Denver Law Review

Volume 22 | Issue 6 Article 2

July 2021

Some Footnotes to the 1945 Statutes

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Some Footnotes to the 1945 Statutes

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Certain Session Laws passed by the 1945 legislature which have a more or less direct bearing upon real estate titles are proper subjects for some comment.

We note that the inadvertent joker in Section 1 of Chapter 136 of the Session Laws of 1943 has been repealed by Senate Bill No. 316. As of April 3, 1945, the publication of a legal notice no longer need be made in the "county where the subject matter of the legal notice or advertisement is located," but the publication shall be made in the county where required by law or by the Rules of Civil Procedure or the rules of court applicable thereto. If your publication conformed to the statute or to the Rules of Civil Procedure or to the rules of court, and you did not in addition publish in a county where the subject matter (real estate) was located, you appear to be safe from attack provided no action is brought prior to October 3, 1945, to set aside or question your proceedings.

House Bill No. 109 has made some technical corrections in connection with estate proceedings. The amendment to Section 253 of Chapter 176, 1935 C. S. A., which becomes effective July 4, 1945, makes some definite changes and presents at least five new problems.

I.

The first problem is that involving the form of verification of a waiver of notice in a proceeding to sell real estate. The old form of waiver was prescribed by 1935 C. S. A. Suppl. Chapter 176, Section 167. The person executing the waiver "subscribed and swore" to the verification. In all of the other proceedings involving probate matters the form of verification was an acknowledgment. The new statute by the amendment to Section 253 contemplates that the waiver shall be "by an instrument duly acknowledged." The effect of the new statute is to make the verification the same for all estate proceedings. It should be noted, however, that all the old forms which read "subscribed and sworn to" must be changed after the effective date of the new act, which is July 4, 1945.

II.

The second problem created by House Bill No. 109 is how much preliminary effort to obtain personal service must be made before service by publication can be had.

A. *Proceeding to Sell Real Estate.*

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As far as a proceeding to sell real estate is concerned the old statute, Section 166, Chapter 176, 1935 C. S. A. provided substantially that service could be had by publication (a) because the person could not be found in the State of Colorado, or (b) if he resides out of the state, or (c) any other reason.

Under Section 253 as amended in 1945 you are required to serve persons in interest (a) personally if they can be found in the State of Colorado, or (b) personally or by mail if they can be found and served outside the State of Colorado.

The change is that whereas formerly you were able to publish against those outside the State of Colorado, now you must serve them either by mail or by personal service if you are able to do so.

The new Section 253 in Subdivision (c) provides that the Rules of Civil Procedure shall apply except to the extent that the procedure set forth in Chapter 176 is different. In other words, if there are any gaps or incomplete statements of procedure in Chapter 176, we should turn to the Rules of Civil Procedure for the proper method to be followed. With this guiding principle in mind, let us consider the question: Who is to determine whether the persons in interest in a proceeding to sell real estate "can be found and served outside the State of Colorado"? In nearly all cases the papers in the estate proceedings give the names of the heirs and a street address, or a city and state as an address. It is reasonably apparent that each one of these persons could be served by mail or by personal service, and the spirit of the new statute apparently requires that such persons *must* be so served. The new statute would seem to provide that you cannot serve non-residents of Colorado by publication unless you are in fact unable to serve them by mail or by personal service. If a petition for letters of administration or a petition for probate gives a city and state, or a street address within a city, as the address of persons in interest, you could not honestly say that those persons could not be served by mail or by personal service unless some definite effort had been made either by mailing the notice, which was subsequently not delivered, or by making effort to obtain service by a local sheriff. Unless the files in the estate affirmatively show that either of such steps were taken, service by publication would be of questionable validity. Because the very jurisdiction of the court is based on the proper compliance with statutes relating to service, it is vitally important that the statute be followed strictly. In the ordinary situation outlined above, it would seem necessary that you file a motion requesting service by publication and setting forth specifically and in detail why you are unable to serve non-residents by mail or by personal service. The statute would further seem to require that a court order should be obtained, based on the motion, and which authorizes service by publication.

It must be realized that the procedure which is outlined above is not necessarily that prescribed by the Rules of Civil Procedure. Rule 4 provides that non-residents may be served by publication. It will be seen that the procedure in estate matters is now more difficult and burdensome than that in the ordinary civil action. However, for the reason stated above, it seems necessary for some sort of court order to be obtained upon some kind of motion supported by some evidence or testimony. I submit that the County Court has inherent powers which must be broad enough to permit the motion and order suggested.

This procedure, it will be seen, is considerably more complicated than required under the former statute; but because Section 166 was expressly repealed, you definitely cannot use the old affidavit for publication.

B. *Proceeding to Admit Will to Probate.*

Exactly the same considerations apply to citations to attend probate of a will and the same procedural steps outlined above must be followed in obtaining service of a citation to attend probate. (You will note that House Bill 109, Section 10, expressly repeals Section 51, Ch. 176, 1935 C. S. A.)

III.

The next problem is the number of publications required. In regard to the sale of real estate, the old statute, 1935 C. S. A., Chapter 176, Section 166, required publication for two successive weeks and the notice was uniformly published three times. The new statute requires notice shall be published "once each week during each of four successive calendar weeks." In Section b of the new statute the quoted portion of the last sentence is defined as four publications. You will note that at least five days must elapse between any two publications and at least 19 days must elapse between the first and last publication. This requirement necessitates new forms of publisher's affidavits to comply with the new statute.

IV.

The next problem is that involved in what kind of notice is published. As far as probate of a will is concerned, the old statute, 1935 C. S. A., Chapter 176, Section 51, a notice was required to be published which contained at least five elements and was rather lengthy. The new statute requires the "citation" to be published. In this latter respect the new statute appears to simplify the old procedure.

V.

There is a collateral matter connected with all estate proceedings which involves the service of process on a non-resident minor. By the adoption of the new Section 253, a blanket rule was made that matters not covered specifically in the estates chapter (1935 C. S. A., Chapter 176) would be governed by the Rules of Civil Procedure. Since Rule

4 (f) of the Rules of Civil Procedure, Chapter 1, was amended effective February 28, 1945, it is now possible to serve a non-resident minor under the age of 18 by personal service.

In regard to House Bill No. 498, Section 7—as one Robert Burns indicated, the best laid plans of mice and men go awry. The inheritance tax department, with the very commendable desire to cut red tape and to simplify the payment of inheritance taxes, encouraged the passage of Section 7, House Bill No. 498, which amended Section 38 of Chapter 85, 1935 C. S. A., as amended by Section 5, Chapter 116, Session Laws of 1943. The intent of the 1945 statute was to limit the inheritance lien for a period of 15 years from the date of death and to abolish the perpetual lien which had existed from 1909. Unfortunately, the 1945 amendment is not effective because our present statute was passed in 1933. In that year, the legislature amended all of the former laws, but they did not abolish the liens which then existed. The 1945 amendment states that the tax imposed by "this chapter shall be and remain a lien . . . for 15 years from date of death". The words "this chapter" refer to the 1933 statute, and the 1933 statute specifically did not abolish liens which existed before 1933. Therefore the 1945 statute does not affect liens which existed prior to 1933. Since 15 years has not elapsed since 1933, there is no actual limitation in effect and the perpetual lien of inheritance taxes will still exist until 1948 unless the next legislature remedies the situation.

There is one other statute in which well-intentioned plans did not materialize.

Senate Bill No. 171 was designed to limit the lien of an unredeemed tax sale to a period of 15 years. However, Section 1 of the statute refers only to tax certificates which are not issued or assigned to a city or county or a district levying such taxes.

It is difficult to see how anyone can say positively, for example, that an unredeemed tax sale certificate issued to John Jones in 1921 for the general taxes of 1920 is barred. John Jones may at any minute assign the certificate back to the county or to the city or to the taxing district. It is common knowledge that assignments of tax certificates are seldom recorded until the holder applies for treasurer's deed. In view of this widespread practice, the mere fact that the abstract does not show an assignment is not conclusive. If such assignment has been made, or will be made, the 15-year limitation is not applicable and the lien of the certificate is not barred.

With this loophole in the statute, it seems highly doubtful if a lawyer examining an abstract of title can pass an unredeemed tax sale certificate even though it is more than 15 years old.