statements may be added and possibly some of the words and statements may be eliminated from the suggested forms. It is imperative, however, that the Rules and Statutes be followed and complied with, and the samples are furnished as a guide to such compliance.

It has been suggested by experienced practitioners that a quiet title suit is too complex a proceding to be susceptible of standardization. The Committee nevertheless came to the conclusion that the drafting of such samples would be helpful both to the lawyer bringing a quiet title suit and to the lawyer examining a quiet title suit. The Committee recognizes that the samples cannot cover all of the problems or all of the fact situations which occasion or necessitate quiet title suits.

After the above somewhat cautious statement, the samples follow:

FORMS STANDARDIZATION COMMITTEE
ROYAL C. RUBRIGHT, Chairman

SUB-COMMITTEE ON DISTRICT COURT FORMS
DONALD M. LESHER, Sub-Chairman.

[1] The committee again solicits suggestions and criticisms from the members of the bench and bar. It is recognized that some of the sample pleadings submitted herewith are not in common usage in each Court within the State of Colorado; the complete set is submitted, but the practicing lawyer himself, perhaps in conference with the Clerk of the Court in which the action is commenced, can best determine which of the samples should be omitted. Although your committee has made an effort to include many unusual factual situations, and suggestions for their proper handling, it cannot be contended that the following report is completely exhaustive.

IN THE DISTRICT COURT
IN AND FOR
THE *CITY AND* COUNTY OF *DENVER*
STATE OF COLORADO [2]

CIVIL ACTION NO. *4-711* DIV. *9*

ZEBINA HEREDITAMENT AND ZENOBIA HEREDITAMENT,[3]
Plaintiffs,

vs.

ARISTARCHUS AEUYIO,[4] *B. B. BPHRTZ*,[5] *CADWALLADER CFRMTZG, also known as CADWALLDER CFRMTZZ*,[6] *DIONYSIUS DUAOBCX, ELIAKIM EVBPCDA*,[7] *FIDELIA FIDELIS FJEFMJT, FIDELIA FIDELIS FJEFMJT, TRUSTEE*,[8] *AND ALL UNKNOWN PERSONS WHO CLAIM ANY INTEREST IN THE SUBJECT MATTER OF THIS ACTION*,[9]
Defendants.[10]

COMPLAINT UNDER RULE 105 [11]

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[2] Rule 10(a), Colo. Rules Civ. Proc.

[3] Any similarity between the names employed in case samples and the names of actual persons, living or dead, is, believe us, *purely* coincidental. The subchairman and each of the sub-members of the sub-committee specifically deny any liability or responsibility resulting from having conceived or employed the names shown.

[4] A slight error in the spelling of names has been held to be not fatal to preclude that party if notice is such as will attract his attention. 23 Colo. App. 229, 129 Pac. 569. Care should be taken, however, to name each party as his name may appear of record.

[5] In Gibson v. Foster, 24 Colo. App. 434, 135 Pac. 121, it was held that although initials and last name are sufficient to constitute a party defendant or plaintiff, initials will not be held to preclude one who holds title in his first name and a different middle initial. Thus a judgment against one A. L. Deleplane was without effect as to Albert S. Deleplane. Where a variance in name occurs because initials and full names are interchanged, it appears that Ch. 40, C.S.A. (Suppl.), Sec. 117 (4) (1941 S.L. pp. 607, 608), would be applicable to actions under Rule 105 to the same extent as in any other instruments affecting the title to the same real property.

[6] Although the general principal of *idem sonans* applies to legal proceedings, whether civil or criminal (65 C.J.S. p. 28, Sec. 14(b)), all names by which a party was known should be shown in the action, if such information is available.

[7] Rule 105 (b), Colo. Rules of Civ. Proc., adopted by the legislature in 1941 to become part of the substantive law as follows: "No person claiming any interest in real property under or through a person named as a defendant in an action concerning real property, to which the Rules of Civil Procedure for courts of record adopted by the supreme court of the state of Colorado are applicable, need be made a party to such action unless his interest is shown of record in the office of the recorder in the county where such real property is situated, and the decree shall be as conclusive against him as if he had been made a party; provided, however, that if such action be for the recovery of actual possession of the property the party in actual possession shall be made a party." Ch. 40, C.S.A. (Suppl.), Sec. 117(2).

1. The plaintiffs *are* the owners[12] *in joint tenancy and in possession*[13] of the following described real estate situate in the *City and* County of *Denver,* State of Colorado:

Plot One, Block One, New Monia.[14]

2. There may be persons interested in the subject matter of this action whose names cannot be inserted herein because said names are unknown to the plaintiffs although diligent efforts have been made to ascertain the names of said persons; such persons

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[12] The Plaintiff's title may be either legal (52 Colo. 153, 124 Pac. 187; 17 Colo. 476; 30 Colo. 56), or equitable (29 Colo. 69, 66 Pac. 901; 21 Colo. 309, 40 Pac. 688; 17 Colo. 231, 29 Pac. 802), and if the defendant answers, the plaintiff must rely on the strength of his own title and not on the weakness of his adversary (85 Colo. 318, 275 Pac. 907; 84 Colo. 220, 269 Pac. 901; 49 Colo. 197, 112 Pac. 542; 10 Colo. 24, 14 Pac. 54; 24 Colo. App. 392, 133 Pac. 1052; 21 Colo. App. 427, 122 Pac. 65).

Under Rule 105, however, the action is one brought for the purpose of adjudicating the rights of all parties thereto. It is not necessary, therefore, that plaintiff's interest appear of record. 1 Am. Juris., p. 907, states: "In the absence of statutory authority to the contrary, an instrument relied on as color of title need not be recorded." See 73 Colo. 451 and Vol. 21, Rocky Mtn. Law Review 226 (Feb. 1949).

[13] In Siler v. Investment Securities Co. Ltd., Colo. Sup. Ct. No. 16458, decided May 5, 1952, the Colorado Supreme Court held that although under the Code, possession of the property in dispute was essential to the maintenance of an action to quiet title, no such requirement is found in Rule 105, Rules of Civ. Proc. The Court specifically held that it was not necessary for the plaintiff to allege and prove that it had possession of the real estate in question. It would appear therefore, that, except in those cases where possession is an issue, the rights of the parties could be adjudicated without the necessity of alleging possession. In these samples, the allegation is made because it is felt that no harm can result from including it.

[14] The property to be quieted must be clearly described in the complaint. (23 Colo. App. 229, 129 Pac. 569), and it has been held that error in the description is a fatal defect (33 Colo. 349, 80 Pac. 1038).

Rule 105(g), Colo. Rules Civ. Proc., provides: "In any proceeding for the recovery of real property or an interest therein, such property shall be designated by legal description."

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[8] The naming of a person in an individual capacity will not preclude him in the capacity of trustee or vice versa. 53 Colo. 363, 127 Pac. 139.

[9] Rule 10(a), Colo. Rules Civ. Proc., provides, in part: "In an action *in rem* unknown parties shall be designated as 'all unknown persons who claim any interest in the subject matter of this action.'" Your committee raises a question as to the necessity, in most instances, of naming unknown parties in view of Rule 105(b), Colo. Rules Civ. Proc., which, in effect, provides that no person claiming any interest under a person named as a defendant need be made a party unless his interest is shown of record. Although unknown parties have traditionally been made defendants and were probably necessary under the Code, it is submitted that, in most instances, the necessity was removed on April 17, 1941, by 1941 S. L. p. 605, Sec. 2 (Ch. 40, C.S.A. Suppl., Sec. 117(2)).

[10] The entire proceedings will be easier to prosecute, and subsequently to examine, if the names of all parties are arranged alphabetically.

[11] Rule 105(a), Colo. Rules Civ. Proc. provides as follows: "An action may be brought for the purpose of obtaining a complete adjudication of the rights of all parties thereto, with respect to any real property and for damages, if any, for the withholding of possession."

have been made defendants and designated as "all unknown persons who claim any interest in the subject matter of this action";[15] so far as plaintiffs' knowledge extends, the interests of the unknown parties are derived through some one or more of the named defendants.[16]

3.[17] The defendants claim some right, title or interest in and to the above described real estate adverse to plaintiffs; the claims of said defendants are without foundation or right.[18]

WHEREFORE PLAINTIFFS PRAY for a complete adjudication of the rights of all parties to this action with respect to the real property hereinabove described; for a decree requiring the defendants to set forth the nature of their claims, determining that the defendants and each of them have no interest, estate, or claim of any kind whatsoever in the above described real estate, forever barring and enjoining the defendants from asserting any claim or title thereto, quieting the title of the plaintiffs in and to the premises, and adjudging that the plaintiffs *are* the owners in fee simple *in joint tenancy* and entitled to possession of the premises above described; and for such other relief as to the Court may seem proper.[19]

"1. Plaintiff is the owner of (legal description).

2. Defendants claim some interest in or title to the above described real property adverse to plaintiff, which claims are inferior to plaintiff's title.

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[15] Although the general rule, as stated in footnote 17, is that it is not necessary to allege the particular interest of each defendant and how the same may have been derived, Rule 9(a)(3) specifically provides: "When parties are designated in the caption as 'all unknown persons who claim any interest in the subject matter of this action' the pleader shall describe the interests of such persons, and how derived, so far as his knowledge extends."

[16] Prior to the adoption of the Rules of Civil Procedure, better practice demanded that the interests of unknown parties be shown to have been derived as heir, creditor, assignee, etc., of certain defendants, naming them. Rule 9(a)(4), however, specifically provides: "Where unknown parties claim some interest through some one or more of the named defendants, it shall be a sufficient description of their interests and of how derived to state that the interests of the unknown parties are derived through some one or more of the named defendants.".

[17] It is deemed not necessary to set out, in full, the exact claim of each defendant and how each was derived. A short complaint is preferable (94 Colo. 496, 31 Pac. (2) 711), and it is merely the duty of the plaintiff to allege that the defendants claim an interest in the property adversely to the plaintiff but have none (52 Colo. 207, 121 Pac. 171; 49 Colo. 522, 113 Pac. 494; 30 Colo. 310, 70 Pac. 428; 22 Colo. 150, 43 Pac. 1002; 15 Colo. App. 325, 62 Pac. 1044).

[18] Rule 10(b), Rules Civ. Proc., provides: "All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which be limited as far as practicable to a statement of a simple set of circumstances. . . . ". Failure to state claims separately, however, is not a ground for dismissal. 29 F. Supp. 303.

[19] In footnote 9, a question was raised as to the necessity of naming unknown persons as parties. Your committee submits the following complaint, with unknown parties not named, as defendants, as an example of extreme brevity, but sufficient to state a cause of action:

WHEREFORE PLAINTIFF PRAYS for a complete adjudication of the rights of all parties hereto with respect to the above-described real property."

Silvester Hasede
Attorney for Plaintiffs [21]
211 Midland Security Bldg.
Denver 2, Colo., ROngno 7746 [22]

Plaintiffs' Address:
4444 Fort Lane
Denver, Colorado

SPECIAL ALLEGATIONS IN COMPLAINT [23]

1. To quiet title against possible claims of State of Colorado for lien for inheritance taxes:[24] (State of Colorado should be made party defendant.[25])

"The State of Colorado is made a party to this action under the provisions of Section 52, Chapter 85, 1935 Colorado Statutes Annotated, and no proceedings are pending in any court of this state wherein the taxability of any transfer of the real property herein involved, and the liability for inheritance tax therefor, may be determined, but all parties, if any, interested in said transfer and in the taxability thereof have been made parties hereto."

2. To take care of a break in the chain of title resulting from the death of one of the fee owners and no subsequent evidence of

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[21] Rule 11, Colo. Rules Civ. Proc., provides: "Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address and that of the party shall be stated."

[22] Since the Determination of Interests samples were published in the August, 1951, Dicta, Hasede has become a partner in the firm of Kojhiu and Hasede, and has moved from the First Majestic-Equitable Building into more spacious quarters.

[23] To be added as separate numbered paragraphs if the factual situation demands. It must be recognized that the following samples make provision for only a *few* of the unusual factual circumstances, which, from time to time, occur in actions *in rem*. These pleading samples are only suggestive forms, not soporific panaceas.

[24] Should not be used unless there is knowledge of the death of one or more of the named defendants, such as where evidence of such death appears of record.

[25] Service should be had upon the attorney general, as provided in Ch. 85, C.S.A., Sec. 52, which reads as follows: "Actions may be brought against the state by any interested person for the purpose of quieting the title to any property against the lien or claim of lien of any tax or taxes under this chapter, or for the purpose of having it determined that any property is not subject to any lien for taxes, nor chargeable with any tax under this chapter. No such action shall be maintained where any proceedings are pending in any Court of this state wherein the taxability of such transfer and the liability therefor, and the amount thereof, may be determined. All parties interested in said transfer and in the taxability thereof shall be made parties thereto, and any interested person who refuses to join as plaintiff therein may be a defendant. Summons for the state in such action shall be served upon the attorney general."

heirship:[26] (Decedent,[27] and all persons who are or who claim to be heirs,[28] should be made parties defendant, even though said heirs have previously conveyed.)

"As particularly as known or can by due diligence be ascertained, the defendant *Alphonso Abiathar Grthvlm* died intestate, at *Sunlit Beach, California*; on or about the *first* day of *October, 1947*, his last place of residence having been *Sunlit Beach, California;* the names, addresses, and relationships to the decedent of all the heirs entitled to any interest in the real property herein described are:

Name	Address	Relationship	Interest
Beatrice Bridget Grthvlm	00 Nought St., Sunlit Beach, California	Wife	1/2
Celestine Corinna Hpuiwmn	11 Waan Ave., South Saguache, Colorado	Daughter	1/8
Darius Dexter Grthvlm	22 Tughe St., Choo Choo, Colorado	Son	1/8
Ephraim Enos Grthvlm	00 Nought St., Sunlit Beach, California	Son	1/8
Fidelia Faustina Grthvlm	00 Nought St., Sunlit Beach, California	Daughter	1/8

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3. To eliminate homestead interest improperly conveyed: (The known fee owner, his or her known spouse,[29] and the person filing the homestead entry should be made defendants; in addi-

[26] Patton on Titles, Sec. 288, pp. 903-905, provides: "In states where unknown parties may be joined as defendants, the matter (heirship) can be determined in actions of right, for partition or to quiet title.".

[27] Although there may be a question as to the advisability of naming as a party defendant an unknown decedent (98 Mont. 291, 39 Pac. 2d 186), it is felt best to name such deceased person so that all persons claiming through him will be included as unknown persons.

[28] Service upon a natural person, under the age of 18 years, within this state, shall be had by delivering a copy of summons to him and a copy thereof to his father, mother, or guardian, or if there be none in the state, then by delivering a copy thereof to any person in whose care or control he may be, or with whom he resides, or in whose service he is employed. Rule 4(e) (2), Colo. Rules Civ. Proc.

[29] If the death of the husband appears of record, and the wife subsequently conveys without showing any change of name, there is probably a presumption that the wife continued unmarried following the husband's death and was a single person at the time of the conveyance. No such presumption attaches, however, if the wife dies first and the husband later conveys because a remarriage by the husband would not result in a change of his name.

tion, the unknown spouses of such parties should be made defendants.)

"Certain of the defendants claim, or may claim, an interest in and to the real property herein described, adverse to plaintiffs, by reason of a certain homestead entry appearing in book *A4567*, at page *98765*, of the records of the Clerk and Recorder of the *City and* County of *Denver*, State of Colorado;[30] there are, or may be, certain persons who claim, or may claim, an interest in and to the real property herein described, adverse to plaintiffs, by reason of said homestead entry, as spouses of such named defendants; the names of such spouses cannot be inserted herein because such names are unknown to plaintiffs, but such persons have been made defendants and designated as "all unknown spouses of *Gamaliel Hezekiah Iyslkpo*, and of *Griselda Hortensia Iyslkpo*." [31]

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4. To cancel tax certificates shown to be outstanding: (the county treasurer, by name and official title, as well as the persons to whom such tax certificates were issued,[32] or assigned, must be

"The following certificates of tax sale remain outstanding on the records of the Treasurer of the *City and* County of *Denver*, State of Colorado:

1. *Certificate No. 51-H377—dated November 14, 1852—issued on sale for taxes of 1851;*
2. *Certificate No. 77-3H15—dated November 19, 1878—issued on sale for taxes of 1877;*

such certificates of tax sale no longer constitute a lien against the real property herein described and should be cancelled."

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5. To quiet title against an expired or dissolved corporation;[33]

[30] Although it is not necessary to allege the exact claim of each defendant and how each was derived, it is considered better practice to make such allegation when special or unusual matters appear.

[31] The suit would probably not be subject to attack if proper parties were made defendants but no special allegation such as here suggested was included in the complaint.

[32] If a municipal corporation is a necessary party, service shall be had on the mayor or clerk of such corporation. (Rule 4(e) (6), Colo. Rules Civ. Proc.). If a county is a necessary party, service shall be had on the county clerk or his chief deputy. (Rule 4(e) (7), Colo. Rules Civ. Proc.).

made defendants.)

[33] To quiet title against a corporation no longer in active business, an expired or dissolved corporation should be carefully distinguished from a defunct corporation. If the corporation is declared defunct by the Secretary of State, the corporation, as an entity, may still hold, sell and convey real estate. Ch. 40, C.S.A., Sec. 83. A defunct corporation, therefore, is sued and service is obtained precisely as though the corporation were in good standing. The title to real estate of an expired or dissolved corporation, vests in the directors acting last before dissolution. Ch. 40, C.S.A., Sec. 66. See also Ch. 40, C.S.A., Sec. 62.

no special allegations in the complaint are necessary, but the former corporation [34] and each of the last directors [35] should be named as parties defendant.

(USE CAPTION AND FULL TITLE [36])

SUMMONS [37]

THE PEOPLE OF THE STATE OF COLORADO

To the above named Defendants, GREETING:

You are hereby summoned and required to file with the clerk an answer to the complaint within 20 days after service of this summons upon you. If you fail so to do, judgment by default will be taken against you for the relief demanded in the complaint.

If service upon you is made outside the State of Colorado, or by publication, or if a copy of the complaint be not served upon you with this summons, you are required to file your answer to the complaint within 30 days after service of this summons upon you.

This is an action to quiet title to *Plot one, Block one, New Monia,* in the *City and* County of *Denver,* State of Colorado.[38]

Dated *January 32,* 195*3*.[39]

IMA DE MOPUBLICAN
Clerk of the District Court [40]
By *Q. D. Istrictcap*
Deputy Clerk

Silvester Hasede
Attorney for Plaintiff
211 Midland Security Bldg.
Denver 2, Colo.,
ROngno 7746

(SEAL OF THE COURT)

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[34] If the entity is not designated as a corporation in the record title, it might be well to include the term "partners".

[35] The directors should be designated in the title as follows: "*Jotham J. Jbycxdw, Leander L. Levfug,* and *Manasseh M. Mhtisjr,* all three as surviving directors and trustees of *Nkglpmon Co.,* formerly a Colorado corporation."

[36] The summons cannot be considered a subsequent pleading within the meaning of Rule 10(a), so that an abbreviated title cannot be used. The Court would not have jurisdiction over any person not named in the title appearing on the summons. Rule 4(c), Colo. Rules Civ. Proc.

[37] Rule 4(c), Colo. Rules Civ. Proc., provides in part: "The summons shall contain the name of the court, the names or designation of the parties to the action, the county in which it is brought, be directed to the defendant, state the time within which the defendant is required to appear and defend, and shall notify him that in case of his failure to do so, judgment by default will be entered against him.".

[38] Rule 4(c), Colo. Rules Civ. Proc., further provides: "If the summons be served without a copy of the complaint, or by publication, the summons shall briefly state the sum of money or other relief demanded.". See also 59 Colo. 504; 6 Colo. 388.

[39] Obviously fictitious.

[40] Rule 4(b), Colo. Rules Civ. Proc., provides in part: "The summons may be signed and issued by the clerk, under the seal of the Court, or it may be signed and issued by the attorney for the plaintiff.".

(USE CAPTION)

ZEBINA HEREDITAMENT, [41] et al,
Plaintiffs,
vs.
ARISTARCHUS AEUYIO, et al,
Defendants.

MOTION FOR PUBLICATION [42]

The plaintiff moves for an order for service by publication upon all of the defendants not otherwise served, and states:

The facts authorizing such service are as follows:[43] this is an action affecting specific property and is a proceeding in rem; the defendants to be served by publication are unknown persons, (*or are domestic corporations* [44] *which cannot be served because*

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[41] Rule 10(a), Colo. Rules Civ. Proc., provides in part: "In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.".

[42] Rule 4(g) (2) provides: "Service by publication may be had on the following parties: (i) unknown parties. (ii) domestic corporations, when such corporation cannot be served because no person can be found upon whom such service can be made. (iii) foreign corporations, when such corporation has not appointed a statutory agent for process or when the agent appointed cannot be found at the address stated in such appointment. (iv) non-residents of the state; persons who have departed from the state without intention of returning; persons who conceal themselves to avoid service of process; or persons whose whereabouts are unknown and who cannot be served by personal service in the state.".

Rule 4(h), Colo. Rules Civ. Proc., effective August 18, 1951, provides: "The party desiring service of process by publication shall file a motion verified by the oath of such party or of someone in his behalf for an order of publication. It shall state the facts authorizing such service, and shall show the efforts, if any, that have been made to obtain personal service within this state and shall give the address, or last known address, of each person to be served or shall state that (*the same is*) HIS ADDRESS AND LAST KNOWN ADDRESS ARE unknown. The court shall hear the motion ex parte and, if satisfied that due diligence has been used to obtain personal service within this state, or that efforts to obtain the same would have been to no avail, shall order publication of the process in a newspaper published in the county in which the action is pending. Such publication shall be made for four weeks. Within (10) 15 days after the order the clerk shall mail a copy of the process to each person whose address OR LAST KNOWN ADDRESS has been stated in the motion. Service shall be complete on the day of the last publication. If no newspaper be published in the county, the court shall designate one in some adjoining county.".

[43] The omission of any of the requirements contained in the Rules is fatal (24 Colo. App. 514; 24 Colo. App. 517; 25 Colo. App. 129, 131; 109 Colo. 567). Any decree based on an insufficient motion of publication is a nullity (23 Colo. App. 53) and may be collaterally attacked (22 Colo. App. 603; 23 Colo. App. 220; 48 Colo. 419).

[44] The statement that "the whereabouts of the defendant are unknown and he cannot be served by personal service in the State of Colorado" will not apply to corporations. 25 Colo. App. 129 held that a domestic corporation cannot be absent from the state, or conceal itself to avoid service of process.

no person can be found upon whom service can be made,[45]) (*or*[46] *are foreign corporations*[47] *which have not appointed an agent for process who can be found at the address stated in such appointment,*[45]) (*or are non-residents of the State of Colorado,*[45]) (*or have departed from the State without intention of returning,*[45]) or are persons whose whereaboute are unknown and who cannot be served by personal service in the State of Colorado.

That search has been made of the public records of the *City and* County of *Denver,*[48] State of Colorado, and of the telephone and other available directories; various inquiries have been made from persons who might have information concerning the defendants; endeavors have been made to serve defendants personally at any Colorado addresses available; but said efforts have been to no avail.

The addresses, or last known addresses, of the following defendants are as herein stated:

Cadwallader Cfrmtzg	*Denver, Colorado*
Cadwallder Cfrmtzg	*Denver, Colorado*
Cadwallader Cfrmtzz	*Denver, Colorado*
Dionysius Duaobcx	*123 Fourth St., Los Angeles, California*
Eliakim Evbpcda	*c/o Nakum Nmmm, Second Colorado National Bank, Denver, Colorado*[49]
Fidelia Fidelis Fjefmjt	*Denver, Colorado*
Fidelia Fidelis Fjefmjt, Trustee	*Denver, Colorado*

[45] Should be omitted where inapplicable.

[46] Although grounds for service by publication may be stated in the disjunctive (25 Colo. App. 129; 67 Colo. 189; 53 Colo. 346), the attorney should use care to state all applicable grounds.

[47] It should be noted that the facts authorizing the service applicable to domestic corporations do *not* apply to foreign corporations. Care should be taken, in service on foreign corporations, to comply strictly with the wording of Rule 4(g) (2) (iii), Colo. Rules Civ. Proc.

[48] Only the records of the county in which the action is brought need be searched. 94 Colo. 459.

[49] Although not necessarily a residence, an address is a direction at which or through which a person may be located. (50 N.E. 2d 633 (Mass.)).

and, except as herein stated, that the address and last known address [50] of each defendant is unknown.[51]

Silvester Hasede
Attorney for Plaintiff

STATE OF COLORADO } ss.
CITY AND COUNTY OF *DENVER* }

Silvester Hasede, states: that he is the attorney for and makes this vertification in behalf of the above-named plaintiffs; that he has read the foregoing motion; and that the facts therein stated are true.[52]

Silvester Hasede
Attorney for Plaintiff

Subscribed and sworn to before me this *37th* day of *January,* 195*3*.

My commission expires *September 20, 1953.*

Sally N. Doakes
Notary Public

(SEAL)

[50] Prior to August 18, 1951, there was a degree of confusion existing over the wording of the former Rule 4(h). The Supreme Court clarified the matter by amending Rule 4(h) to read: ". . . or shall state that his *address and last known address* are unknown." A statement that the defendant's address is unknown is insufficient, it must *also* be stated that the last known address is unknown. See 71 S.W. 2d 833 (Mo.); 132 Fed. 2d 677.

[51] Under former Code, Sec. 45, it was sufficient if the affidavit stated that the residence, whereabouts, and post office address were unknown to the *affiant.* In construing a requirement similar to ours, however, it was said in Glenn v. Hollub, 36 Fed. Supp. 941, 942, that the plaintiff is required to ascertain at his peril, the last known address of the defendant as a matter of fact.". See also 154 Atl. 255; 57 N.E. 2d 819; 211 N.W. 916, 57 A.L.R. 1218. Any failure to determine a last known address, when one is available, will, accordingly, result in a failure to comply with the rule. A statement that the residence, address, whereabouts, and post office address are unknown is not a statement, as required, that the last known address is unknown.

Although Bar Association Title Standard No. 69 provides as follows:

> "Problem: Marketability of title is dependent upon a quiet title suit. The recorded instruments affecting the title in the office of the Clerk and Recorder disclose no address of a defendant, and the motion for publication states that the address, and last known address of the defendant are unknown. The motion and other proceedings are on their face in all respects in compliance with the rules: Even if the attorney examining the title knows of an address or has been able to discover an address not shown in said records of the recorder's office affecting said title, should the title be passed as marketable? ANSWER: Yes. MEMO: The above Standard is not intended to prescribe the duties of the attorney bringing a quiet title suit."

The duties of the attorney bringing a quiet title suit to ascertain and state all addresses and last known addresses is not diminished.

[52] In 25 Colo. App. 219, an affidavit for publication which was made on information and belief was held *not* to comply with the requirements of law for that reason. A verification should, accordingly, be made positively and not on information and belief.

(USE CAPTION AND ABBREVIATED TITLE)
ORDER FOR PUBLICATION AND MAILING

THIS MATTER coming on to be heard, and the Court being satisfied that due diligence has been used to obtain personal service within this state, or that efforts to obtain the same would have been to no avail,[53] it is ordered that the Summons herein be published in *The Denver Clarion,* a newspaper published in the *City and* County of *Denver,* State of Colorado,[54] for four weeks,[55] and that the Clerk of this Court mail a copy of the Summons to each person whose address or last known address was stated in the Motion for Publication.

Done in open court this *39th* day of January, 195*3*.[56]

BY THE COURT:
Zadok Zedekiah
Judge

(USE CAPTION AND ABBREVIATED TITLE)

CERTIFICATE OF MAILING OF COPY OF PROCESS

I hereby certify that I have this day mailed a copy of Summons in this action with postage prepaid thereon to each person hereinafter named at the address hereinafter set opposite their names,[57] to-wit:

Cadwallader Cfrmtzg	*Denver, Colorado*
Cadwallder Cfrmtzg	*Denver, Colorado*
Cadwallader Cfrmtzz	*Denver, Colorado*
Dionysius Duaobcx	*123 Fourth St., Los Angeles, California*
Eliakim Evbpcda	*c/o Nakum Nmmm, Second Colorado National Bank, Denver, Colorado*
Fidelia Fidelis Fjefmjt	*Denver, Colorado*
Fidelia Fidelis Fjefmjt, Trustee	*Denver, Colorado*

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[53] Rule 4(h), Colo. Rules Civ. Proc.

[54] Rule 4(h), Colo. Rules Civ. Proc., requires that publication be made in the county in which an action is pending.

[55] Rule 4(h), Colo. Rules Civ. Proc., formerly required publication "at least once a week for 4 successive weeks". Effective February 26, 1944, the rule was amended, in this provision, to its present requirement of 4 weeks, which means 5 insertions. See Dicta XIX, no. 9, p. 231, for an article by H. D. Henry, and Dicta XXI, no. 3, p. 62, for an article by J. P. Helman.

[56] There is no such date as January 39, 1953.

[57] Although it is the custom of the clerks of the Courts to list each person to whom summons was mailed, it is the opinion of the committee that the certificate would be sufficient if it showed mailing to "each person whose address or last known address was stated in the motion for publication at such address".

Dated *January 39th, 1953.*[58]

Ima De Mopublican
CLERK OF THE COURT
By *Q. D. Istrictcap*
Deputy Clerk

(SEAL OF THE COURT)

(USE CAPTION AND ABBREVIATED TITLE)
DISCLAIMER [59]

The Defendant, *City and County of Denver,* disclaims any right, title, or interest in and to the property described in the complaint herein.

Wherefore, this Defendant prays that he may go hence without costs.

F. Lunkeynum Berten
Attorney for Defendant
City and County of Denver
Municipal Bldg., Denver, Colo.,
MA. 1133

Defendant's address:
Municipal Bldg., Denver, Colo.

(USE CAPTION AND ABBREVIATED TITLE)
AFFIDAVIT RE MILITARY SERVICE [60]

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[58] By an amendment effective August 18, 1951, the former time of ten days, within which to mail, was extended to fifteen days. Among other things, this will frequently permit the mailing of printed summons prepared by the newspaper of publication rather than illegible carbon copies.

[59] Rule 105(c), Colo. Rules Civ. Proc., provides in part: "If any defendant in such action disclaims in his answer any interest in the property or allows judgment to be taken against him without answering, the plaintiff shall not recover costs against him, unless the Court shall otherwise direct . . .".

[60] U.S.C.A. (suppl.), Section 520 (1), provides as follows: "In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment. Unless it appears that the defendant is not in such service the court may require, as a condition before judgment is entered, that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under this Act."

The above statute was adopted in substance as Rule XXIII of the Denver District Court.

Silvester Hasede, of lawful age, states:

That he is *the attorney for the plaintiffs in the above entitled action;*[61] that he is unable to determine[62] whether or not any of the defendants are in military service of the United States or in the military service of any nation with which the United States may be allied in the prosecution of the war, or have been ordered to report for such military service or for induction into such military service.[63]

Silvester Hasede
Attorney for Plaintiff

STATE OF COLORADO }
CITY AND COUNTY OF *DENVER* } SS.

Subscribed and sworn to before me this *99th day of January,* 195*3*.[64]

My commission expires *September 20, 1953.*

Sally N. Doakes
Notary Public

(SEAL)

(USE CAPTION AND ABBREVIATED TITLE)

MOTION FOR APPOINTMENT OF ATTORNEY AND FOR ORDER FOR ENTRY OF JUDGMENT[65]

COMES NOW *Silvester Hasede* in behalf of the plaintiffs herein and requests that this Court appoint an attorney to represent all non-appearing defendants in accordace with the Soldiers' and Sailors' Civil Relief Act of 1940, as Amended, and moves for an order of entry of judgment in accordance with the provi-

[61] Although the Soldiers' and Sailors' Civil Relief Act, as amended, provides that the plaintiff shall file the affidavit, the person knowing the facts—usually the attorney—should sign it.

[62] In 158 Pac. 2d 907 (Okla. 1945), it was determined that an affidavit was in compliance with law which stated that the affiant was unable to determine whether defendants were engaged in military service. If the affidavit states that the defendants are not in such military service, the facts upon which the affidavit is based must be set forth.

[63] The failure to file a military affidavit does not render the judgment void, but only voidable, subject to attack by those persons actually in military service who had a meritorious defense and who were prejudiced in presenting that defense by reason of such military service. 256 Fed. 38; 83 S. 190 (La.); 179 Pac. 831 (Mont.); 174 S.W. 2d 276; 163 S.W. 2d 607; 167 Pac. 2d 870 (Okla.).

[64] An affidavit made prior to default (within thirty days after the last publication) fails to meet the requirements of law. 36 N.Y.S. 2d 480; 188 Pac. 322. The affidavit should, as nearly as practical, set forth facts relating to the military service of the parties as of the day of the decree. 18 A. 2d 714; 141 Pac. 2d 908; 198 Pac. 45; 42 N.E. 2d 176; 134 Pac. 2d 251; 22 S.E. 2d 426; 87 L. Ed. 1587.

[65] Your committee is of the opinion that there is no need for this motion. We are informed, however, that some courts require it. The attorney should inform himself as to local practice.

sions of said Act, and as grounds for this motion states that certain of the defendants herein are in default and that the plaintiff has filed proper affidavit stating that he is unable to determine whether or not such defendants are in the military service of the United States or its allies.

Silvester Hasede
Attorney for Plaintiff

(USE CAPTION AND ABBREVIATED TITLE)
ORDER APPOINTING ATTORNEY [66]

It is hereby ordered that Sigismund [67] Agnes,[68] be and he hereby is appointed to represent any and all defendants who are or who may be in the military service pursuant to the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, as Amended.

Done in open court this *99th* day of *January*, 195*3*.

BY THE COURT:
Zadok Zedekiah
Judge

(USE CAPTION AND ABBREVIATED TITLE)
ANSWER [69]

The undersigned attorney, having heretofore been appointed to represent all defendants who are in or who may be in the military service, as defined by the Soldiers' and Sailors' Civil Relief Act of 1940, as Amended, does hereby enter his appearance in behalf of such defendants and, in answer to the plaintiff*s*' complaint, states that he is without sufficient knowledge or information upon which to base a belief concerning the allegations of said complaint and therefore neither admits nor denies the same, and requests this Court to require that the plaintiff*s* be put on strict proof.

Sigismund Agnes
Attorney appointed by the Court

(USE CAPTION AND ABBREVIATED TITLE)
ORDER FOR DEFAULT AND ENTRY OF JUDGMENT [70]

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[66] Many courts, as a local custom, require a written order. In the opinion of the committee a minute order would be sufficient.

[67] Of Teutonic origin meaning: "protector of."

[68] Of Greek origin meaning: "chastity."

[69] Although some courts, as a local custom, require this answer, it is deemed unnecessary if proper finding of appearance is made in the decree. The filing of such an answer raises a question as to the necessity of a defendant's docket fee.

[70] 50 U.S.C.A. (suppl.), Section 520 (1), provides: "If an affidavit is not filed showing that the defendant is in the military service, no judgment shall be entered without first securing an order of court directing such entry."

THE COURT FINDS:

That each and every defendant herein has failed to appear within the legal time permitted for a defendant to plead, or has filed his disclaimer herein;

IT IS ORDERED: that a default is hereby entered for all defendants not personally appearing herein;[71] and that judgment in the above entitled matter shall be entered forthwith.[72]

Done in open court this *99th* day of *January, 1953.*

BY THE COURT:
Zadok Zedekiah
Judge

(USE CAPTION AND FULL TITLE [73])

DECREE

THIS CAUSE coming on to be heard,[74]

THE COURT FINDS:

That each defendant herein has been properly served as required by law and rule of Court;[75] that *Sigismund Agnes*, attorney at law, has been heretofore appointed and appeared for any and all defendants who are in, or who may be in, or who may have been ordered to report for induction into, the military service as

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[71] Although Rule 55(a), Colo. Rules Civ. Proc., permits the Clerk of the Court to enter default, this rule is not a limitation on the power of the court. 1 F.R.D. 448.

[72] 50 U.S.C.A. (suppl.), Section 520 (4), provides as follows: "If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment." Oct. 17, 1940, Chap. 888, Sec. 200, 54 Stat. 1180.

[73] Bar Association Title Standard No. 40 provides as follows: "Problem: In an action concerning real estate brought under Rule 105, is it necessary that the written decree of court designate the names of all the parties to the proceeding? Answer: Yes.

Note: The rules provide that the caption of the complaint shall include the names of all parties but that in other pleadings it is sufficient to state the name of the first party on each side. A decree of court is not a pleading.

Unless the recorded decree is a proceeding, affecting title to real property, designates all of the parties defendant, an examination of the abstract would not disclose whether or not all necessary parties were made defendants in the action. In other words, a complete record title would not be shown in the recorder's office."

[74] Under the provisions of Rule 55(f), Colo. Rules Civ. Proc., proof of service and failure to plead must be made and the court must require proof of the claim.

[75] A recitation in the decree is not conclusive if the record discloses lack of jurisdiction. 48 Colo. 419; 22 Colo. App. 612.

defined by the Soldiers' and Sailors' Civil Relief Act of 1940, as Amended; that this is an action in rem affecting specific real property; that the court has jurisdiction of all parties to this suit and of the subject matter thereof; that the allegations of the complaint are true; that every claim made by said defendants is unlawful and without right; that no defendant [76] herein has any title or interest in or to the property described herein or any part thereof; therefore:

IT IS ORDERED, ADJUDGED AND DECREED that *Zabina Hereditament and Zenobia Hereditament,* Plaintiffs, at the time of the commencement of this proceeding,[77] were, *and they now are,* the owners in fee simple, *in joint tenancy, with right to possession,*[78] of the real property situate in the *City and* County of *Denver,* State of Colorado, described as follows:

Plot one, Block one, New Monia

that complete fee simple title in and to said real property be and the same hereby is quieted in and to the above persons, and that each of the defendants has no right, title, or interest in or to the said real property or any part thereof, and that they are forever enjoined [79] from asserting any claim, right, title, or interest in or to the said real property or any part thereof.[80]

Done in open Court this *99th* day of *January,* 195*3*.

BY THE COURT:
Zadok Zedekiah
Judge

Approved as to form.
Fee received.
Sigismund Agnes
Military Attorney

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[76] A decree in which a person having claim or title is not summoned or made a party defendant or does not appear is without effect as to such party. 21 Colo. App. 427; 22 Colo. App. 386.

[77] Bar Association Title Standard No. 71 provides as follows: "Problem: "A" commences Quiet Title proceedings, but thereafter and before final decree is entered "A" conveys the property to "B" by warranty, quit claim or other deed. "B" is not substituted as a party to the Quiet Title proceedings. Final decree is entered finding that 'plaintiff is the owner and in possession' of the real property. Is B's title merchantable? Answer: Yes."

[78] Although the right to possession is not a necessity for an action under Rule 105, the decree should find such right if it be the fact.

[79] The decree bars the defendants and all persons who claim under them from asserting any further claim to the real estate. 63 Colo. 222.

[80] 49 C.J.S. 837 provides as follows: "It will be presumed, in consonance with the presumptions of regularity and validity, that plaintiff was entitled to maintain the action; that all the proceedings were regular, and all jurisdictional steps were taken; that all necessary parties were represented; that an appearance by an attorney was authorized; that the judgment was supported by the pleadings and proof; that all matters covered by the judgment were in fact litigated by the parties; that some disposition was made of every defendant in the case." And also at page 869: "Recitals in a judgment are presumed to be true and correct unless contradicted by other parts of the record."