TAX DEEDS REVISITED

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I. Tax Deeds

A land owners' security of title such as it is, derives from Magna Carta. In 1215 King John declared that:

"No free man shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or anyways destroyed; nor will we go upon him in any way except by the lawful judgement of his peers or the law of the land."

We must remember, however, that all land is held as a tenant of the Sovereign, and the Sovereign (Government) can terminate our lease upon following due process.

This exercise of the right of eminent domain can take several forms: escheat, expropriation, or legislation authorizing deprivation of ownership. Some of these imply the payment of compensation, while others do not.

Some of the more drastic processes can proceed in the absence of either notice or compensation. Under the Quieting Titles Act notice is supposed to be given to the owner of a competing claim. If he is not identifiable or not properly notified by reason of mistake or some other cause short of fraud, there is no compensation for lost property.

Similarly, the Land Titles Clarification Act provides for the issuance of certificates of absolute title by the Minister of Lands and Forests. Such a certificate presupposes the extinguishment of any competing claims. This can occur without notice to the owner of land or holder of a lien. Any person who has lost title by reason of the issue of a certificate can apply to the Minister for compensation, but has lost the property right.

A number of special acts vest land in an applicant in order to quiet a title for which no other remedy is available. In some instances a formula is provided whereby a person who loses property can get compensation, but this is not always the case.

The tax collector's right to a first and paramount lien on the land can be traced right back to Magna Carta. Obviously the civil servants of the day were at the King's elbow when he was negotiating terms with the barons. Whatever good the Magna Carta did, it did not put Robin Hood and his Merry Men out of their jobs, protecting the poor who could not pay their taxes.

To look at the positive side of the power to sell land to recover taxes, it does the following:

1. It provides a mechanism to collect taxes and arrears while at the same time providing an incentive to make due payment.

2. It places abandoned land back on the Market and into productive utilization.

3. It can, given the right circumstances, extinguish obsolete titles and abandoned claims.

II. Statutory Authorities for Tax Sale

Since January 1, 1976, the statute governing tax sales in Nova Scotia has been the Assessment Act. Section 178 of that Act reads as follows:

> Effect of Deed
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> 178 Such deed shall be conclusive evidence that all the provisions of this Act with reference to the sale of the land therein 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.

Prior to January 1, 1976, the collection of taxes and tax sale proceedings were governed by a number of different acts, which contained similar phraseology. Some of them were the City Charters of Halifax, Dartmouth and Sydney, Chapter 100 of the Acts of 1954 (Municipality of the County of Halifax). Some towns had special acts; tax sales were governed in Truro from 1937 to 1976 by S.N.S. 1937, Chapter 89; in Stellarton from 1936 to 1976 by S.N.S. 1936, Chapter 84; and in Westville from 1936 to 1976 by S.N.S. 1936, Chapter 89.

New Glasgow enacted special tax sale legislation in 1934 (Chapter 79) and Sydney Mines in 1951 (Chapter 80). Neither of these acts has been repealed, although Assessment Act procedures appear to apply. Some argument as to the continuing validity of these old acts could be made, based on the doctrine that, if there is no intention indicated in the legislation creating a general acts, then local acts are not repealed by general public acts.

III. A GOOD ROOT OF TITLE?

I vividly recall when I was an articled clerk my principal, Charles W. Burchell, Q.C., taking me on my first day of service to Halifax City Hall, where we checked the files of the Treasurer to determine the validity of a tax sale encountered in a title search. I was instructed that a prudent solicitor always checked these records to verify that a tax sale had been properly held.

Some years later it was commonly accepted practice in the Halifax area for title searchers to accept a tax deed on its face, since the statute clearly stated that its effect was to vest a fee simple title in the purchaser free from encumbrances.

If we consult legal texts on this matter, we find the statement of Armour, writing in 1925,

> "Inasmuch as taxes are made a charge upon the land itself, and not upon the interest of any particular person therein, the effect of a sale of the land is to create a new root of title and to extinguish all prior interests therein."[1]

By 1973, however, things had changed, at least in Ontario. The Ontario Municipal Act stated that the effect of a tax deed was to vest in the purchaser the land sold "in fee simple according to the nature of the estate or interest sold." This was interpreted to convey only the interest of the assessed owner.[2] In that case, the Court set out its position on tax deeds in Ontario as follows:

> It was developed in argument that legal practitioners in this Province for many years have tended to place great reliance upon the discovery of a registered tax deed in their certificates of title. The Courts have made it abundantly clear that the final and binding effect of a tax deed which might appear to have been conferred under s.185 of the Assessment Act, R.S.O. 1937, C.272, which now appears in almost identical language as s.589 of the Municipal Act, R.S.O. 1970, c.284, is only applicable if

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1 Armour, E.D., A Treatise on the Investigation of Titles to Real Property in Ontario, Canada Law Book Company Ltd., 1925, p.175.

2 Re Kirton and Frolak (1973) 33 DLR (3d) p.281.

there is in fact valid sale of the land for taxes based in turn upon a valid assessment. Thus, it appears to me that the statement in Armour on Real Property, 2nd ed. (1916), p.116, must be read with some reservation. The statement was as follows:

> "A sale of land for taxes operates as an extinguishment of every claim upon the land, and in fact forms a new root of title, and therefore extinguishes the right to dower therein."

The language of Boyd, C., in Essery v. Bell (1909), 18 O.L.R. 76 at p.79, is peculiarly appropriate here:

> "The production of the tax deed is not enough--it is a mere starting point; further evidence must be given going to the foundation on which the deed rests, in order that the validity of the assessment and all subsequent proceedings may be exhibited."[3]

This case was cited by LaMont as authority for the following proposition:

> "The above quotation from s.586 indicates that the municipality is only selling what interest the registered owner and subsequent encumbrancers had in the property."[4]

It must be observed that the wording of the Ontario statute at that time was completely different from the Nova Scotia acts. In 1984 Ontario passed new statute in wording substantially similar to the Nova Scotia acts. DiCastri now states the law to be as follows:

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3 Supra at p.283.

4 LaMont, DHL, Real Estate Conveying, The Law Society of Upper Canada, Department of Continuing Education, Toronto, 1976, p.350.

"Subject to the provisions of the relevant statute, the mere production of a tax sale deed is insufficient in assertion of an indefeasible title; further evidence must be adduced to establish there was in fact a valid sale for taxes, based in turn upon a valid assessment. These qualifications must be read into the generally accepted statement that a tax sale forms a new root of title. The efficacy of a tax sale deed is determined by the relevant assessment and taxation statute. There is a heavy duty on the taxing authority to observe strictly the provisions of the statute."[5]

Significantly, half the cases cited in this paragraph are from Nova Scotia courts.

IV. Early Nova Scotia Cases

A Nova Scotia case that reached the Supreme Court of Canada is regarded as providing the basic pronouncement on the validity of tax sales.

In O'Brien v Cogswell[6] Strong, J. stated as follows:

"Enactments of this class are to be construed strictly, and in all cases of ambiguity which may arise that construction is to be adopted which is most favorable to the subject. Further, all steps prescribed by the statute to be taken in the process either of imposing or levying the tax

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5 DiCastri, V., The Law of Vendor and Purchaser (3 Ed.), Carswell, 1989, para.775.

6 (1889) 17 S.C.R. 420.

are to be considered essential and indispensible unless the statute expressly provides that their omission shall not be fatal to the legal validity of the proceedings; in other words, the provisions requiring notices to be given and other formalities to be observed are to be construed as imperative, and not as merely directory, unless the contrary is explicitly declared."

But the learned judge then went on to say as follows:

"If the legislature has in unequivocal words said that a man's property may be sold for taxes and his title divested, although the tax for which it was sold was illegally imposed, and although the owner never had any notice of its imposition, the courts are bound to give effect to what the lawgiver has so enacted, and the gross hardship and flagrant injustice of such a law is no answer to an action invoking its judicial enforcement and application. These considerations do, however, constitute grounds for very carefully and strictly construing an enactment relied upon as warranting such a harsh and unreasonable conclusion and for so restricting its operation as to avoid injustice, if the language will possibly admit of such a construction."

In that case there had been three objections raised to the proceedings leading up to the sale. Two of them related to notices leading up to the sale. Citing the section (110) which provided that a deed has conclusive effect, Strong, J. said:

"I am of the opinion that in order to give effect to this section 110 we must hold that the omission to give the notices required by ss.57 and 93 was covered by it upon the deed being executed. These notices are preliminaries required by the Act with reference to the sale and have

> nothing to do with the imposition or assessment of the tax. They come, therefore, within the words of the 110th section which provide that 'the deed shall be conclusive evidence that all the provisions of the Act with reference to the sale of the land have been complied with', and, in my judgement, cover the objections to the title which have been rested on the failure of the City Collector to comply with the requirements of s.57 and with the failure of the Board of Assessors to give the notice required by s.93, the notices mentioned in both these sections being provided for as preliminaries of the sale and not of the assessment."

Restricting the operation of this curative section to matters relating to the sale, he found that it did not cover the fact that the land had never been properly assessed, and on this ground set aside the sale.

In similar circumstances in 1921[7], the Nova Scotia Appeal Court found property was not property assessed and set aside a tax deed. The Court stated that the curative section was only available to cure defects connected with the sale of land for taxes and could not cover the failure to give notice of assessment to the owner in the manner set out in the act.

In Ennis v Bell[8], on the other hand, a daughter was the owner of a property in Halifax, in which her mother had an interest by way of dower. The City assessed the property in the name of the mother and sent to her the assessment notices and notices that the taxes were in arrears. The property was subsequently sold for arrears of taxes. The court considered O'Brien v Cogswell and concluded that no procedural irregularities sufficient to vacate the sale had occured and that the sale was valid.

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7 Domanisky v Fitzgerald (1912), 62 DLR 524.
8 Ennis v Bell (1918) 52 NSR 31.

An interesting variation from the usual scenario occured in Hyland v Halifax[9]. In that case the court found the tax deed was irregular, but that half the property had been sold by the Grantee to a purchaser for value without notice who was not joined in the proceedings. The court set aside the deed only as to that portion still owned by the purchaser, and awarded damages to the previous owner with respect to the balance.

In Melynk v Sydney[10] the Appeal Court dealt with a situation wherein the City had purchased a property at a tax sale. Subsequently, a prospective purchaser from the former owner requested a tax statement and was not informed of the sale. The purchaser bought the property from the former owner and paid taxes assessed to him for five years. The City then advised him it owned the property. The Appeal Court held the City was estopped from claiming the property and set aside the tax sale.

In Hebb v Hebb[11] the Appeal Court considered the effect of a tax deed containing a lot not referred to in the assessment or notice of sale. Apparently reference to this additional lot was added to the deed after the sale. The defendant raised the curative section of the Assessment Act relating to tax sales but the court held that this did not apply since the reference to the additional lot was not added nor was its conveyance "pursuant to a tax sale". Citing O'Brien v Cogswell (supra) the court held that proof is required of strict compliance with all the requirements of the Act respecting the assessment, because on such assessment all tax sale proceedings are founded. The deed was ruled null and void insofar as it purported to convey the additional lot.

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9 (1932) 5 MPR 174 (Reversed on other grounds [1933] SCR 317 (Note: This case was criticized in Delaurier v Nova Scotia, (1987) 80 NSR (2d) 7)..

10 [1933] 2 DLR 74.

11 [1944] 2 D:R 255.

In Aulenback v Aulenback[12] a previous owner had sold a corner lot out of his property to a purchaser who built a house on it but did not record his deed until many years later. Both properties were separately assessed. The taxes on the main property fell into arrears and it was sold for taxes, and the tax deed description included the original lot size including the corner lot sold previously. The court considered the validating provision of the Assessment Act and ruled that it

> "could not apply to a deed of land that was not assessed for such taxes, nor to a deed of land on which separate tax had been assessed and paid, which land was mistakenly included in the description of land sold for taxes."

This, the court ruled, precluded the deed from being an instrument within the meaning of the Registry Act since it was invalid from the beginning.

1960-1978.

From about 1960 until 1978 there was general agreement among property practitioners that the statutory provisions as to conclusiveness of a tax sale deed meant what they said, and that a tax deed cured all past title defects and commenced a new root of title.

The Recent Cases.

Lawyers kept their collective heads buried in the sand like a flock of ostriches until, in 1978 there came the decision in Devereaux & Robinson v Saunders[13]. In this case the court considered the effect of the Assessment Act provision as to the conclusive effect of a tax deed and found that:

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[12] [1949 2 DLR 365.
[13] (1978) 26 NSR 2d 283
[14] (1975) 21 NSR 2d 298.

> "If 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."

This meant, in short, that from now on an inquiry had to be made to see if the person assessed was owner of the property assessed in this name.

A case several years earlier might have served as a warning, but since this decision was in line with established authority it passed by unnoticed. This was Crestpark Realty Limited v Riggins[14]. In this case a bookkeeping error at City Hall led to a service charge for one lot being posted against a neighbouring parcel. When it was not paid, the property was sold. In the meantime purchasers had acquired the lot from its former owner and constructed a house on it. The court set aside the sale because no arrears were owing on the lot in question and ruled that the conclusiveness section could not save the tax deed.

In the course of deciding Scott v Smith, a very difficult case with many complex issues[15], Hallet, J. stated,

> "A municipality cannot sell real property for arrears of taxes where there are no arrears.",

and set aside a claim based on a tax deed description which appeared to encroach on neighbouring lands.

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[15] Scott v Smith (1979) 6 NSR (2d) 541.

This decision was appealed and section 178 of the Assessment Act was raised as a defence of the tax deed before the Appeal Court, which stated,

> "Despite the terms of s.178 there are circumstances where one can look behind a tax deed and where it will be held to be of no effect."

> "In the instant case I think it is clear that the land purported to be sold under the tax deed, as described therein, cannot be said to be land of the Respondent."

Gordon v Attorney General of Nova Scotia[16]. The decision in this case set new parameters to the inquiries that had to be made to ensure that a tax deed was good. In 1827 the owner of the property sold a four acre lot to an individual, and in 1843 the former owner purported to sell his entire lot, including the four acre lot, to another. This property descended by will and was sold for taxes in 1925. The City purchased it. The Plaintiff, who had no deed, claimed a possessary title. The court found the tax sale to be defective because the heirs of the individual who got the deed in 1827 were not assessed.

MacDonald v MacLennan[17]. In this case there were two separate assessments of the same land. The tax deed was found to be invalid because no notice of the sale was given to the owner and because the owner's taxes were not in arrears.

After all these decisions setting aside tax deeds, Mr. Justice Grant, in a Vendors and Purchasers Act application, upheld a tax sale in Carnegy and Carnegy v Godin and Comeau-Godin[18]. In this case the owner of the property died

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16 (1981) 48 NSR 2d 340.
17 (1981) 48 NSR 141.
18 (1982) 52 NSR 697.

and left the prperty to two individuals. The assessor did not find the will on record in the Registry of Deeds, so after making inquiries, he altered the assessment to (naming one of the heirs) "et al", and sent notices to the named individual. In the course of his decision, Grant J. stated,

> "In the cases cited to me there has been a grievance and damage suffered by a person - selling when there were no taxes due, assessing the wrong person, the wrong lot, selling the wrong land, selling too much land or a variation thereof."

The court found the circumstances of this case to be "an error, informality or irregularity by the assessor", which is cured by section 188 of the Assessment Act. The tax deed was found to be a valid conveyance.

Horyl v Town of New Waterford[19]. This was a decision of Glube, J. The Town was unable to ascertain the owner of a property because his deed was not on record. The lot was assessed to "owner unknown" after a diligent search by tax officials to ascertain the owner. Subsequently the property was sold at tax sale, and then at yet another tax sale eight years later. The court found there was a responsibility on the owner of a property to make inquiries and protect himself by correcting an erroneous assessment. The tax sale was upheld.

Hage Enterprises v Loughan and Conrad[20]. This was another case where the assessment was to a named individual although some other people were entitled to a partial interest in the property by descent. There was a tax sale, and its validity came into question under the Vendors and Purchasers Act. Rogers, J. considered the decision in Devereau v Saunders but

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19 (1980) 44 NST (2d) 70.
20 (1983) 56 NSR (2d) 181.

found that the present sale was held under the Halifax County Special Act (SNS 1954 chapter 100) which contained more emphatic wording as to the effect of a tax deed than did the Assessment Act considered in that case. Another factor was the fact that the person assessed certainly owned an interest in the property. This and other factors led the court to conclude that the tax sale was a valid one.

Deslaurier v Nova Scotia[21] In this case Rogers, J. not only failed to follow his own previous decision in Hage Enterprises v Loughan[22], but also held that a tax sale that was void resulted in subsequent deeds being void. In so doing he appears to have restricted the application of the rule laid down in Hyland v Halifax which gave protection to an innocent purchaser from the Grantee in a tax sale deed. The errors in the proceedings leading up to the tax sale were identified by the court as follows:

1. The assessment roll failed to accurately describe the assessed person's place of residence and the description of the assessed property (s. 17).

2. Where the assessed person died, notice of assessment was not given to his executor or alternatively posted on the property (s. 27).

3. No notice of taxes due was ever served on the Deslauriers (s.83).

4. No notice of tax sale was given (ss. 139, 140).

5. No diligent inquiries were made to determine ownership (s. 138).

6. The advertisement of the tax sale did not adequately describe the property (s. 144(2)).

7. No certificate was ever filed or available for public inspection (s. 165).

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21 (1987) 80 NSR (2d) 7
22 supra note 20

The court decided that these errors could not be cured by the curative provisions of the Act and ruled that the tax deed and subsequent deeds were void.

In Begg v East Hants[23] Richard, J. set out a position as to the effect of a tax deed as follows:

> "There was a time when a title searcher could take some considerable, but perhaps unwarranted, comfort in finding a valid tax deed in a chain of title. However, it now appears, in light of recent authorities that a tax deed conveys only the interest of the assessed owner and to this extent is vulnerable to attack. Therefore, the purchaser at the tax sale takes only what the municipality had to give which cannot be any greater an interest than that of the assessed owner at the time of the sale."

This statement becomes more understandable when it is appreciated that the Crown owned a one-half undivided interest in the property, and what was decided was that the tax deed conveyed only the other interest in the land. The court's decision must be read in that context.

Marsman v Prevost[24]. This was a decision of the Court of Appeal. A property was abandoned by its former owner and a person with the same surname had the property assessed in his name. After paying taxes for a few years he then failed to pay the taxes and the property was sold at tax sale in 1965. Setting aside the sale, the Court pointed to the fact that the legal description in the tax deed contained, after the metes and bounds description, the following words, "The same having been assessed to George Marsman Jr. et al" and made a linkage of this

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23 (1987) 80 NSR (2d) 320.
24 (1987) 76 NSR 83.

with the description to limit operation of the tax deed to property owned by George Marsman Jr., which was nil and permitted the sale to be set aside. In so doing, the decision of Cowan, CJTD in Devereaux and Robinson v Saunders[25] was cited.

It is submitted that there is a clear distinction between the two situations. In the Devereaux case the tax deed description was followed by the words, "the lands and premises hereby conveyed or intended to be conveyed are those lands which were owned or occupied by the said Titus Mosher at the time of his death." This limited the operation of the description to include only such lands, and it is understandable that Cowan, CJTD, would have stated,

> "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."

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[25] Supra note 13.

Clearly, it was because Titus Mosher did not own the land that the tax deed did not convey it, not because he was not assessed for it.

It is submitted that the terminology in the Marsman deed was not so restrictive and its operation was not limited to property owned by Marsman, and that the Court's declaration in this case that "the Municipality conveyed to the appellant the right title and interest in the land of George Marsman Jr. which was nil" does not logically follow from the previous decision.

This case, from our Province's highest court, appears to say that a tax deed conveys only the interest the assessed person held in the land. We hope this position will be clarified in a subsequent decision.

Bras d'Or Recreation Ltd. v Gillis[26]. In this case, a number of procedural defects led Nathanson, J. to declare a tax deed void. These were:

1. Failure of Treasurer to prepare a schedule of lots on which tax not paid (s. 154).
2. Copy of Schedule not forwarded to Director of Assessment (s. 158).
3. Proof of service of Notice of Sale on owner lacking.
4. Posting of notice of sale not on each lot sold (s. 158).
5. Description of land in warrant inadequate (s. 158).
6. Warrant not supported by Treasurer's report (s. 160).
7. Sale of individual lots as a block not authorized by Act.

Yet despite all the foregoing obstacles, a tax deed in a chain of title may yet be found to be a valid conveyance.[27]

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[26] (1987) 81 NSR (2d) 340.
[27] Garner v Interchurch Housing (1987) 83 NSR (2d) 258.

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