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"NEW LOOK" FOR TAX DEED ACTIONS

RICHARD F. MARUSZEWSKI*

The City of Milwaukee in the past fourteen years through November, 1948, perfected title to twelve thousand and eighty-two parcels of land on tax delinquencies. Seven thousand, three hundred and twenty-nine court actions were necessary. In some instances there were one hundred or more defendants in an action. Most parcels so acquired were sold by the city, the annual sales running into millions. These sums indicate the importance of tax titles to municipalities.

Attorneys are called upon constantly to pass on these tax titles or to participate in tax title actions. Every attorney who examines abstracts is likely to run across tax titles and must be acquainted with tax law and procedure including the frequent legislative amendments. Real estate law is regrettably mutable. The 1947 amendment is in the right direction.

All attorneys and taxing districts should be vitally interested in the "new" Section 75.521, Wisconsin Statutes 1947, which provides *in rem* tax foreclosure proceedings as distinguished from the *personam* actions heretofore in vogue.

The Wisconsin Legislature, in its last session, proceeded with the present trend of streamlining tax foreclosure proceedings. The new version of procedure *in rem* under Section 75.521 provides a modern approach to the acquisition of tax delinquent lands by counties and cities. This law was written on an optional basis so that counties and cities may elect to come under the new law, reserving the right to invoke the "old" law. An ordinance is set up which should be substantially followed by the county or city in electing to proceed under the new law. In effect the new law is supplementary and is not a law in substitution. No provisions of the "old" law (that is the "old" methods of acquiring tax title) have been repealed. If Section 75.521 is followed, all provisions in conflict with it are disregarded. In actual practice there is some flexibility. The governmental units may interchangeably use the various methods, although using more than one method may not tend to efficiency in perfecting tax titles.

DIFFERENCES BETWEEN "OLD" AND "NEW"

Section 75.521 provides strictly and wholly for an action *in rem*, having as one of its apparent objectives the elimination of the formalities attaching to personal actions. Under the "old" procedure a tax deed could only be issued on land sold for nonpayment of taxes upon

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service of a written notice of application for a tax deed on the owner or owners and mortgagees of record.¹ The notice, allowing three months from the date of service for redemption, must be served personally. This notice is served in the same manner as any other notice in any action. Milwaukee serves notices of application for tax deeds the same as a summons is served² and in accordance with Chapter 262 of the Statutes. The new Section 75.521 does not provide for any personal service of any notice. After three consecutive years of delinquency, the local treasurer files in the office of the Clerk of Circuit Court a verified list of the parcels of property affected by unpaid tax liens, including the last owners and mortgagees, the descriptions, the amounts of the taxes, names of other municipalities having a possible interest in the lands, and files therewith a petition praying for judgment vesting title in the city or county. This has the same force and effect as a *lis pendens*. The treasurer may, in addition, mail a copy of the petition to the last known address of each owner and mortgagee of record. This is not mandatory. This list of tax liens and the petitions need not be recorded, unlike a *lis pendens*.

Upon filing the list in the Clerk's office a notice is prepared by the treasurer that such list of tax liens has been filed. This notice, and the list of tax liens and petition, must be published once a week for three successive weeks, in the English newspaper of the largest general circulation published in the county.³ The form of notice is specifically provided in the act. In addition thereto the treasurer must post in his office the list of tax liens filed in the court. At least eight weeks must be allowed for redemption from the date of the first publication. Publishing and posting are jurisdictional requirements. Tax titles are *stricti juris* and statutes must be strictly complied with or the title is void.⁴

Any person or taxing district having any right, title or interest in or lien upon any parcel may redeem during the redemption period by paying all the taxes and accrued interest.⁵ A stranger cannot redeem—*inclusio unius exclusio alterius*.⁶

The said person or taxing district, in the alternative, may serve within thirty days after the final redemption date a verified answer upon the treasurer setting up specific defenses. Failure to redeem or answer by

¹ The City of Milwaukee purchases all of the lands sold for taxes as it is the sole and exclusive bidder for the tax certificates. This is pursuant to an ordinance under Section 74.43(3), Wisconsin Statutes.

² Section 75.12(3), Wisconsin Statutes.

³ This proviso in the law limits the publication of the notices in the County of Milwaukee to the Milwaukee Journal, a daily newspaper.

⁴ *Potts v. Cooley*, 51 Wis. 353, 8 N.W. 153 (1881); *Stoelker v. Cappon*, 247 Wis. 453, 19 N.W. (2d) 896 (1945).

⁵ *Eaton v. North*, 25 Wis. 514 (1870).

⁶ 61 L.R.A. 734; *State v. Driscoll*, 54 P. (2d) 571 (Mont.) (1936).

operation of law forever bars and forecloses all right, title or interest of the former parties in interest. The only defenses available are: (1) that the lands were tax exempt; (2) that the tax lien was erroneous in that in fact the taxes were paid; or (3) that the tax lien is barred by the statute of limitations. No other defense to the petition can be urged. Under the "old" procedure, Section 75.42, other additional defenses were available.

Under the "old" procedure, upon the expiration of ninety days allowed for redemption, pursuant to the notice of application for tax deed above referred to, a tax deed issues from the State of Wisconsin, and in some cases from the city, to the taxing district. Once this tax deed has issued the county or city has title in fee simple absolute to the lands affected. Subsequently, pursuant to Section 75.39, Wisconsin Statutes, an action is usually commenced in the county where the lands are situated, somewhat similar to an action to quiet title, but more popularly referred to as an action to bar former owners and quiet title. Under the "old" law it becomes necessary not only to locate and serve all owners and mortgagees of record, but also land contract vendees, judgment creditors, claimants in estates, claimants in bankruptcy, and all other persons who may have any right, title, claim, interest or lien in or upon the lands conveyed to the city or county by the tax deed. Separate actions were required when there were separate owners of each parcel. It is possible to have one hundred separate actions affecting one hundred separate parcels. Under Section 75.521 all these separate actions become unnecessary and one petition can foreclose all the owners and other persons in interest in a multiple number of parcels through but one judgment. Section 75.521 provides that upon entry of judgment the county or city is vested with title in fee simple absolute to the lands listed. No personal judgment can be entered against any persons having any interest in the lands. In this respect it is interesting to note that under Section 75.19, Wisconsin Statutes, ("old" procedure) the city or county can foreclose upon tax certificates without having the lands conveyed by a tax deed. The foreclosure is handled in the same manner as a mortgage foreclosure. Thus, under the procedure it is possible that upon the eventual sale of the lands involved by the sheriff, a deficiency may result for which a judgment *in personam* might be possible, assuming that there was proper service of process in the first instance. Under Section 75.521, as noted, it is impossible to enter a personal judgment.

Under the "old" law⁷ an occupant had to be served. If the occupant was not served, the tax deed was void.⁸ Section 75.521 makes no provision for serving occupants. This will be a boon to Milwaukee, if Section

⁷ Section 75.12, Wisconsin Statutes.

⁸ *Rosenberg v. Borst*, 185 Wis. 223, 201 N.W. 233 (1924).

75.521 is used by the city, since pursuant to Section 24.33, Milwaukee Charter, both occupant and owner had to be served with notice of application for a tax deed. Thus who is an occupant will not have to be determined.

Under the "old" law the owner, at the time notice of application was given, had to be served. Section 75.521 says only the last owner *of record* need be named on the list of tax liens.

Limitations of Section 75.26 and Section 75.27, Wisconsin Statutes, will not be important under Section 75.521 as all parties are barred immediately upon entry of judgment.

Section 75.03, Wisconsin Statutes, dealing with right of redemption of minors and incompetents and time for exercising their rights, will not apply under Section 75.521 as these parties can be foreclosed in the same action as all other persons. By the same token Section 75.51, making it mandatory to dismiss actions to bar former owners as against incompetents and minor defendants, will no longer be applicable.

PROCEDURE

All procedural steps, other than court procedure, taken pursuant to Section 75.521 have to be proved by affidavits.

Contesting a tax on a particular parcel by verified answer will in no way affect reducing to judgment the remaining list of tax liens pursuant to the petition, excepting therefrom only the parcel affected by the contest. This contested tax and the parcel affected are severed from the rest of the list of tax liens and set for immediate trial with preference over all other causes in the process of actual trial.

The judgment entered under Section 75.521 has the effect of the issuance of a tax deed and of a judgment to bar former owners and quiet title. A certified copy of the judgment in both default and contested cases must be recorded by the prevailing party.

The new act became effective April 1, 1948, and is retroactive to include all tax sales certificates not outlawed by the statute of limitations, and the rights of any minor, incompetent, or nonresident in any tax sale certificate dated prior to April 1st are governed by the new act.

To overcome constitutional objections, whenever a minor or an incompetent has an interest in the lands involved, a guardian ad litem must be appointed to protect his interest.

Undoubtedly restrictions and covenants running with the land would not be cut off by judgment pursuant to Section 75.521, as Section 75.14 (4) would still apply. Nor would easements be cut off.⁹

The time limitations outlawing certificates under Section 75.20 apply to Section 75.521.

⁹ *Doherty v. Rice*, 240 Wis. 389, 3 N.W. (2d) 734 (1942).

Section 75.521 can be adopted by any county or city authorized by law to collect and sell its own taxes. The only city in Wisconsin that falls within this classification is the City of Milwaukee. The adoption can be by simple ordinance or charter ordinance, preferably by charter ordinance since then any subsequent change in Section 75.521 will be effective automatically by reference.

QUESTIONS

The new law provides that it can be availed of only after a parcel of land has been sold to the county or city for delinquent taxes for three consecutive years. It is conceivably possible under the provision that a person could pay his taxes every third year, thus precluding the city or county from invoking Section 75.521. There is a serious question whether the county or the city may apply a payment on delinquent taxes to any tax delinquent year, disregarding the desire or direction of the taxpayer. Therefore, if the taxpayer is delinquent in taxes for two consecutive years and decided to pay the next succeeding year's tax in full, the city or county might not be able to apply it to the earliest delinquent year. Thus one could preclude the county or city from ever foreclosing pursuant to Section 75.521, notwithstanding that taxes for three or more years are delinquent, provided these delinquencies are not for three or more consecutive years.

As sometimes happens, the lands on which the tax is levied may be erroneously described on the tax certificate evidencing the sale of the land to the county or city. No provision in Section 75.521 is made for a correction of this description in the action commenced pursuant thereto. The court having jurisdiction over the foreclosure upon the petition filed could be vested with the power to amend, correct, complete, clarify, and make more definite the description appearing on a certificate so that the judgment entered barring rights of all persons of interest would be correct and applicable to the land upon which the tax was actually levied.

The act provides that the treasurer "may" mail, by registered mail, a copy of the list of the tax liens and the petition filed in court to the last known post office address of each owner and mortgagee and each interested taxing district of record. This by no means adds anything to the drastic *in rem* procedure.

The City of Milwaukee by Charter Ordinance¹⁰ has adopted Section 75.521. A resolution was further adopted directing the city treasurer to mail, by registered mail, the said copy of the list of tax liens and the petition filed in court to the parties in interest.

¹⁰ Charter Ordinance No. 140 of the City of Milwaukee, passed September 13, 1948, and effective sixty days after publication.

Provision probably ought to be included in Section 75.521 for the amendment of the petition filed in court for the purpose of inserting the names of heirs of owners or mortgagees who may have died during the pendency of the petition in the courts. In the alternative the act could be amended to read that *only* owners' and mortgagees' names of record *at time of filing list of tax liens and petition* should be placed thereon.

This new law further provides that in the list of tax liens the owners and mortgagees of record are to be named.

The following questions are suggested: (1) What if it is a known fact that the said record owners or mortgagees are deceased and no probate of their estates was had for the purpose of disclosing the successor true owners or mortgagees? (2) Will tax liens of the United States or income or inheritance tax liens of the State of Wisconsin be extinguished by 75.521?

A tax deed fair on its face is prima facie evidence of a marketable title.¹¹ A title not open to judicial doubt is a marketable title.¹² Judgment under Section 75.521 undoubtedly will result in at least as good and marketable a title as one obtained by tax deed.

An early test of the constitutionality of this new act is most desirable. The big question will be due process.¹³ Statutes should be upheld unless they are clearly unconstitutional.¹⁴ Due process is not necessarily judicial process.¹⁵ Substantial rights of property cannot be impaired without offering an opportunity to a person affected to present his case.¹⁶ In tax collections the exigencies of efficiency make impossible formalities of personal notice, and courts therefore have held general notice with a hearing at some stage of the proceedings to be sufficient.¹⁷

Taxes being a necessary incident to good government, the doctrine of "due process" is somewhat more lax when applied to taxation matters. Mere severity of an act is not a valid objection to it. Regardless of the decisions on other tax laws, an early decision by the Wisconsin Supreme Court on Section 75.521 is a practical requisite.

¹¹ *Haumersen v. Sladky*, 220 Wis. 91, 264 N.W. 653 (1936).

¹² *Gates v. Parmly, et al*, 93 Wis. 294, 66 N.W. 253 (1896).

¹³ Article XIV, Section 1, United States Constitution.

¹⁴ *Sinking Fund Cases*, 99 U.S. 700, 25 L.Ed. 496 (1879).

¹⁵ *United States v. Ju Toy*, 198 U.S. 253, 49 L.Ed. 240 (1905).

¹⁶ *Ekern v. McGovern*, 154 Wis. 157, 142 N.W. 595 (1913); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 69 L.Ed. 953 (1925).

¹⁷ *McGregor v. Hogan*, 263 U.S. 234, 68 L.Ed. 282 (1923).

CONCLUSION

There is no doubt that Section 75.521 will be of tremendous advantage to taxing districts in the saving of the court costs now involved under the "old" procedure; in reducing the effort entailed in the examination of abstracts to discover necessary parties other than the last record owners and mortgagees; in minimizing the enormous work, legal and stenographic, demanded under the "old" procedure in the prosecution of the actions. Assuming the constitutionality of Section 75.521, Wisconsin Statutes, the taxing districts can expedite the final results in a large and important volume of litigation.