TAX DEEDS

This topic was introduced in the C.L.E. brochure with words to the effect that the Tax Deed was thought to convey "perfect title" until recent years. In fact, it has been clear for almost a century that a tax deed does not necessarily provide a good "root of title" and that in reality it is very little different from a Sheriff's Deed or Quit Claim Deed. Recent cases in Nova Scotia have shown that it is not safe to rely upon a Tax Deed as anything other than one link in a chain of title, and conveyancers who rely upon Tax Deeds and do not perform an adequate title search do so at their own risk. This paper will attempt a brief review of the relevant legislation and cases.

The procedures governing the sale of property for arrears of real property taxes in Nova Scotia are now found in the Assessment Act, particularly in Sections 153 to 179, although other sections may be relevant. The provisions in the Halifax and Dartmouth City Charters have been repealed and are no longer applicable, although it should be noted that the old Section 26 of the Halifax City Charter was virtually identical in wording to Section 178 of the present Assessment Act. The former Section 369(1) of the Dartmouth City Charter was likewise very similar to Section 178 of the Assessment Act, although in some ways it went even further as a curative provision by purporting to establish that a Tax Deed was conclusive evidence that all provisions of the Act with reference to the assessment and taxation **of land sold for** taxes were duly complied with. In consequence, most of the cases dealing with the effects of Tax Deeds decided under provisions analogous to Section 178 of the Assessment Act can be applied to tax sales held pursuant to the provisions in the current Assessment Act.

Tax sales may be held of properties where taxes have been in arrears from at least the preceding year although most municipalities wait for a longer period. The Municipal Treasurer with the assistance of the assessors compiles a list of properties liable to be sold for arrears of taxes and notifies all owners and encumbrancers to this effect. By virtue of Section 9 of the Matrimonial Property the spouse of any owner is evidently also entitled to be notified. Following compliance with the notice provisions, the Treasurer advertises the tax sale, and the property is ultimately sold at public auction. Thereafter., unless taxes are in arrears for more than six years, the owner and any encumbrancer of the property has one year to redeem it, failing which the purchaser may obtain a Tax Deed from the Municipality.

Many practitioners have traditionally based their belief that such a Tax Deed provides a good root of title upon Section 178 of the Assessment Act or its equivalent. Section 178 reads as follows:

"Such deed shall be conclusive evidence that all the provisions of this Act with reference to the sale of the land, herein described have been fully complied with, and every act and thing necessary for the legal perfection of such sale has been duly performed, and shall have the effect of vesting the said land in the grantee, his heirs or assigns, in fee simple, free and discharged from all encumbrances whatsoever."

In fact, however, such curative provisions have long been very strictly interpreted by the courts where equitable considerations made it desirable to do s.o. Thus the Supreme Court of Canada in O'Brien v. Cogswell (1890), 17 S.C.R. 420 at 432 held that such curative provisions must be construed "in such a way as not to give them the violent and **unjust operation contended for**, according to which land which may have been illegally assessed for taxes might be sold and conveyed behind the back of the owner without the slightest notice having been given to him." In that case, Justice Strong held that the validating provision in the Halifax City Charter could only be relied upon to correct errors relating to the sale of the land but not errors relating to the assessment.

Such a strict construction of provisions analogous to Section 178 has been common in subsequent cases. Section 178 specifically deals only with sale procedures, and nothing in the Section purports to perfect the assessment upon which the tax liability is based. If the assessment is in some way invalid, or if property is sold for taxes when in fact no arrears are owing, the Tax Deed may be set aside as void.

In the case of Hebb v. Hebb (1944), 2 D.L.R. 255, a Tax Deed was held void insofar as it purported to convey additional lands which had not been included in the advertisement but which were added to the i Tax Deed at the purchaser's request following the sale. The Nova Scotia Court of Appeal held the Tax Deed void insofar as it related to the additional land and stated that "Proof is required of strict compliance with all the requirements of the Act respecting the assessment, because on such assessment all sale proceedings are founded". The a **Court further** held that the Plaintiff, whose claim to the additional lands was based upon a possessory title, had standing to maintain an action for a declaration that the tax sale deed to the additional lands was invalid, especially where the Plaintiff had been assessed for taxes on the property and had kept them paid up.

Similarly, in Aulenback v. Aulenback, (1949) 2 D.L.R. 365, the Nova Scotia Court of Appeal held that the then equivalent of Section 178 of the Assessment Act did not validate a Tax Deed insofar as it purported to convey land on which there were no arrears of taxes owing but which had been mistakenly included in a description of a larger parcel of land sold for taxes. The Court, in commenting upon the then equivalent of Section 178, stated as follows:

"The deed to which that Section applies is a deed of land on which taxes were in arrears and it does not apply to a deed of land which was not assessed for such taxes, nor to a deed of land on which a separate tax had been assessed and paid, which land was mistakenly included in the description of lnnd sold for taxes."

The Court went on to cite O'Brien v. Cogswell as authority for the proposition that the Section only made a deed conclusive evidence of full compliance with all proceedings preliminary to the sale and not to proceedings relating to the assessment or levying of the tax, and found the deed under which the Defendant claimed the lands to be **void ab initio**. Graham, J. quoted with approval the **comment of** the Trial Judge to the effect that " it is no better than if a stranger conveyed lands he had not owned and in which he had no interest".

In the recent decision of Devereaux and Robinson v. Saunders (1978), 26 N.S.R. (2d) 283, the Defendant vendor of land took the position that the Plaintiff purchasers should be satisfied with a Tax Deed to the property as a sufficient answer to **objections to title**. The Nova Scotia Court of Appeal upheld the decision of Cowan, C.J.T.D., who held that a Tax Deed does not convey anymore than the interest, if any, in the land of the person assessed for the taxes. Chief Justice Cowan, in commenting upon Section 178 of the Assessment Act, stated as follows:

"... while the section provides that the deed shall be conclusive evidence that all the provisions of the Act, with reference to the sale of the lani described in the deed have been fully complied with and every act and thing necessary for the legal perfection of such sale has been duly performed, it may be shown that the lands which have been sold and which have been assessed by the Municipality, are not, in fact, owned by the person assessed. If, for example, the Municipality erroneously assesses lands owned by one person in the name of another person, and then proceeds to sell the lands under the tax sale provisions, the resulting deed does not, in my opinion, deprive the true owner of title. Again, while the section states that the deed has the effect of vesting the land described in the grantee, in fee simple, freed and discharged from all encumbrances whatsoever, it is quite clear, in my opinion, that, in the present case, where the deed, after setting out detailed descriptions of the various lots by metes and bounds, contains the phrase previously referred to, confining the operation of a deed to "those lands or interest in lands which were owned or occupied by Titus Mosher at the time of his death, on or about the 6th day of February, A.D., 1958, and assessed to the estate of the said Titus Mosher at Feltzen South aforesaid on the 12th day of October, A.D., 1962, being the date of the tax sale aforesaid", the deed is effective to convey to the defendant only those lands or interests in lands which were owned or occupied by Titus Mosher at the time of his death, i.e. February 6, 1958. If, therefore, certain of the lands were not owned or occupied by Titus Mosher at the relevant time, or, if owned or occupied, were subject to other outstanding interests, the deed does not, in my opinion, convey to the defendant a greater interest than that to which Titus Mosher was entitled at the relevant time."

Mr. Justice Morrison applied the same reasoning in the recent decision of Crestpark Realty Limited v. Riggins et al (1977), 21 N.S.R. (2d) 298, where he set aside a City of Dartmouth tax sale and held that the resulting Tax Deed was void because no arrears were in fact owing on the lot sold.

In short, it would appear that the courts may overturn tax sales if there is any invalidity in the assessment upon which the tax liability is founded. Such invalidity may arise out of a duplicate assessment, out of the assessment of exempt property, or out of the assessment of property to the wrong person. By the same token, a tax sale must take place for arrears of taxes that are indeed owing. If these conditions precedent are not met, the curative provision in Section 178 will not validate the sale, at least insofar as the sale **purports to** convey lands with respect to which these **conditions** precedent have not been met.

It should be noted that the limitation periods designed to protect Municipalities from liability are of no particular significance in assessing the validity of the Tax Deed as a good root of title. In the first place, such limitation periods will be strictly construed against the Municipality; thus in the Crestpark Realty Limited v. Riggins case, the court held that the one year limitation period for actions against the City of Dartmouth did not begin to run until the Tax Deed was actually delivered, in spite of the City's **contention** that the period began to run from the tax sale. Moreover, the Nova Scotia Court of Appeal in Hebb v. Hebb held that the limitation provisions of Section 174 of the then Assessment Act, which provided that "no action shall be commenced for anything done in pursuance of any provision of this Chapter" after a certain period, could not be relied upon by the Defendant Municipality. The **court** construed the Section strictly and found that the limitation as to time was restricted only to things done in pursuance of the Act, and not to a sale of lands not authorized by the warrant of sale to be sold. If a tax sale were based upon an invalid or improper assessment, or were held where no arrears were in fact owing, it might well be interpreted as not being "in pursuance" of provisions of the Assessment Act and thus not protected by Section 196, which reads as follows:

"No action shall be commenced for any thing done in pursuance of any provision of this Act, after six months from the date of the act or omission complained of, unless at such date the plaintiff was absent from the Province, in which case the action may be brought at any time after the return of the plaintiff to the Province, so as the same is brought within two years from the date of the act or omission complained of, and the place of trial of every such action shall be in the county where the cause of action arose."

Furthermore, even if a Municipality was protected by a limitation of actions provision, this would not protect a purchaser basing his title upon a tax deed from an attack by one claiming to be the rightful owner of the land. As between two such parties, where a tax sale came about because of irregularities in the assessment or calculation of arrears, **the court** might well find that the former owner had a better title to the land then the purchaser **holding under a** Tax Deed. The Tax Deed could be held void, **even in the** situation where the purchaser had no recourse against the Municipality as a third party because of the limitation of action provisions. Similarly, a vendor basing his title upon a Tax Deed in an application under the Vendors and Purchasers Act, might find the court unwilling to uphold his Tax Deed as a sufficient answer to the purchaser's objection to title, as in Devereaux and Robinson v. Saunders. If the limitation period had expired, the vendor might have no recourse against the Municipality and yet could be left with unmarketable land.

For all of these reasons, it appears that a Tax Deed is not necessarily a good root of title and should not be treated as such. Like a Sheriff's Deed or a Quit Claim Deed, it is really not more than a link in a chain of title, and good conveyancing practice would require a solicitor to search the title back in the usual fashion to a Warranty Deed. A review of the case law clearly indicates that a Tax Deed is not now and never was a good root of title, in spite of the sometimes unfortunate habit of relying upon same.

Accordingly, tax sales, as a method of clarifying titles, are equally imperfect.

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