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Process In Forfeited and Delinquent Land Suits—A Moot Question?

George G. Bailey

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Any discussion of the question presented by this paper must deal largely with the recent decisions of the West Virginia Supreme Court of Appeals in the cases of State v. Simmons, and Davis v. Hylton. However, before referring further to these cases, a brief resumé of pertinent delinquent lands cases presented to the court in recent years, together with general comment on the decisions in such cases, may be enlightening. In the opinion of the writer, no statute has caused so much confusion or inconsistence of decision in the court, or in the several members thereof, as has the delinquent land law. In State v. Blevins, the court makes this statement:

"The questions certified by the trial court are copies in haec verba of the grounds stated by defendants in support of their demurrer, and do not constitute proper questions. The grounds of demurrer are argumentative and lack conciseness. Furthermore, the form in which the questions are certified practically disposes of all questions of law arising in this case. But because of the history of former statutes providing procedure for the sale of lands under Article XIII of the Constitution and the public interest involved, we shall discuss all of the questions certified."

In the Gray case, the questions involving process and service thereof were discussed at length even though the defendants made a general appearance thereby waiving process and service. The opinion of the court in this respect is admittedly dictum. A further unusual instance is found in the concurring opinion in the Gray case apparently approving the amendatory action of the leg-

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* Address delivered at the annual meeting of the West Virginia Bar Association, September, 1951.
** Member of the Ohio County bar.
1 64 S.E. 2d 509 (W. Va. 1951).
7 52 S.E.2d at 780.
islature taken subsequent to the decision of the court in the case.\(^8\)

In the case of *State v. Simmons*, where the questions of process and service were presented for the first time, we find two members of the court abandoning their former position in the *Gray* case, one judge joining with the judges of the former minority, and the other presenting a theretofore unraised constitutional question, which in the light of his construction of the statute governing process and service is unnecessary to his decision and apparently is also dicta. With the case of *Davis v. Hylton*, approving *State v. Simmons*, the law involving process and service thereof in delinquent lands suits appears to be settled.

In fairness to the court and the judges thereof it must be stated that the willingness to decide questions whether properly presented or not and the dicta of said cases appears necessary in view of the vigorous and repeated attack upon any and all laws providing for the sale by the state of lands forfeited or sold for nonpayment of taxes.\(^9\) Unquestionably the court found it proper and in the public interest to approve at the earliest possible moment what it felt was a proper law. Until the passage of the present law\(^10\) few, if any, sales of delinquent tax lands had been held since 1931. Many thousands of properties were in status quo, producing no tax revenue for the state and its political subdivisions, and as a result increasing in some measure the burden on properties upon which taxes had been paid by the owners thereof during the same period.

In the *Simmons* case one of the properties involved was sold for nonpayment of taxes for the year 1945 in the name of one Cottrell by the sheriff of Kanawha County. After said property had been sold to the state, Cottrell conveyed the property to Drake by deed dated June 14, 1947, and promptly recorded. In November, 1948 the state by its deputy commissioner for Kanawha County

\(^8\) *Id.* at 778.

\(^9\) The delinquent land law has been before the court continuously since 1942. The opinion of the court in *State v. Gray* includes the following statements: "This legislation was subjected to vigorous attack in the Circuit Court of McDowell County, in the case of *State v. Blevins*, infra, and was considered by this Court on appeal." (At 772). Further, "The attack on this statute is, in our opinion, somewhat nebulous. Running through the several points of attack are insinuations, if not direct charges, of some unholy purpose or artful design to by-pass certain alleged rights of former owners, and others interested in land proposed to be sold . . . ." (At 773.) The trial judge prepared a printed opinion in the case which was filed with the decree and made a part of the record.

\(^10\) *Supra* note 4.
filed its suit in the circuit court of Kanawha County to sell certain properties, including the Cottrell-Drake property. Cottrell, a resident of Kanawha County and a named defendant, was not served with process, and was proceeded against as an unknown defendant and by publication. In April 1949, one Summers purchased the property at public auction held under court decree and the purchase was thereafter confirmed by proper decree and a proper deed for the property made and delivered. In October 1949, Cottrell and Drake filed a petition in the case asking that the decrees of sale and confirmation be vacated and the deed to Summers set aside on the grounds that neither Cottrell nor Drake had been served with process, that Drake had not been named a defendant, and that neither had any knowledge of the proceeding until after the sale had been made and the deed for the property delivered. A demurrer to the petition interposed by the state was overruled by the circuit court and the questions arising thereon were certified. Held, that under the statute in effect a former owner of land need not be named defendant, and that a named defendant, although a resident of the county in which suit was instituted, need not be served with process but can be proceeded against by publication only.

The case of Davis v. Hylton presented a comparable situation and therefore it is deemed unnecessary to dwell at length upon the facts and circumstances of the case. One Olive Davis, a resident of Mercer County and living upon the property involved, was proceeded against in a suit filed by the state in the circuit court of Mercer County by publication. A summons against her had been delivered to the sheriff for service, but same was not served and was returned "not found". The property was sold under decree of the circuit court to Hylton, the sale confirmed by subsequent decree, and a deed for the property delivered and recorded. Thereafter Davis learned for the first time of the suit and the proceedings therein and filed a suit in equity against Hylton to cancel the deed and set aside the sale. By final decree the circuit court of Mercer County cancelled the deed to Hylton and set aside the sale by the state. From that decree appeal and supersedeas was granted. Held, that the decision of the court in the Simmons case governed the instant case. Reversed and remanded to the circuit

court with directions to dismiss the suit and enter a decree for costs in favor of Hylton.

Pertinent Statutory Provisions

The statutory provisions under consideration by the supreme court in the two cases just discussed were Sections 11 and 12 of Article 4 of Chapter 160, Acts of the Legislature of West Virginia 1947, the pertinent provisions of which are as follows:

"Sec. 11. Parties Defendant; Right to Intervene. — In a suit for the sale of any forfeited or delinquent land, the deputy commissioner shall name as a party defendant the former owner in whose name the land was forfeited, or was returned delinquent and sold, as the case may be. . .

Sec. 12. Summons; Service; Publication. . . [The form of the summons is set out.] . . .

"The summons shall be served on the named defendants in the manner provided by law for the service of process in other chancery suits. . . .

"In view of the fact that the state has absolute title to all forfeited land, to all land sold to the state for nonpayment of taxes and become irredeemable, to all escheated land, and to all waste and unappropriated land, and must under the constitution have such an absolute title before the land may be sold for the benefit of the school fund; and in view of the fact that the former owner of any such land, or any person claiming under him, has no further interest therein nor rights in respect thereto except such privilege of redemption as may be extended to him by the Legislature as an act of grace; and in view of the further fact that all parties known and unknown who may claim an interest in any of the lands included in the suit are given notice thereof by the order of publication provided for above; therefore, the Legislature deems it both expedient and necessary to provide that failure to name any such person as a defendant, or failure to serve the summons on any named defendant, shall in no wise affect the validity of any of the proceedings in the suit for the sale of the state's title to such land."

A quick glance at these provisions reveals the fact that they are contradictory. They provide that the former owner in whose name land was forfeited or sold shall be named a defendant, and that named defendants shall be served with process if within the jurisdiction of the court. On the other hand, they also provide that a failure to name such person a defendant, or the failure to serve a summons on a named defendant, shall not affect the validity of the suit.
The first attempt by the supreme court to reconcile this conflict is found in the dicta of the majority opinion of the *Gray* case. Here the court says:

"In view of the mandatory requirement of service of process contained in the first portion of Section 12, of the 1947 Act, we are of the opinion that the last paragraph thereof should be construed as intended to cover cases of inadvertence, or, in particular, where the names of owners and claimants are not known, and not as nullifying the requirement of service aforesaid. By giving to this portion of the section this construction, we reconcile, to some extent, the apparent inconsistency aforesaid."

And further:

"We hold, therefore: (1) That when the real estate proceeded against in this cause became irredeemable on the 1st day of July, 1947, the former owner, and all persons having an interest in, or liens upon said land, lost all their right, title and interest therein, and the said land became the absolute property of the State; (2) that under the Constitution of this State a judicial proceeding is necessary to sell said lands under the provisions of Section 4, Article XIII of our Constitution, and that in said proceeding the Legislature has the power to provide for such sale without making the former owner or other interested persons therein a party thereto; (3) that the provisions of Section 11 and 12, Chapter 160, Acts of the Legislature, 1947, providing that former owners, and other interested persons, be made parties to such proceeding, and requiring the service of process on parties defendant, and an entry of an order of publication as to those not served, constitutes only an act of grace on the part of the State, and not an act required by Section 4 of Article XIII of the Constitution of this State; . . . (5) that Chapter 160, Acts of 1947, aforesaid, requiring the service of process on all parties to the proceeding therein providing for, if within the jurisdiction of the court in which such proceeding or suit is instituted, is valid and binding on the Circuit Courts of the various counties of the State, and that such courts have the power and, in our opinion, are charged with the duty of requiring the service of such process on all persons residing in this State, who can be located and served; . . ."}

However, the concurring opinion of the minority did not agree with this interpretation. After pointing out that consideration of the questions of process and service is unnecessary and essentially dicta, it is said:

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12 59 S.E.2d at 778.
13 Id. at 779 and points 4 and 7 of the syllabus.
"But, treating the question of the validity of either the process or the service thereof as a point of decision herein, I disagree with the opinion of the Court thereon. I think that under the guise of interpreting and construing Section 12, idem, this Court has attributed to the Legislature an intent which, by the farthest stretch of the imagination, can not be read therein. On the other hand, I think that the Legislature has clearly and unequivocally stated its intention with reference to the requirement of process, and the service thereof, by stating 'that failure to name any such person as a defendant, or failure to serve the summons on any named defendant, shall in no wise affect the validity of any of the proceedings in the suit' Section 12, idem."¹⁴

The direct holding of the court on the question of process and service came thereafter in the decision of the Simmons case. Here the court dismissed the statements of the Gray case as dicta, but nevertheless was compelled to repeatedly refer to that case. The construction to be given the pertinent statutory provisions and the reconciliation of all conflict is set forth in the following language of the court:

"Despite any provision of Section 12, Article 4, which precedes the final provision of that section of the statute, it is manifest that the Legislature in enacting the section, intended that the failure to name the former owner of the land involved in a suit instituted under Chapter 160, Acts of the Legislature, 1947, Regular Session, or any person claiming under him, as a defendant, or the failure to serve the summons on any named defendant, should in no wise affect the validity of any of the proceedings in such suit. . . . When these provisions are so read and considered, and when effect is given to the section in its entirety, it is clear that the provision that the summons shall be served on the named defendants in the manner provided by law for the service of process in other chancery suits is not mandatory, but directory, in character. . . .

"Section 12, Article 4, considered and construed as a whole, means that in a suit to which it applies, the former owner of the land involved, and any other persons having or claiming an interest in such land, may or may not be named in the summons; that if any such person shall be named as a defendant, he may or may not be personally served with process in the suit; that an order of publication, setting forth the requisite facts and information, shall be entered; and that the former owner, and all other interested persons, whether

¹⁴ Id. at 780.
named or not named as defendants, may be validly proceeded against by such order of publication, even though any of such persons may reside within the jurisdiction of the court in which such suit is instituted. The section as so interpreted and applied, is directory, not mandatory, in character. . . .”

The holding in the Simmons case is later followed and approved in Davis v. Hylton. It appears therefore that the principles enunciated by our court in these two cases is now the law in West Virginia, and that any further discussion of process and service has become a moot question. This is particularly true in view of the fact that the subsequent legislature has now amended the law so as to delete the provisions causing conflict and the legislative intention to dispense with process is now clear.

It is respectfully submitted, however, that in view of the clear and definite wording of the earlier provision of Section 12, that our court in resolving the conflict could well have discarded the loose, confusing, and verbose wording of the final paragraph of said section as being no effective enactment at all and no clear expression of legislative intent. This statement purposely overlooks the argument that by the use of so many words the legislature must have intended to enact something. But a legislature summary of principles theretofore established by several decisions of the supreme court, followed by the statement that the legislature “deems it both expedient and necessary to provide” etc., without actually making clear provision for anything at all does not force a court to discard a clear and terse statement. It seems a foregone conclusion and best left unsaid that any action of the legislature must have been “deemed necessary and expedient” or it would not have been a subject of legislative consideration. It is believed that the wording of no enactment of the legislature is more discouraging than that of the final paragraph of Section 12. A possible exception is the subsequent amendment of this section with its additional “mumbo-jumbo”, but with the conflicting albeit clear wording removed from the section the resulting legislative intent is revealed. The language used is not contradictory.

15 64 S.E. 2d at 512, 513.
17 “The summons shall be served on the named defendants in the manner provided by law for the service of process in chancery suits.”
18 W. VA. CODE c. 11A, art. 4, § 12 (Michie, 1949).
Power of the Legislature to Dispense with Process and Service

The general dissatisfaction of many members of the bar and of some jurists is the result of basic legal training that process and service is always necessary. We have been taught that the first step in beginning any legal proceeding is the issuance of process. Notice to parties affected by the proceeding and personal service upon all parties defendant within the jurisdiction of the court is fundamental with us. We abhor the idea that any person or his property can be proceeded against without notice. We know that publication, while necessary and legally acceptable, is a poor and ineffective means to an end. In his dissent in the Simmons case, Judge Fox voices our feeling when he says:

"To me there is something repellent in the idea of depriving people of rights and property through the processes of the courts of the land without personal service of process where it can be had, or the best notice that can be given where, on account of the limits of jurisdictions, all interested parties cannot be reached."¹⁰

However, proceedings to sell land for collection of unpaid taxes have long been recognized as substantially different from proceedings between individuals. The great weight of authority throughout the country is against our feeling in the matter, and is clearly summarized in the Blevins and Simmons cases. Whether we like it or not this is general law and the law of West Virginia. Any remedy for the situation lies with the legislature and not with the courts. Many legislatures have in the past believed it wise and necessary to require process and personal service.

¹⁰ 64 S.E. at 516.