

1969

Tax Titles in Virginia

Marvin C. Bowling Jr.

Repository Citation

Bowling, Marvin C. Jr., "Tax Titles in Virginia" (1969). *William & Mary Annual Tax Conference*. 406.
<https://scholarship.law.wm.edu/tax/406>

TAX TITLES IN VIRGINIA

MARVIN C. BOWLING, JR.

Associate Counsel, Lawyers Title Insurance Corporation

As you know, lawyers like to make wise and irrefutable statements, so I will begin by making one. People don't like to pay taxes! Ever since there have been sovereigns and subjects there has been a struggle to persuade the subject that he should pay the sovereign that which the latter considers to be fair and adequate compensation for the privilege of being governed. Even absolute rulers such as English Kings and Barons under the feudal tenure system often found it necessary to take drastic steps to collect taxes from their underlords and peasants. It was this power to take the property of citizens for the sovereign's use when citizens failed to pay a levy set without their consent that triggered the downfall of absolute rulers and the advent of more democratic governments.

The complaint of our American forefathers of "taxation without representation" set the stage for tax legislation in our country. There is no question but that governments must assess taxes for their expenses and it is also true that when a citizen does not pay his taxes, the governing body must have machinery by which it can collect such taxes out of the property of the citizen.

It is the machinery for collection of taxes by the State of Virginia from the real estate of the taxpayer that is the subject of this talk. I believe there are two criteria regarding real estate tax sales which are elementary in setting up this machinery.

First, the tax sale must result in the collection of the taxes due. This makes it important that there be a buyer ready, willing and able to purchase the land at the tax sale. In determining whether to make a purchase the buyer will consider not only the value of the land but the validity of the title thereto which he will acquire. It is well recognized that land purchased at a tax sale is generally a good bargain for the purchaser but the status of the title is often questionable. As we shall see, these results are very much interrelated.

The second criterion in setting up tax sale machinery is to make certain that the rights of the taxpayer are not infringed upon. If his taxes are delinquent it is proper that his land be sold for tax collection but he should be given sufficient notice that he is to lose his land, have ample opportunity to pay his delinquent taxes and retain his land and, if he does lose title to his real estate, receive adequate compensation for his property over and above the amount necessary to pay the delinquent taxes.

As can be seen these criteria oppose each other to a certain extent. The taxing authorities are anxious to make a sale as quickly and simply as possible and are interested primarily in obtaining enough money at the sale to pay the taxes. The result is that the property is often sold at a price far below its actual value and the taxpayer may lose his land for a fraction of its value.

For this reason we find that the courts have been very sympathetic to the taxpayer. Although the tax sale statutes in Virginia contain many safeguards for the benefit of the taxpayer, the courts have time and again upset the title in the hands of a purchaser because of some technical error or omission in complying with the statutory procedure. This attitude of the courts has thrown tax titles into serious disrepute. This produces a vicious circle. Because tax titles have been discredited, a purchaser is unwilling to make a substantial bid and the sale brings little. Because tax sales bring little, courts set them aside and discredit tax sales.

Another result of the low repute of tax titles is that often the State must bid in the land which removes it from the tax rolls.

With these thoughts in mind, I would like to review briefly the tax sale procedures provided by the Virginia Statutes as well as the statutory attempts to validate titles passing through such sales. Our legislature has recognized the propensity of our courts to set aside these sales and has attempted to pass laws which will persuade the courts to hold such titles good and marketable.

Title insurance companies naturally follow the law as laid down by the courts so I will primarily comment on the insurability of tax titles and, more specifically, the attitude of Lawyers Title Insurance Corporation with respect to tax titles. As you shall see this depends on which of the statutory tax sale procedures are utilized and the attitude of the courts toward those procedures and the statutes intended to validate those procedures.

There appear to be four statutory procedures under which property generally is sold for delinquent taxes. These methods are covered by Sections 58-1014, 58-1029, 58-1083 and 58-1101. An analysis of these methods reveals a marked similarity between Sections 58-1014 and 58-1101, both being judicial in nature, i.e. sales by court order. Likewise, Sections 58-1029 and 58-1083 are closely related, neither being of a judicial nature. We are willing to insure title to the property acquired through the judicial processes if the defendants were personally served and subject, of course, to the statutory appeal rights. On the other hand, we are not willing to insure title to property acquired by resort to the non-judicial proceedings per se inasmuch as title to the property is subject to be divested by quite generous rights of redemption and the tendency of the courts to invalidate such sales for more or

less minor errors. Following is a brief discussion of the particular methods, grouped according to similarity of the quality and insurability of title so acquired.

Section 58-1014 provides for the obtaining of a judgment against the tax delinquent in the same manner by which an individual reduces a delinquent account to judgment. Section 58-1017 provides that the payment of such judgment or decree shall be enforced by appropriate process of execution or attachment in the same manner that it could be enforced in a proceeding between individuals. Section 58-1108 provides that in proceedings under Section 58-1014 to 58-1020 the character of the title acquired by the purchaser at the judicial sale shall be governed by the principles and rules applicable to the titles of purchasers at judicial sales of real estate generally and not by the principles and rules applicable to tax titles acquired through tax deed made by clerks of courts.

For the foregoing reasons, we are in a position to insure this type of "tax title" under the same conditions that we would insure titles passing through judicial sales generally with the exception that we do require that if such sales are recent, personal service be made upon the taxpayer rather than service by publication. If service is by publication, we will take into consideration the lapse of time involved, the possession of the property and other related matters. Of course, we will, in any case, require that the appeal period from the suit expire without an appeal being noted. On a case basis we will consider insuring after passage of the one year period prescribed by Section 8-673 even though service is by publication. See *Robertson v. Stone*, 199 Va. 41, 97 S.E. 2d. 739.

Section 58-1101 provides for the sale of tax delinquent property by the governing body (if it has previously purchased at a tax sale) by bringing an original action in equity in any court of record having equity jurisdiction. The same rights of appeal apply as discussed immediately above, together with the right of sale and conveyance by the municipality. We will insure titles to property thusly acquired if the proceedings are regular in all respects, subject to the expiration of statutory rights of appeal. This appears to be the procedure most commonly used by counties and municipalities. On a case basis we will consider insuring after passage of the one year period prescribed by Section 8-673 even though service is by publication. See *Robertson v. Stone*, 199 Va. 41, 97 S.E. 2d. 739.

With respect to non-judicial tax sales pursuant to the provisions of Sections 58-1029 through 58-1063 and Sections 58-1083 through 58-1097, we are unwilling to insure in the absence of special circumstances discussed below. These titles may be set aside for errors in procedure which are often held to be jurisdictional and result in an invalid title. Section 58-1029 merely provides for the purchase of property being sold

at the courthouse door following the advertisement of tax delinquency.

Sections 58-1083 through 58-1097 appear to be merely a method for the sale of property previously purchased at a tax sale by the Commonwealth. This sale establishes no new title but is merely a method of enforcing the lien of the Commonwealth. It is not a judicial sale. In fact, it merely adds to the possibility of non-compliance with statutory requirements.

With respect to the conditions under which we might insure tax titles acquired through nonjudicial sales, I refer you to Section 58-1066. This is an attempt by the legislature in 1928 to validate tax titles when the tax deed has been of record for 15 years and 20 years have elapsed since the date of the sale. In reliance upon this section, we will insure such tax titles provided the tax deed was recorded after 1928 (the date of passage of the act) and when such tax deeds have been of record for 15 years, provided 20 years has passed since the date of the tax sale. We would also require that an attorney certify that the tax sale, in his opinion, was properly conducted in all respects.

If the provisions of Section 58-1066 are not applicable, we would have to consider each nonjudicial tax title on an individual basis, taking into account such matters as the length of adverse possession, general warranty deeds given subsequent to the tax sale and the applicability of the betterments statutes.

Section 58-1064 is another attempt by the legislature to validate tax sales by providing that the title may not be defeated except by proof of four specified defects and further that no suit may be brought to set aside the tax deed after two years of its recording, except for fraud.

Section 58-1064 does not appear to be of much comfort even after the expiration of the two year period prescribed therein since the cases indicate that the courts will ignore this statute of limitation if it feels that an error in the tax sale proceedings is jurisdictional, even though the error is not one of the four specified in the statute.

Of course, the tax title can be cured by a quiet title suit brought against the taxpayer, his heirs, devisees and assigns. However, if service is by publication the defendant will have two years (or one year if served with a copy of the decree) to petition to have the case reheard under Section 8-78. Section 8-673 is inapplicable since the quiet title suit does not result in a judicial sale.

As can be seen from the foregoing resume of tax sale procedures in Virginia, the two methods of judicial tax sales can produce valid and insurable titles. However court actions are expensive and time consuming and even though they may bring higher bids because the purchaser will acquire a good title, taxing authorities would much prefer a simpler method which would have the same result.

This brings us back to our non-judicial sales and the question of

whether any amendment of our statutes relating to non-judicial tax sales will produce tax titles which will be upheld by our courts.

Before suggesting any possible legislation of a validating or curative nature, I must emphasize that unless the bench and bar will give full force and effect to the intent of such legislation it will not be effective. As we have seen, there are presently two types of statutes in our Code attempting to validate non-judicial sales. Section 58-1064, which provides a two year period of limitation has not been effective. On the other hand, Section 58-1066 which provides for a 20 year period appears to be effective. However, this is a rather long period of time to wait for a title to become valid.

While no one can predict the attitude of the courts toward a tax validating statute, I would like to see our legislature attempt to remedy the ills attending tax titles by enacting a statute of limitations relating specifically to tax titles and which would include the requirement of a relatively short period of adverse possession of the property under a tax deed with recorded evidence of such possession. I believe our courts would be less apt to upset the title of a bona fide purchaser at a tax sale if he had gone into possession of the property in reliance upon his tax deed and had recorded evidence of such possession among the land records.

This type of statute is suggested as a Model Tax Title Limitation Act by Messrs. Simes and Taylor of the University of Michigan Law School in their book entitled "Improvement of Conveyancing by Legislation", page 183. This suggested statute would prohibit any action by the former owner to set aside a tax deed if five years had elapsed since the tax deed was recorded and the purchaser had been in possession for 6 months after 4 years and 6 months of the 5 year period had elapsed. 6 months is a fairly short period and I would prefer a possession period of 2 or 3 years or perhaps for the entire 5 years.

The statute would allow the purchaser after the five year period to record an affidavit of possession which would be prima facie evidence of such possession. If this affidavit were given by a disinterested party, it would be more effective.

The statute would then go on to say that the limitation on bringing a suit by the former owner-taxpayer would apply "regardless of whether the tax deed or any of the proceedings upon which it is based are void or voidable for any reason, jurisdictional or otherwise. If the deed is executed substantially in the form prescribed for the execution of such deeds, the limitation shall apply regardless of whether the deed be deemed void upon its face. The period shall not be extended by reason of the minority, insanity, imprisonment, non-residence, or death of any person, or by reason of any other fact, or circumstance."

This is strong language and would show our courts that the legisla-

ture felt that after property had been sold for taxes, even under a non-judicial statutory procedure, with all the safeguards prescribed for the taxpayer's benefit in that procedure and a 5 year period had elapsed with the purchaser occupying the property for that period, the former taxpayer who had made no objections during that process and for that period of time should not be allowed to then upset the title in the hands of a bona fide purchaser.

If such legislation can be adopted and upheld by our courts much will be done to make tax titles valid and insurable by title companies. The result should be that real estate tax sales will bring higher prices which will benefit our cities and counties as well as the taxpayer who now often loses his land without compensation. It will also provide land for industrial and residential development in our state which may not now be utilized because validity of the title depends on a tax sale.