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How Secure Is Your Tax Foreclosure Title?

L. R. Bonneville, Jr.

existence of disproportionate values in land and the improvements thereon will not by itself alter land ownership. To award land to the improver even though compensation be given the owner, without meeting the criteria for acquisition of legal ownership, would effect a private condemnation. In *Tyree v. Gosa*[41] it was said. "No court has the power to compel a person to convey and surrender his property for any other person's private use (except for ways of necessity) in exchange for any sum, no matter how great."[42] This statement, broader than generally recognized equity rules, indicates the reluctance of the Washington court to let considerations of economic hardship alter legally fixed boundaries unless they appear in a situation where an otherwise substantial legal argument for alteration has been already made out.

A survey of modern Washington boundary cases shows that the doctrines of Estoppel, Oral Agreement, and Acquiescence are very much alive in the current of judicial thought. These doctrines can create or dissolve boundary lines under a wide divergence of practical situations, but all too often are inadequately presented to the court. The practitioner can with profit separately and thoroughly consider each in the solution of any boundary problem.

[41] 11 Wn.(2d) 572, 119 P.(2d) 926 (1941).
[42] *Ibid.*, at p. 581.

HOW SECURE IS YOUR TAX FORECLOSURE TITLE?

L. R. BONNEVILLE, JR.*

The statute of the state of Washington relating to the conclusiveness of tax judgments reads:

> And any judgment for the deed to real property sold for delinquent taxes shall estop all parties from raising any objections thereto and the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax has been paid. or the real property was not liable to the tax.[1]

In dealing with this statute in the past, the Supreme Court of Washington has said, "The essential thing is the actual payment of the taxes,"[2] and "Thus it appears that the conclusive effect of the judgment

*Member of the Tacoma, Washington, Bar.
[1] REM. REV. STAT. § 11288 [P P C. § 979-313].
[2] Puget Sound National Bank v. Biswanger, 59 Wash. 134, 139, 109 Pac. 327, 329 (1910)

can be overcome only by proof that the tax has been paid or that the property was not liable therefor."[3]

However, in the recent Washington case of *Kropi v. Jacobson*,[4] a tax title, procured through a judgment in foreclosure proceedings for delinquent taxes, was set aside as void, even though the taxes had not been paid. The reason assigned was that the foreclosure had been caused by the failure of the county treasurer to note upon the receipt given in payment for current taxes that certain back taxes were due. To the legislative direction that there shall be two exceptions to the conclusive effect of a judgment in tax foreclosure proceedings, the court has added a third—frustration of the taxpayer in the payment of his taxes by the public officer.

In the *Kropi* case, the property owner left money with a friend to pay the taxes on his property while he was absent in the military service. The current taxes for the year 1943 were paid, but he did not pay taxes assessed for prior years, not knowing that such were due. A deputy in the Pierce County treasurer's office issued a receipt for the taxes for 1943, but failed to note on this receipt that back taxes were due except to write the letters "B. T." in the corner of the tax receipt. These letters were an attmpt to comply with REM. REV STAT. § 11246 (P P C. § 979-217) which reads:

> that in issuing a receipt for such current tax the county treasurer shall endorse upon the face of such receipt a memorandum of all delinquent taxes against the property therein described, showing the year for which said tax is delinquent and the amount of delinquent tax for each and every year.

The property was subsequently sold for the taxes which were delinquent and was purchased by the defendant Jacobson. The plaintiff had no knowledge of the foreclosure proceedings until after the sale of his property The court found that the deputy treasurer had not complied with the statute above set forth (REM. REV STAT. § 11246), and held that the decree of tax foreclosure should be set aside and the treasurer's deed cancelled, reasoning that one who attempts to pay his taxes has a right to the protection of the statute and, upon being misled, may have the foreclosure set aside.

The court in the *Kropi* case did not mention the statute[5] providing for the conclusive effect of a judgment in tax foreclosure but decided

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[3] Schultz v. Kolb, 189 Wash. 187, 64 P.(2d) 79 (1937).
[4] 27 Wn.(2d) 451, 178 P.(2d) 742 (1947).
[5] REM. REV. STAT. § 11288 [P P C. § 979-313].

the case entirely upon the authority of *Nalley v. Hanson*[6] which in turn relied upon *Schultz v. Kolb*[7] In the *Schultz* case, a quiet title action, the property owner relied upon the legal principle that *an effort made in good faith to pay taxes is equivalent to payment, at least it will be a ground for setting aside the decree of foreclosure.* In affirming this principle, the court collated the prior Washington decisions on the problem but found that here the property owner was not entitled to relief because her evidence did not show a *bona fide* attempt to pay the taxes. There was only the uncorroborated testimony of the plaintiff that some years earlier an unidentified official in the county treasurer's office had told her that she would have no trouble because of back taxes, even though she knew that there were some due. The need for maintaining the finality and conclusiveness of tax foreclosure judgments was recognized, the court reasoning that if such judgments, having every aspect of regularity, may be so informally overthrown, the door to fraud will be opened wide and the stability of a large class of titles will be shattered.

Thus the court, while acknowledging avoidance of the foreclosure judgment in certain situations, served notice that such was not without restriction or limitation. Although the denial of relief in the *Schultz* case was based upon a finding that there was no *bona fide* attempt to pay the taxes, it seems to the writer that such a limitation is very ambiguous. Perhaps a better method would be to state flatly that relief will be granted the property owner only when he has so conducted himself that to deprive him of his property would work a manifest injustice. This expressly recognizes that it is an equitable rule to be applied in the spirit of fair play and justice which is the primary approach adopted in the *Kropi* case.[8] ("It is not the policy of the law that the owner should lose his land through excusable mistake."[9])

A comparison of the cases in Washington involving the avoidance of tax titles on the grounds herein discussed reveals an interesting illustration of the initial adoption of a rule of law to meet a particular problem, and the gradual extension of the rule, case by case, to new

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[6] Nalley v. Hanson, 11 Wn.(2d) 76, 118 P.(2d) 435 (1941), where the failure to pay taxes was caused by the neglect of the county treasurer to include taxes upon certain tracts of land in a list of taxes which the treasurer had agreed to mail to the property owner.

[7] Schultz v. Kolb, 189 Wash. 187, 64 P.(2d) 79 (1937).

[8] 27 Wn.(2d) 451, 178 P.(2d) 742 (1947).

[9] Puget Sound National Bank v. Biswanger, 59 Wash. 134, 139, 109 Pac. 327, 329 (1910).

situations, each in turn relying upon those preceding, until the end result is quite different from the rule originally propounded.

The first case in Washington to treat of this subject was *Bullock v. Wallace.*[10] There the court was faced with the statute (still applicable today) making tax foreclosure judgments conclusive in collateral proceedings,[11] and a factual situation where the county treasurer had erroneously reported the amount of the taxes due in response to the taxpayer's inquiry The taxpayer duly paid the amount so reported and the property was subsequently sold for tax delinquency, the judgment being by default, upon constructive notice, as is the procedure today In directing that the taxpayer should recover the property, thus avoiding the foreclosure judgment, the court held that a *bona fide* attempt to pay was the legal equivalent of payment and cited a legal encyclopedia[12] as its main authority, supported by but one case and it from another jurisdiction.[13] Notice that here the owner made both an inquiry as to the amount of taxes due and an actual payment of the amount stated.

Within three years, the court cited the *Bullock* case as authority for setting aside a tax title (without re-examination of the proposition involved) in five different cases arising in the same way[14] The taxpayer in each instance and in response to a direct inquiry was told that no taxes were due. Shortly thereafter, the court extended the doctrine to a situation in which the taxpayer had sent a blank check to the county treasurer to cover the payment of all his taxes, the amount being unknown to the taxpayer, and the treasurer failed to fill in the check for an amount sufficient to pay the taxes upon the property in question and the property was subsequently sold for delin-

[10] 47 Wash. 692, 92 Pac. 675 (1907).

[11] REM. REV. STAT. § 11288 [P P C. § 979-313].

[12] 27 AM. & ENG. ENCY. LAW (2d ed.) p. 775, "If the owner of land, or a party having an interest therein, in good faith applies to the proper officer for the purpose of paying the tax thereon, and payment is prevented by the mistake or fault of such officer, the attempt to pay is considered, in most jurisdictions, as the legal equivalent of payment insofar as to discharge the lien and bar sale for nonpayment."

[13] Breisch v. Coxe, 81 Pa. St. 336 (1876).

[14] Loving v. McPhail, 48 Wash. 113, 92 Pac. 944 (1907), connected case, Loving v. Maltbie, 64 Wash. 336, 116 Pac. 1086 (1911), Taylor v. Debritz, 48 Wash. 373, 93 Pac. 528 (1908), Gleason v. Owens, 53 Wash. 483, 102 Pac. 425 (1909), Blinn v. Grindle, 58 Wash. 679, 109 Pac. 122 (1910), *see also* Tacoma Gas & Elec. Light Co v. Pauley, 49 Wash. 562, 95 Pac. 1103 (1908), where the court refused to set aside the tax title when the taxpayer had received no answer from the treasurer's office as to taxes due.

quent taxes.[15] The next extension was the *Nalley* case[16]—failure of the deputy treasurer to include taxes upon certain tracts of land, where the taxpayer had sent a list of all his property to the treasurer. The latest extension is the *Kropi* case[17] where it is apparent that direct inquiry as to delinquent taxes (apparently a requirement of the earlier cases) would have disclosed them and no foreclosure would have occurred. Such is the course of judicial legislation.

Because avoidance of tax titles due to frustration by a public officer of the taxpayer's attempt at payment of taxes is well entrenched in the law of Washington, a purchaser of property at a tax sale might well inquire, "How may I protect myself?" There seems no way of obtaining adequate assurance that such a title will not be upset anytime within three years after the issuance of the deed by the county treasurer. The most careful search would fail to uncover many of these types of irregularities. Of course, if an examination of the tax rolls discloses that current taxes have been paid while earlier taxes remained delinquent, such would be adequate warning. Moreover, the three year statute of limitations applicable to actions to set aside treasurer's deeds after foreclosure for delinquent taxes,[18] would appear broad enough to bar this type of action, thus giving complete protection to one who buys after the statute has run. Cases in this state holding a *void* tax deed sufficient to start the statute running would justify the above conclusion.[19] To date, the point has not been squarely presented to nor passed upon by the Washington court.[20] Note, however, that this statute of limitations probably could not be raised in an ejectment action against the original taxpayer-owner who remains in actual possession of the property after the foreclosure and sale.[21] Except for this, the

[15] Puget Sound National Bank v. Biswanger, 59 Wash. 134, 139, 109 Pac. 327, 329 (1910).

[16] Nalley v. Hanson, 11 Wn.(2d) 76, 118 P.(2d) 435 (1941).

[17] 27 Wn.(2d) 451, 178 P.(2d) 742 (1947).

[18] REM. REV. STAT. § 162 [P P C. § 73-13], "Actions to set aside or cancel the deed of any county treasurer issued after and upon the sale of lands for general, state, county or municipal taxes, or for the recovery of lands sold for delinquent taxes, must be brought within three years from and after the date of the issuance of such treasurer's deed."

[19] Baylis v. Kerrick, 64 Wash. 410, 116 Pac. 1082 (1911), Fish v. Fear, 64 Wash. 414, 116 Pac. 1083 (1911), Wilson v. Korts, 91 Wash. 30, 157 Pac. 47 (1916), Jorgensen v. Thurston County, 145 Wash. 282, 259 Pac. 720 (1927).

[20] *But see* Baylis v. Kerrick, *supra*, note 19, at p. 413, where the court recognizes the problem, but was not required to solve it for the decision in the case. *See also* Blinn v. Grindle, 58 Wash. 679, 109 Pac. 122 (1910), where the court indicates that the statute of limitations does apply.

[21] Buty v. Goldfinch, 74 Wash. 532, 133 Pac. 1057 (1913), Spaulding v. Collins, 190 Wash. 506, 68 P.(2d) 1025 (1937). In both these cases there was a complete failure of the court to acquire jurisdiction in the foreclosure action—in the *Buty* case,

purchaser must rely upon the efficiency of the county treasurer's office. Happily, errors of this sort occur but rarely

It would be indeed difficult to criticize a court for giving utterance to a doctrine which results in decisions appealing to our sense of justice. It would be harsh government that would deprive a man of his property through no fault or neglect on his part.

But the plight of the purchaser of the tax title should not be disposed of by merely saying, "Caveat emptor."[22] Also the interest of the state in the collection of taxes is involved. Foreclosure of tax liens and the subsequent sale of the property is the final step in the enforcement of the property tax laws and anything which tends to restrict the opportunity for sale necessarily hampers the collection of taxes. Such decisions may in part have been responsible for difficulties experienced in the efficient collection of property taxes.[23]

If it be granted that the setting aside of a tax foreclosure title under the circumstances indicated is salutary, the problem is then one with which the legislature should deal. The loss should be shifted from the purchaser at the tax sale. The "betterments statute"[24] gives adequate compensation for improvements put upon the property by the innocent purchaser, but this does not protect him from the loss of his bargain, the anticipation of profit being the usual motivating factor inducing purchases of tax title property An individual purchaser may protect himself by procuring title insurance,[25] but this is no legal solution. It merely makes the injury to the individual purchaser less painful by a distribution of the loss through increased insurance rates,[26] and gives no protection to the uninsured purchaser.

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because of lack of proper notice, and in the *Spaulding* case because of an inadequate property description. The court held upon appeal that the statute of limitations was not a bar to the original owner who remained in possession. It is possible that at some future time the Washington court might rule that it was the complete lack of jurisdiction in the foreclosure action that was the determinative factor and thus apply the statute of limitations as a bar even against an owner in possession.

[22] Kropi v. Jacobsen, *supra,* note 4, at p. 429.

[23] For a detailed study of property tax collection procedure in Washington, particularly as to the partial failure of the final step of foreclosure and sale, *see* Eldridge, *Property Tax Collection Procedure in Washington,* 17 WASH. L. REV. 123 (1942).

[24] REM. REV. STAT. § 797 [P P C. § 24-15]. The court in Bullock v. Wallace, 47 Wash. 692, 92 Pac. 675 (1907), required the taxpayer to reimburse the purchaser for improvements made on the property as a condition to setting aside the foreclosure judgment.

[25] Title insurance policies will be issued where the title depends upon judgment in tax foreclosure proceedings. The possibility of the title being upset is considered as an unavoidable risk.

[26] The writer recognizes that this loss is further spread to the general public by increased rents and a resulting increase in general prices, but feels that the spreading of the loss in this manner is often more theoretical than actual and that the principal

Because the state has caused the loss or injury through its public officers and agents, it should be responsible. One method would be for the legislature to provide for the presentation of claims against the state for losses caused by the errors of public officers, the measure of recovery taking into account the true value of the property at the time of the purchase. Another solution would be to hold the treasurer and his bondsmen liable to the taxpayer for failure to properly list delinquent taxes, the amount of the recovery to be the actual loss to the taxpayer.

An interesting sidelight to the *Kropi* case[27] is disclosed in the briefs filed by both parties and by the American Legion as *amicus curiae*. The question presented, with intensive argument, was whether certain sections of the Federal Soldiers' and Sailors' Civil Relief Act,[28] suspending actions against persons in the military service, applied to actions *in rem* for the foreclosure of tax liens. A decision in favor of the property owner on this proposition would have cast doubt upon the validity of many tax foreclosure proceedings instituted during the recent war. The court, however, decided the case in favor of the taxpayer-owner solely because he was frustrated in his attempt to pay taxes. No reference was made to the possibility of applying the federal law, thus leaving it as yet undecided.

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burden remains with the insured property owner, especially in the case of residential as distinguishd from commercial property..

[27] *Supra*, note 4.

[28] 50 U. S. C. §§ 501-590.