A Possessory Title — Would You Accept It?

Even as lowly Articled Clerks we were admonished by our principals to search our titles back "at least 40 years", "begin with a warranty deed as our root" (never a quit claim deed nor an Estate), and last, but far from least, "never certify a possessory title". Sound advice? Well, maybe. It has long been recognized that a vendor under a standard agreement of sale can thrust upon an unwilling purchaser a possessory title, assuming, of course, said Mr. Vendor can unequivocally substantiate his possessory title, or in the jargon of the trade, establish "open, notorious and uninterrupted possession". However, what mountain does a vendor climb to reach this acceptable, forensic summit?

To those of us who ply our trade, not behind bench or lectern, but through the labyrinth of daily practice, the filing and recording of a detailed and comprehensive statutory declaration setting out continuous acts of possession for at least a period of 40 years would seem the most obvious tack. But what if our prospective purchaser does not accept this approach and requires better proof than a statutory declaration? I suppose we could record our declaration and sit with folded hands and wait for a period of 20 years until our declaration became an ancient document, and thereby pray that by some mystic process, known primarily to Phipson, our declaration might take on sufficient sanctity to solve our problem. However, one would undoubtedly experience difficulty in finding a purchaser willing to extend the closing date until the expiration of that period of time. So much for that mountain.

Quieting Titles Act

There is a second approach: *Quieting Titles Act,* R.S.N.S. 1967, c. 259. The effect of this Act is that we come out of the thicket with a solid title that will stand up against all claimants. However, one unwieldy feature of the Act is a rather prolonged waiting period before the title becomes crystallized. Under s.16 of the Act the certificate of title does not become absolute and irrevocable until one year after its registration, which although laudable in context, is hardly palatable to the transient trade of real estate where agreements of sale are very often executed on the same day the moving company is called with the "closing" set for the following fortnight. This, too, seems to be the wrong mountain.

Land Titles Clarification Act

We might try a third approach: *Land Titles Clarification Act,* R.S.N.S., 1967, c.162. This Act has proved very useful as a way of obtaining good title, but its major drawback is that the property must be located in what the Act refers to as, "a land titles clarification area", meaning an area of land that the Minister of Lands and Forests declares as suitable for title clarification *(s.2(i))*. Unfortunately, the areas so designated at the present time comprise less than one per cent of the total land area in the province, so it is of limited value in most property transactions. So our mountain turns out to be a hill.

Vendor and Purchasers Act

What about the *Vendor and Purchasers Act,* R.S.N.S., 1967, c.324? Might a frustrated vendor find solace here and thrust his possessory title on the unwilling purchaser? Apparently, in Nova Scotia *he can.* Two rather innocuous looking cases, each the decision of a single judge emanating from our Supreme Court, hold fast and true to the premise that a possessory title must be accepted by a purchaser under a standard type of agreement of sale, and furthermore, the *Vendor and Purchasers Act* is the place to go get it.

In *Re Parsons and Smith* (1971) 18 D.L.R. (3d) 586, Hart, J. (as he then was) had to deal with a vendor attempting to thrust a possessory title on an unwilling purchaser under a standard type of agreement of sale. Apparently, the vendor had several years prior to the hearing recorded a fairly exhaustive statutory declaration in an obvious attempt to buttress his possessory title. The purchaser's solicitor in his search of title discovered the declaration on record, and apparently nothing more, and thus refused to accept the title. His objection to the title on the grounds of possessory title was heard before Mr. Justice Hart under the *Vendor and Purchasers Act.* A preliminary objection was made as to the propriety of the Act, but the Court came down hard on the side of finding that, "there can be no doubt that *an objection* to title taken on the ground that it is possessory only is an objection that can properly be determined pursuant to the *Vendor and Purchasers Act.* A title by possession is one that may be enforced upon a purchaser and the evidence necessary to establish such a title is very often a subject of dispute between the parties". Actually, Mr. Justice Hart dismissed the vendor's application ruling that the statutory declaration was in the opinion of the Court insufficient to establish possessory title, but the *dicta* leaves a cutting edge.

Objections to Title

One will note that in *Parsons and Smith* the hearing was triggered by an *an objection* to possessory title originally asserted by the purchaser. Let us suppose that this specific objection was not made, but another objection as to the validity of title (e.g., an outstanding dower interest), and during the course of the hearing the vendor brings up the argument of possessory title. Can the purchaser then reply by claiming that as *no objection* was made to possessory title the vendor cannot now raise it because the *Vendor and Purchasers Act* is confined only to objections raised by the respondent purchaser? Hart, J. lightly touched on this very point and probably more by soliloquy than *dicta* pondered that our *Vendor and Purchasers Act,* compared to similar Acts in other jurisdictions, *"might"* permit the validity of the whole contract to be explored and adjudicated on at the hearing, which would of course open the door to any argument as to title, objected to, or otherwise. This *dicta* of Hart, J. in *Parsons and Smith* seemed to have lain embalmed between the covers of the Dominion Law Reports and probably this fitting repose would have continued had it not been for a recent decision of Glube, J., as yet unreported, in a case called **Stevens and MacKenzie* (S.H. No. 24722, October 4, 1979).

In *Stevens and MacKenzie* Madam Justice Glube had to deal with an objection to title based on the validity of a quit claim deed as the purported root of title, which although recorded in 1931, was unsupported by any previous deeds, and thus offended that stern, fatherly advice of our principals, "begin with a warranty deed as your root". At the hearing the vendor admitted the lack of proper paper title, but sought to argue possessory title, and this of course invited the reply that this issue could not now be brought under the *Vendor and Purchasers Act.* After carefully ruminating the matter, Glube, J., *followed* the *dicta* of Hart, J., in *Parsons and Smith* in holding that a possessory title can be enforced upon a purchaser, and *extended* the *dicta* by further holding that the matter of possessory title was a proper one to bring under the Act, whether raised as an objection beforehand or not. It now appears that once any objection is raised under the *Vendor and Purchasers Act* the fuse is lit and the whole of the contract comes under judicial scrutiny. It would seem that the only remaining extension of the Act left to be decided is the complete elimination of the necessity for *any* objection, thus allowing the Applicant to apply at any time during the currency of the contract for an interpretation of the contract *per se.* The actual *ratio* of the case, however, was the same as in *Parsons and Smith* because Glube, J., dismissed the application of the vendor, holding that the evidence failed to support a finding of possessory title, and again, as in *Parsons and Smith,* all findings *qua* the *Vendor and Purchasers Act* thus appear as *dicta.*

Applying the Decisions

When we juxtapose *Parsons and Smith* with *Stevens and MacKenzie* the full force and effect of the two decisions raise far from unimportant problems of practice to the property lawyer:

1. Is the *Quieting Titles Act* now an outmoded and emasculated piece of legislation? If I have a client concerned about the validity of his paper title, but possibly able to support a possessory title, why should I even consider the *Quieting Titles Act* and expose him to delay and expense when he could, for example, sign an agreement of sale with his wife or nominee, possibly accompanied by a declaration of trust, object to possessory title, and then apply under the *Vendor and Purchasers Act,* and have the title secured expeditiously and inexpensively?

2. Is a ruling as to possessory title under the *Vendor and Purchasers Act* relative or absolute? If it is absolute, it is unnecessary to use the *Quieting Titles Act* for the reason already mentioned. If it is relative, and thus the distinction between the *Quieting Titles Act* and the *Vendor and Purchasers Act* is that the former makes good title against the whole world and the latter against the parties to the hearing (vendor and purchaser), the question that is left begging is whether this distinction *in law* is practical *in fact.* V executes an agreement of sale to P, V has only a possessory title at best, P objects to the title, V applies under the *Vendor and Purchasers Act,* the court holds the possessory title valid and P is compelled to buy the property. Three years later P executes an agreement to sell the same property to X who objects to the possessory title notwithstanding th ruling of the court three years before, and refuses t buy. If the Act is relative, X is not bound by the decisio three years before, nor is the court who hears the nev application between P and X. Although it is highl improbable a court would not uphold the possesso title the second time given basically the same facts what if during P's seisin of the property a valid third o conflicting interest appears, appearing for the first tim to the knowledge of P, but existing during or prior to th time V owned the property, e.g., an intervening act i the chain of possession? Under such circumstances, i is not improbable that a second hearing would uphol the objection by X, and in the final scene of this tragi drama P holds in his hand two judicial pronouncements the first saying he has good title and the second sayin he has not good title. Unfortunately for our pseudonyr P, the sequence of events has not been in his favou and he is left with an unsaleable piece of property.

3. Now, let us really be practical. As practitioner we are well aware that most of us would not certify to mortgage company a title based solely on possessior Going back to the hypothetical above between V and F let us suppose P applies for a mortgage immediatel after the first hearing when the judicial pronouncemer upheld the possessory title, and you are asked to certif title to the mortgage company. Would you certify th title? If your answer is in the negative, the plight of becomes even more pronounced because he find himself with a piece of property upon which he cannc obtain a mortgage, and differing from his status unde an agreement of sale, he has no recourse to the cou because the mortgagee is free to accept or reject hi application. If your answer is in the affirmative, you bravado is to be admired.

Conclusion

It is unlikely that pronouncements under th *Vendor and Purchasers Act* are absolute as t possessory title, and as a consequence, the principl that must be vividly underscored is if a court cannc under that Act grant absolution as to title, why shoul the practitioner hold himself out to certify the titl Undoubtedly, any party compelled to accept possessory title under the *Vendor and Purchasers Act* i free to apply under the *Quieting Titles Act,* but surel such a party should not be compelled by judicia sanction to inherit the problems of the former owner. is obvious that such pronouncements under the *Vendc and Purchasers Act* carry with them serious headache to both practitioner and public. I think that possesso title should continue to be the foundation of a good titl but I do not adhere to the view that it should b established under the *Vendor and Purchasers Act.* Onc the issue of possessory title is sought to be forced on a unwilling purchaser, the vendor should be required t establish his title under the *Quieting Titles Act,* or applicable, *Land Titles Clarification Act.* Failing th approach, the *onus* of proof required by an applica seeking to establish possessory title under the *Vendc and Purchasers Act* should be comparable to th statutory requirements under the *Quieting Titles Ac* e.g., plans, advertising, abstracts, notification t adjoining owners, and possibly even a waiting perio

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TAX NOTES

Compensation On Termination

Prior to the budget of November 16, 1978 and to the introduction of Bill C-37 (which Bill as C-17 was reintroduced in substantially the same form by the present government in October 1979) the taxation of compensation to employees on termination of employment was confused. In general if the compensation was characterized as damages for wrongful dismissal or breach of contract, the receipt was not taxable. If the compensation was characterized as a payment made in accordance with an employment contract or in lieu of notice, it was taxable. Inevitably there was a disagreement between Revenue Canada and the taxpayer as to the characterization of the payment.

The Government has attempted to resolve the confusion by the not particularly novel approach of taxing practically all compensation on termination. However, no doubt in order to avoid the inference that it is anything less than a philanthropic organization, the Government has devised a formula which attempts, but fails, to give the appearance of providing a reasonable exemption. One might speculate that our Government faced with the problem put to Solomon would either have kept the baby or taxed both of the alleged mothers.

In substance a new definition of so-called "termination payments" has been inserted in the Income Tax Act. The definition provides that all payments which were tax free prior to the amendment are after November 16, 1978, classified as "termination payments." These payments are to be included as a taxable receipt to a maximum of 50% of the employee's previous twelve months' remuneration. The twelve months are calculated from the earlier of the termination date or the date on which an agreement in respect to termination was entered into. An example may assist to illustrate the calculation:

> An employee earns $50,000 in the twelve months prior to termination. On termination as a result of being wrongfully dismissed he receives $35,000 in damages for breach of contract and $10,000 in lieu of notice of termination.
>
> Prior to November 16, 1978 he probably would be taxed on $10,000 and $35,000 would be a tax free receipt.
>
> After November 16, 1978, $25,000, being 50% of prior twelve months' remuneration, would be included as a termination payment since the 50% is less than the previous tax free receipt. The excess payment of $35,000 minus $25,000 equalling $10,000 would be a tax free receipt.

Result of Amendment

If a practitioner is fortunate enough to obtain a large settlement of a dismissal claim, (i.e., an amount which exceeds one-half the previous twelve months' remuneration to the employee) in order to obtain some tax exemption he must still convince Revenue Canada that the settlement constitutes damages for wrongful dismissal and would, therefore, have been tax exempt prior to November 16, 1978. This may now be easier since Revenue will at least get some share of the compensation. However, only that portion greater than 50% of the previous twelve months remuneration would be tax exempt. Certainly the amendment does not solve much in these situations.

However, on the bright side, if the damages the practitioner has managed, by dint of hard work and late nights, to glean on behalf of his client is less than 50% of the client's previous twelve months' remuneration, no argument with Revenue Canada ensues. All of the compensation is then taxable.

Small Business Update

In the January 1979 Law News the budget proposals with respect to the small business deduction were discussed. Under the proposals the small business deduction would have been denied to corporations involved in earning professional income, income from certain personal services, and income from the provisions of certain management and other administrative services.

By virtue of new proposals introduced by the Government the three categories of corporations will still not obtain the small business deduction but will be subject to a new small business tax rate of 33-1/3% rather than be subject to the normal rate of corporate tax of between 46% and 52%.

The changes will apply to taxation years commencing after 1979 for corporations in existence on October 23, 1979 and to all taxation years for corporations formed after October 23rd. Change of year end will be permitted in certain circumstances.

Contributed on behalf of the Nova Scotia Taxation Sub-Section of the Canadian Bar Association.

Possessory Title continued

All of this should be mandatory, which would have the desired effect of almost forcing the applicant to apply under the *Quieting Titles Act.*

It is somewhat more than parenthetical to note again in passing the fact that in *Parsons and Smith* and *Stevens and MacKenzie* both judges held the applicant's proof of possessory title insufficient and unsatisfactory. The question as to what degree of proof is sufficient and satisfactory under the Act remains to date unanswered.

Unless qualified by future decisions or future legislative enactments, the best pearl of wisdom to the property lawyer would be to insert an appropriate covenant in his agreements of sale defining as unacceptable a possessory title.

— Floyd Horne

*Digested under REAL PROPERTY in this issue.