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SECURITY OF TAX FORECLOSURE TITLES, CHAPTER 2

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In dissenting in *Berry v. Pond*,[1] Hill, J., said, "By this decision, we not only add a new exception to those enumerated in REM. REV. STAT. § 11288 [P.P.C. § 979-313],[2] but write a new chapter on How Secure Is Your Tax Foreclosure Title?"[3] It is the purpose of this comment to indicate the nature of the new chapter and to suggest that it is inadvisedly if not erroneously written.

The facts in *Berry v. Pond* are these (see chart): Steinle, in 1889, bought from the United States a quarter-quarter of section 11 (the NW¼ of the NE¼ section), and assuming it to be a "standard" subdivision, 1,320 feet by 1,320 feet, divided it into eight five-acre tracts. From the known north line of the section he measured south 1,320 feet and built a south boundary fence. Tract 8 of the plat is in its southwest corner and defendant (respondent) is the present owner, according to his deed, of the south half of tract 8. In fact the north-south distance across the quarter-quarter is approximately 1,260 feet and Steinle enclosed a sixty-foot strip of the SW¼ of the NE¼. On the overlap he built a cabin, which was later destroyed and replaced by a dwelling valued at $2,000. The defendant and his predecessors have apparently at all times kept taxes paid on the south half (or south 330 feet, which according to the plat would be the same) of tract 8 and improvements. Taxes on the adjoining property to the south (in the SW¼ of the NE¼) became delinquent and it was sold for taxes, plaintiff being the purchaser; on the tax rolls this land was apparently listed as unimproved. A survey made at plaintiff's request revealed the overlap and plaintiff brought an action to quiet title to the sixty-foot strip. Judgment was entered for the defendant and plaintiff appealed. The

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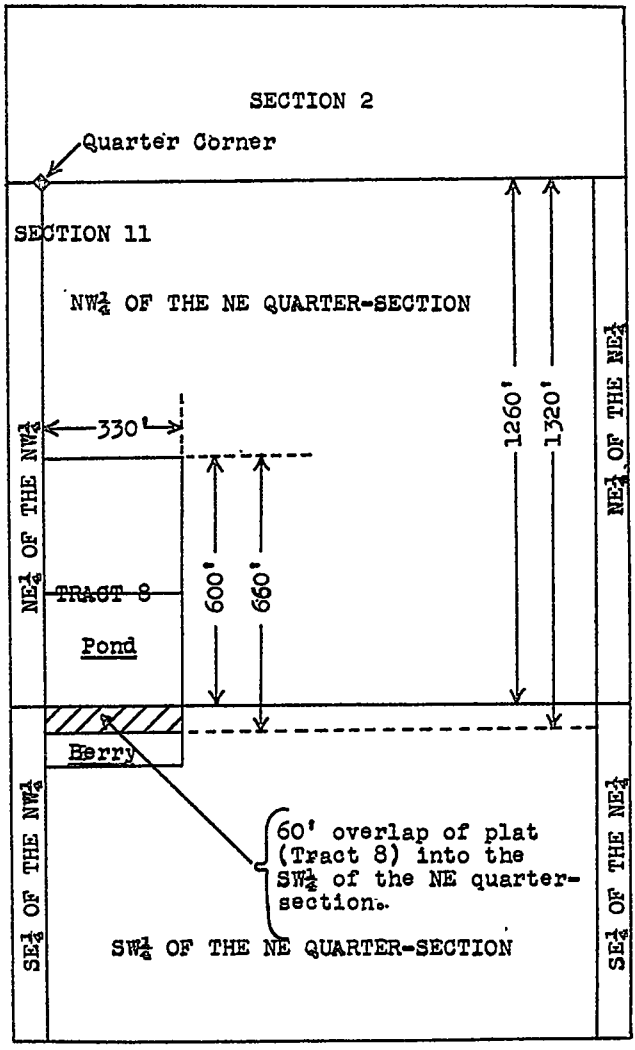
[1] 133 Wash. Dec. 543, 206 P.(2d) 506 (1949).

[2] ". . . the judgment [for the deed to real property sold for delinquent taxes] itself shall be conclusive evidence of its regularity and validity in all collateral proceedings [as to objections which existed at or before rendition of the judgment and could have been presented as a defense], except in cases where the tax has been paid, or the real property was not liable to the tax." In the two situations set forth in the statute the sale is void. The supreme court had added a third exception, a bona fide attempt by the taxpayer to pay the taxes, *i.e.*, frustration of the taxpayer in the payment of his taxes by the public officer, is equivalent to payment for the purpose of setting aside the decree. Kropi v. Jacobson, 27 Wn. (2d) 451, 178 P.(2d) 742 (1947); Nalley v. Hanson, 11 Wn. (2d) 76, 118 P.(2d) 453 (1941); Bullock v. Wallace, 47 Wash. 692, 92 Pac. 675 (1907).

[3] Comment, 23 WASH. L. REV. 132 (1948).



supreme court affirmed, holding the tax foreclosure void as to the sixty-foot overlap because the taxes had been paid thereon. The court said, "It is the fact of payment of the taxes on the land occupied, not the description used in the tax receipt that is determinative of the issue here."[4]

Reference in a description to a properly recorded plat is merely an authorized way to state briefly what would otherwise constitute a cum-

[4] The majority opinion was written by Mallery, J. Jeffers, C. J., Beals and Steinert, JJ., concurred. Hill, J., dissented.

bersome metes and bounds description.[5] When Steinle platted the NW¼ of the NE¼ of section 11 he could not increase the area by indicating its size to be other than it legally was; hence all tracts in his subdivision must fall within that quarter-quarter. To state "Tract 8" is merely to state something like the following: "That portion of the northwest quarter of the northeast quarter of section 11 more particularly described as follows: Beginning at the quarter corner on the north line of said section 11, running thence south on the center line of said section 660 feet to the northwest corner of the tract herein described and the true point of beginning, thence continuing south on said center line 660 feet to the south line of the said northwest quarter of the northeast quarter; thence east along said south line 330 feet; thence north on a line parallel to the center line of said section, 660 feet to a point on a line parallel to the north line of said section and 330 feet east of the true point of beginning; thence west 330 feet on said last mentioned line to the true point of beginning; containing 5 acres more or less."

The circumstances that the first described boundary line of the tract is stated to be 660 feet long will not control against the fact that none of the tract is outside of the northwest quarter of the northeast quarter-section and that the terminus of the line is in the south line of the quarter-quarter.[6] The fact that Steinle built a fence sixty feet south of the south line of the quarter-quarter in the belief that he placed it on the south line of the quarter-quarter did not change the true location of that south line, regardless of what it might have done with reference to the acquisition of the sixty-foot strip by adverse possession.

Since none of Tract 8 can properly be found to be in the government subdivision to the south of that which the subdivider owned, it follows that the south half of Tract 8 is not. Assuming that the south half of Tract 8, or the south 330 feet of Tract 8 as the description was carried on the tax rolls, means all of Tract 8 except the north 330 feet thereof,

[5] 4 TIFFANY, REAL PROPERTY § 992 (3d ed., 1939), 6 THOMPSON, REAL PROPERTY § 3370 (Perm. ed., 1940).

[6] The original government survey controls any later private survey or plat of the government subdivision, and the location of a government subdivision line by the original survey cannot be disputed by private parties, that is, even though the line was inaccurately surveyed (so that the subdivision is not regular) the actual survey controls. A purchaser takes a government subdivision (or part thereof) according to the government survey and calls in his deed inconsistent with such survey must yield to that survey. See 4 TIFFANY, REAL PROPERTY § 994 (3d ed., 1939), THOMPSON, REAL PROPERTY §§ 3383, 3384, 3387 (Perm. ed., 1940). So, in the instant case, since Tract 8 is in the plat of the government subdivision, the location of its south line is controlled by the location of the south line of the government subdivision by the official government survey, not by the later private survey.

it necessarily follows that by defendant's deed there was conveyed a tract 270 feet north and south by 330 feet east and west, not one 330 feet square.[7] There seems to be no way by which the description on the tax rolls or the one in defendant's deed can properly be said to include the sixty-foot overlap. This does not say, however, that defendant has not acquired the ownership of the sixty-foot strip. Without doubt either his own adverse possession, or his and that of his predecessors together, perfected ownership of the strip.[8]

A correct description of defendant's ownership (by deed plus adverse possession) would be that indicated above (Tract 8, etc., or the metes and bounds description) plus something as follows: "That portion of section 11 beginning at the northwest corner of the southwest quarter of the northeast quarter thence south along the center line of said section 60 feet; thence east along a line parallel to and 60 feet south of the north line of said southwest quarter of the northeast quarter 330 feet; thence north to said north line at a point 330 feet east of the point of beginning; thence west along said north line 330 feet to the point of beginning."

The problem remains then, how can it be concluded that defendant paid taxes on the strip? The basis of this conclusion seems to be that the land was assessed as being 330 feet square and he was taxed for improvements which were erroneously indicated to be on the tract described (south 330 feet of Tract 8). Since the improvements were

[7] The assumption here can be based on more than one state of fact; but, for instance, if the north half of the tract was conveyed and the then owners of the two halves agreed on the boundary between their ownerships at a point 330 feet south of the north line of the tract, that agreement probably would fix the north line of the "south half" regardless of the location of the south line of the south half. See Ellis, *Boundary Disputes in Washington*, 23 WASH. L. REV. 125 (1948). Or, as the ownership of the sixty-foot overlap in the instant case (except for tax foreclosure complications) was perfected by adverse possession, so too the area north of the claimed dividing line between north and south halves of Tract 8 probably would be acquired by adverse possession, regardless of the original correctness of the location of the boundary line.

The gist of the argument on this point is that each half of tract should measure only 300 feet rather than 330 feet. The possibility of double taxation, according to an accurate description, would relate to the south thirty feet of the north half and the north thirty feet of the south half. This assumes that the tax roll identified the two halves as the north 330 feet and the south 330 feet, respectively. If the tract is only 600 feet in north-south length then there would be sixty feet of overlap *within* the tract, according to the tax roll. On the other hand the north 330 and south 330 feet could be construed to be only terms meaning the north half and the south half, in which event there would be no double taxation, although there might be an overvaluation of both halves (as having more area than actually was the case).

[8] The requirements of adverse possession, as set forth in many cases, were clearly met. *See, e.g.*, Skoog v. Seymour, 29 Wn. (2d) 255, 187 P.(2d) 304 (1947); Foote v. Kearney, 157 Wash. 681, 290 Pac. 226 (1930); King v. Bassindale, 127 Wash. 189, 220 Pac. 777 (1923); McCormich v. Sorenson, 58 Wash. 107, 107 Pac. 1055 (1910); Thornely v. Andrews, 45 Wash. 413, 88 Pac. 757 (1907); Erickson v. Murlin, 39 Wash. 43, 80 Pac. 853 (1906).

not on Tract 8 he must have been taxed for the land where the improvements were. (Apparently the only improvements on the land occupied by defendant were on the overlap.)

This is erroneous in more than one aspect. First, it represents a complete reversal of the usual strict requirement in Washington of a complete written description of the land, particularly in tax cases.[9] Second, it overlooks the fact that improvements are assessed separately from the land[10] and also may be taxed separately.[11] Third, it gives conclusive effect to the assessor's misapprehension of the location of improvements, the location on the ground of a particular description, and the area included by a particular description.

As to the third point in the preceding paragraph, *Rushton v. Borden*[12] must be considered. Although the court treats that case as clearly distinguishable, the only difference appears to be the lack of significant improvements on the tract adversely held. In the *Rushton* case the adverse claimant and the assessor both thought a road running northeasterly crossed the west line of the NW¼ of the SE¼ section some distance north of its south line and did not cross the south line at all, and therefore the description in the deed and the area occupied was totally within the subdivision (the quarter-quarter). In fact the road crossed the south line some distance east of the west line and only a small triangle of the area possessed was in the particular subdivision, most of the area being in the subdivision to the south. The court held that although the adverse claimant had paid taxes according to the description and both he and the assessor thought there was such land in the subdivision, the tax foreclosure of the subdivision to the south wiped out the adverse possession title.[13] Here the misapprehension of

[9] McMurren v. Miller, 158 Wash. 284, 290 Pac. 874 (1930); McGuire v. Bean, 151 Wash. 474, 276 Pac. 555 (1929); Moller v. Graham, 106 Wash. 205, 179 Pac. 858 (1919); Kennedy v. Anderson, 88 Wash. 457, 153 Pac. 316 (1915); Martin v. Rankert, 67 Wash. 325, 121 Pac. 817 (1912); Welch v. Beacon Place Co., 48 Wash. 449, 93 Pac. 923 (1908).

[10] REM. REV. STAT. § 11135 [P.P.C. § 979-533] provides for the valuation of real property exclusive of improvements, and also that the value of all improvements and structures should be determined and then the aggregate value of the property including all structures and other improvements (excluding the value of crops growing on cultivated lands). Amended in other respects by Wash. Laws 1939, c. 206.

[11] REM. REV. STAT. §§ 11264, 11264-1, 11264-2, 11264-3 [P.P.C. §§ 979-493, 979-511, 979-513, 979-515].

[12] 29 Wn. (2d) 831, 190 P.(2d) 101 (1948).

[13] The court stated that it was not called upon to pass upon the question of whether the possession and use of a certain tract was sufficient to constitute adverse possession, as it has previously held that a tax foreclosure wipes out any rights acquired by adverse possession, citing *Gustaveson v. Dwyer*, 78 Wash. 336, 139 Pac. 194 (1914); and *Johnson v. Burdeson*, 25 Wn. (2d) 269, 170 P.(2d) 311 (1946). In the former the court said. "A foreclosure of a tax lien is a proceeding *in rem* and vests in the purchaser a

both assessor and taxpayer (adverse possessor) that there was land which could be described as in the deed and on the tax rolls did not preserve the adverse claimant's title, and there was no suggestion that taxes paid should be applied to anything south of the south line of the subdivision. In the *Berry* case, though Tract 8, owned by the defendant, was the only area described on which he paid taxes, the misapprehension of defendant and the assessor that the improvements were on Tract 8 apparently led the court to conclude that the taxes were paid by defendant on the land to the south of Tract 8. The assessment of the improvements as being part of Tract 8 did not make it so even if the assessment does show the assessor's misapprehension.

Sorenson v. Costa,[14] the California case on which the court relies, is itself strange and is probably distinguishable from the *Berry* case, so that it is of dubious value as authority. The facts in other California cases are closer but the holdings are *contra* to the holding in the *Berry* case. If the *Sorenson* case is law in California, it would seem to be so because it can be distinguished from the *Berry* case. In the California case all persons owning in a particular block assumed their boundaries to be seventy-five feet from those actually described in their deeds. The applicable California adverse possession statute required the claimant to possess and also pay the taxes on the land possessed.[15] None of the land described in the claimant's deed was occupied by him; instead he occupied a lot seventy-five feet in width adjoining the seventy-five-foot lot described in his deed. The case is one of total misdescription, not merely an overlap stemming from improper boundary. The opposing party similarly occupied one lot and claimed another, and in fact discovered the common error in the neighborhood when the survey he secured indicated that he had bought at the tax sale the lot he had been occupying for years. This is another distinguishing feature from the *Berry* case in that here there is no dispute between one claiming through a tax title and an adverse possessor, rather the dispute is between the adverse possessor and the grantee of a deed describing the disputed lot. The court held that for the purpose of satisfying the adverse possession statute, the possessor would be held to have paid the taxes on the land occupied. Further, in California there might be a justification for protecting the person

new title superior to any possessory rights, however exclusive or adverse." See also Hanson v. Carr, 66 Wash. 81, 118 Pac. 927 (1911) (tax title is paramount to an easement, all other liens, titles and claims).

[14] 32 Cal. (2d) 453, 196 P.(2d) 900 (1948).

[15] CAL. CODE CIV. PROC. § 321-325. 1 CAL. JUR. 492, § 4.

who has been assessed according to his understanding as to which tract was assessed and on which he paid taxes because in that state there is some measure of personal liability for real estate taxes.[16] Be that as it may, in "overlap" cases the California rule is different and taxes are held to have been paid only according to the written description (contrary to the *Berry* case) even when there has been improvement in the disputed strip.[17] The problem of "payment of taxes" for adverse possession purposes might well call for a result different from the result in a case determining the validity of a tax foreclosure.[18]

While not strictly analogous, the situation in which a tax sale destroys easements across a servient estate represents an approach contrary to that of the *Berry* case. In determining whether an easement survives the tax foreclosure of the servient estate, the court has been concerned only with the tax roll description of the servient estate, and unless there is segregation on the rolls of the easement right that right is destroyed.[19] In the *Berry* case the court looks to the belief of the adjoining owner (who might be analogized to the dominant owner of the easement) and to the appearances from his standpoint to determine which land was assessed, *i.e.*, since he believed the improvements upon which he paid taxes were on his land, his ownership of the land was not affected by tax foreclosure under a description which included the disputed strip. Had the court looked only to the descriptions (Tract 8 and the portion of the SW¼ of the NE¼) there could be found no overlap and since there was no mention of any segregated interest in the overlap area, the unmentioned interest would be destroyed by the sale. Under this approach, is a dominant owner of an easement to be allowed to insist that the easement still exists despite the tax sale of the servient estate? Using the *Berry* case approach this would be the analysis: when the dominant area is assessed the owner thinks of his ownership as including the easement right; the easement right

[16] CAL. REVENUE AND TAXATION CODE, § 2186. "As judgment against the person. Every tax has the effect of a judgment against the person. " (1939), Weston Investment Co. v. State, 31 Cal. (2d) 390, 189 P.(2d) 262 (1947), Kloek, *Effect of Tax Deeds on Easements and Rights of Way*, 16 CHI-KENT L. REV. 328, 358 (1937).

[17] Johnson v. Buck, 7 Cal. App. (2d) 197, 46 P.(2d) 771 (1935), Holzer v. Read, 216 Cal. 119, 13 P.(2d) 697 (1932), *In re* Wasson, Wasson v. Waldrop, 54 Cal. App. 261, 201 Pac. 793 (1921), Wilder v. Nicolaus, 50 Cal. App. 776, 195 Pac. 1068 (1921), Friedman v. Southern California Trust Co., 179 Cal. 266, 176 Pac. 442 (1918), Mann v. Mann, 152 Cal. 23, 29, 91 Pac. 994 (1907), McDonald v. Drew, 97 Cal. 266, 32 Pac. 173 (1893), 1 CAL. JUR. 568, § 50.

[18] Also strange is the fact that the *Sorenson* case relied on certain non-California cases referred to in an A.L.R. note, but said nothing of California cases cited in the same note which reached an entirely different result. See 132 A.L.R. 216, 223, 227, 228.

[19] *See, e.g.*, Harmon v. Gould, 1 Wn. (2d) 1, 94 P.(2d) 749 (1939), Tamblen v. Crowley, 99 Wash. 133, 168 Pac. 982 (1917), Wilson v. Korte, 91 Wash. 30, 157 Pac. 47 (1916), Hanson v. Carr, 66 Wash. 81, 118 Pac. 927 (1911).

adds value to his ownership; that value is included in arriving at the assessed value; therefore when the dominant owner pays his taxes he pays taxes on the easement. From this it follows that foreclosure of the servient estate does not destroy the easement because the taxes thereon have been paid. The Washington court has consistently held just the opposite, that is, that the tax sale of the servient tenement extinguishes the incorporeal hereditaments of the dominant tenement.[20]

Sympathy for the defendant's position may have had a silent voice in support of the court's result, for he would seem to have been caught by the inescapable risk to every landowner that "his" improvements are in fact on his neighbor's land and by the unavailability of the common cure through adverse possession. The security of tax titles *is* important to the community at large and no adequate reason appears for decreasing that security in order to shift the risk of misplaced improvements. However, the defendant would not necessarily be wholly deprived of his value by a holding for the plaintiff.

The spirit of separate assessment and taxing of improvements indicates that since the defendant has paid taxes on the improvements which he made on plaintiff's land, and even though under ordinary fixtures rules improvements are part of the land, the betterments statute could be construed to require plaintiff to reimburse defendant for his tax payments and the value of the improvements made.[21]

As mentioned previously, except where the tax has been paid or the property was not liable to the tax, the validity of a deed by the county treasurer and the conclusiveness of the tax foreclosure judgment are established by REM. REV. STAT. § 11288. A third exception, frustration of the taxpayer by a public officer in the payment of his taxes, was added by the court.[22] By the *Berry* case, as Hill, J., said in his dissent therein, "We now, whether we admit it or not, add a fourth exception, *i.e.*, where property on which the tax is foreclosed is immediately adjacent to that on which a taxpayer has paid taxes and which the taxpayer believes and has reason to believe is included in the description in his tax statement."

To repeat the thought of the first paragraph, it is suggested that the result of the case is inadvisable and erroneously reached.

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[20] Cases cited note 19 *supra.*

[21] REM. REV. STAT. § 797 [P.P.C. § 24-15]. "In an action for the recovery of real property upon which permanent improvements have been made or general or special taxes or local assessments have been paid by a defendant, or those under whom he claims, holding in good faith under color or claim of title adversely to the claim of plaintiff, the value of such improvements and the amount of such taxes or assessments with interest thereon from date of payment must be allowed as a counterclaim to the defendant."

[22] Cases cited note 2 *supra.*